SCSL-04-16-A
(177 — 1087)

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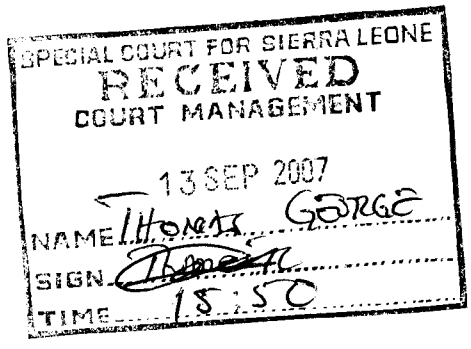
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

IN THE APPEALS CHAMBER

Before: Hon. Justice George Gelaga King, President
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice Geoffrey Robertson, QC
Hon. Justice A. Raja N. Fernando

Registrar: Mr. Herman Von Hebel

Date filed: 13 September 2007



THE PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu

Case No. SCSL-04-16-A

PUBLIC
APPEAL BRIEF OF THE PROSECUTION

Office of the Prosecutor:
Dr. Christopher Staker
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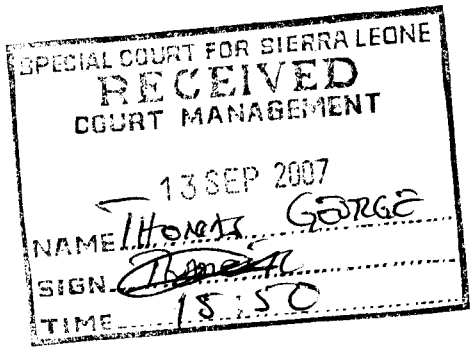

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I. Introduction

1. Pursuant to Rule 111 of the Rules of Procedure and Evidence, the Prosecution hereby files this **Appeal Brief** containing the submissions of the Prosecution in its appeal against the Judgement of the Trial Chamber dated 20 June 2007 in Case No. SCSL-04-16-T, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*,[1] as revised pursuant to the Corrigendum issued by the Trial Chamber on 19 July 2007[2] (the "**Trial Chamber's Judgement**").
2. Some authorities and documents are referred to in this Appeal Brief by abbreviated citations. The full references for these abbreviated citations are given in Appendix A to this Appeal Brief.
3. The Prosecution's grounds of appeal against the Trial Chamber's Judgement are set out in the Prosecution's Notice of Appeal, filed on 2 August 2007 (the "**Prosecution's Notice of Appeal**").[3] References below to the Prosecution's Grounds of Appeal are to the grounds as set out in the Prosecution's Notice of Appeal.
4. The standards of review to be applied by the Appeals Chamber in an appeal against a judgement of a Trial Chamber are well established in the case law of the International Criminal Tribunal for the Former Yugoslavia ("**ICTY**")[4] and the International Criminal Tribunal for Rwanda ("**ICTR**").[5] It is submitted that the same standards of review are applicable under the Statute and Rules of the Special Court.
5. The remedy requested in each of the Prosecution's Grounds of Appeal is without prejudice to the remedies requested by the Prosecution in respect of each of its other Grounds of Appeal.

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[1] **SCSL-16-613**, Registry page nos. 21465-22096.
[2] **SCSL-16-628**, Registry page nos. 23025-23678.
[3] **SCSL-16-630**, Registry page nos. 001-013.
[4] See, for instance, ***Tadić* Appeal Judgement**, para. 64; ***Furundžija* Appeal Judgement**, paras 34-40; ***Čelebići* Appeal Judgement**, paras 434-435; ***Kunarac* Appeal Judgement**, paras 35-48; ***Vasiljević* Appeal Judgement**, paras 4-12; ***Kordić* Appeal Judgement**, paras 13-20; ***Nikolić* Appeal Judgement**, paras 6-9; ***Blaškić* Appeal Judgement**, paras 8-24; ***Marijačić* Appeal Judgement**, paras 15-18.
[5] See, for instance, ***Semanza* Appeal Judgement**, paras 7-11; ***Gacumbitsi* Appeal Judgement**, paras 6-10; ***Musema* Appeal Judgement**, paras 13-21; ***Akayesu* Appeal Judgement**, para. 178; ***Kayishema* Appeal Judgement**, para. 320.

6. In relation to certain of the Prosecution's Grounds of Appeal, one of the alternative remedies that the Prosecution seeks is for the Appeals Chamber to remit the case to the Trial Chamber for further findings of fact on specific issues.[6] The Appeals Chamber has the power on appeal to remit limited issues of fact back to the Trial Chamber, and where it does so, the Trial Chamber has no power to go beyond determining those limited issues, and cannot conduct a new trial.[7] In the present case, it would not be impracticable for the Appeals Chamber to order this remedy, should this prove to be necessary. All of the issues of fact that the Prosecution requests (as an alternative remedy) be remitted to the Trial Chamber are issues that have already been fully briefed and argued by the parties in their final trial briefs and oral closing submissions. The Trial Chamber could therefore issue a supplementary judgement making findings of fact on these limited specified issues without the need for any further proceedings before the Trial Chamber.

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[6] **Prosecution's Notice of Appeal**, paras 8(ii), 14(ii) and 24(ii), and see paragraphs 240, 447(ii), 649 (ii) below.

[7] ***Čelebići* Sentencing Appeal Judgement**, para. 17.

II. Prosecution's First Ground of Appeal: Failure of the Trial Chamber to find all three Accused criminally responsible under Article 6(1) and Article 6(3) for all crimes committed in Bombali District and Freetown and the Western Area

A. Introduction

7. The Indictment charged all three Accused under both Article 6(1) and Article 6(3) of the Statute with numerous crimes committed in Bombali District between 1 May 1998 and 30 November 1998,[8] and in Freetown and the Western Area between 6 January 1999 and 28 February 1999.[9]

8. The Trial Chamber's findings on whether these crimes were proved to have been committed (leaving aside the question of the individual responsibility of the three Accused) are contained, in respect of Bombali District, in paragraphs 880-898, 1027-1041, 1134-1145, 1219-1224, 1351-1363, 1416-1417, and 1542-1573 of the Trial Chamber's Judgement, and, in respect of Freetown and the Western Area, in paragraphs 899-951, 1042-1170, 1225-1243, 1375-1389, 1418-1429, 1574-1612 of the Trial Chamber's Judgement. Regarding the recruitment and use of child soldiers, the Trial Chamber's findings are contained in paragraphs 1244-1258 of the Trial Chamber's Judgement, which specifically include findings that the recruitment *and use* of child soldiers occurred in Bombali District and in Freetown and the Western Area.[10]

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[8] **Indictment**, para. 48 (Counts 3-5), para. 54 (Counts 6-9), para. 62 (Counts 10-11), para. 70 (Count 13), para. 78 (Count 14) (for the more limited period of 1 March 1998 to 30 November 1998), and, in relation to Counts 1 and 2, para. 41 of the Indictment. In relation to Count 12, paragraph 65 of the Indictment charged all three Accused with criminal responsibility for the recruitment and use of child soldiers "At all times relevant to this Indictment, throughout the Republic of Sierra Leone", which included instances of recruitment and use of child soldiers in Bombali District in this period. In some of these paragraphs of the Indictment, the end date of the Indictment period was erroneously stated as "31 November 1998".

[9] **Indictment**, para. 49 (Counts 3-5), para. 56 (Counts 6-9), para. 63 (Counts 10-11), para. 72 (Count 13), para. 79 (Count 14), and, in relation to Counts 1 and 2, para. 41 of the Indictment. In relation to Count 12, paragraph 65 of the Indictment charged all three Accused with criminal responsibility for the recruitment and use of child soldiers "At all times relevant to this Indictment, throughout the Republic of Sierra Leone", which included instances of recruitment and use of child soldiers in Freetown and the Western Area in this period.

[10] **Trial Chamber's Judgement**, paras 1253, 1257-1262 and 1277-1278.

9. The crimes that were found by the Trial Chamber to have been committed in Bombali District and in Freetown and the Western Area are referred to below as the "**Bombali District Crimes**" and the "**Freetown and Western Area Crimes**" respectively. The expressions "Bombali District Crimes" and "Freetown and Western Area Crimes", when used below also include all of the crimes committed in Bombali District or in Freetown and the Western Area that are encompassed within the Prosecution's other Grounds of Appeal, to the extent that the other Grounds of Appeal are upheld.[11]

10. As set out in further detail below, the Trial Chamber found that the Bombali District Crimes and the Freetown and Western Area Crimes were committed by AFRC troops on a massive scale, and in a systematic manner.

11. When considering the individual responsibility of each of the Accused for these crimes, the Trial Chamber dealt in separate parts of its Judgement with the responsibility of each Accused for the Bombali District crimes (apart from the three enslavement crimes),[12] for the Freetown and Western Area Crimes (apart from the three enslavement crimes),[13] and for the three **"enslavement crimes"**.[14,15]

12. In respect of all of these crimes, the findings of the Trial Chamber regarding the individual responsibility of **Brima** were as follows. In relation to the three enslavement crimes the Trial Chamber found that Brima was responsible under Article 6(1) for all three enslavement crimes in Bombali District and Freetown

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[11] The expressions "**crimes committed in Bombali District**" or "**crimes committed in Freetown and the Western Area**", when used below have the corresponding meaning.

[12] **The Trial Chamber's Judgement** deals with the responsibility of **Brima** at paras 1700-1744, 2104, 2113-2120, of **Kamara** at paras 1911-1929, 2105, 2117-2120, and of **Kanu** at paras 2025-2044, 2106, 2121-2123.

[13] The **Trial Chamber's Judgement** deals with the responsibility of **Brima** at paras 1745-1838, 2104, 2113-2120, of **Kamara** at paras 1930-1977, 2105, 2117-2120, and of **Kanu** at paras 2045-2098, 2106, 2121-2123.

[14] The Trial Chamber used the expression "**enslavement crimes**" or "**three enslavement crimes**" to refer collectively to the three crimes of (1) enslavement (abductions and forced labour), (2) sexual slavery, and (3) recruitment and use of child soldiers (see, for instance, **Trial Chamber's Judgement**, paras 1824, 1826-1827, 1833, 1834, 1838, 1971-1972, 2089, 2095). The same terminology is used in this Appeal Brief.

[15] The **Trial Chamber's Judgement** deals with the responsibility of **Brima** at paras 1662, 1820-1834, 1837-1838, 2104, 2113, of **Kamara** at paras 1662, 1870-1976, 2105, and of **Kanu** at paras 1662, 2089-2098, 2106

and Western Area,[16] but declined to make any finding of his liability for these three crimes under Article 6(3).[17] Apart from the three enslavement crimes, Brima was found to be individually responsible under Article 6(3) of the Statute for all of the Bombali District crimes,[18] and all of the Freetown and Western Area Crimes.[19] However, he was only found individually responsible under Article 6(1) for either committing or ordering a limited number of the Bombali District Crimes,[20] and for committing or ordering a limited number of the Freetown and Western Area Crimes,[21] as well as aiding and abetting one single killing incident in Freetown and the Western Area.[22] In particular, the Trial Chamber expressly found that the Prosecution had "not adduced any evidence that the Accused Brima planned, instigated or otherwise aided and abetted any of the crimes committed in the Bombali District",[23] and that "no evidence was adduced that the Accused Brima planned any crimes under Counts 3 through 6, 10 through 11 and 14 in Freetown and the Western Area".[24]

13. In respect of all of these crimes, the findings of the Trial Chamber regarding the individual responsibility of **Kamara** were as follows. The Trial Chamber failed to make any findings as to the responsibility of Kamara under either Article 6(1) or 6(3) for any of the three enslavement crimes in Bombali District or Freetown and Western Area.[25] Apart from the three enslavement crimes, Kamara was found to be individually responsible under Article 6(3) of the Statute for all of the Bombali District crimes,[26] and (in the Prosecution's submission) for all of the Freetown and Western Area Crimes.[27] However, he was only found liable under Article 6(1) for ordering one specific incident that occurred in Bombali District

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[16] **Trial Chamber's Judgement**, paras 1835, 1836 and 1837 respectively.
[17] **Trial Chamber's Judgement**, para. 1838.
[18] **Trial Chamber's Judgement**, paras 1721-1744; **Sentencing Judgement**, para. 42.
[19] **Trial Chamber's Judgement**, paras 1787-1810; **Sentencing Judgement**, para. 42.
[20] **Trial Chamber's Judgement**, paras 1700-1720. See also **Sentencing Judgement**, para. 41.
[21] **Trial Chamber's Judgement**, paras1746-1786. See also **Sentencing Judgement**, para. 41.
[22] **Trial Chamber's Judgement**, para. 1786.
[23] **Trial Chamber's Judgement**, para. 1720.
[24] **Trial Chamber's Judgement**, para. 1784.
[25] See **Trial Chamber's Judgement**, paras 1970-1977; see Sentencing Judgement para. 70
[26] **Trial Chamber's Judgement**, para. 1928; **Sentencing Judgement**, para. 71.
[27] See **Trial Chamber's Judgement**, para. 1950; **Sentencing Judgement**, para. 71 and see paragraphs 170-172 below.

(the killing of five girls in Karina),[28] and for aiding and abetting three specific incidents in Freetown and the Western Area.[29] In particular, the Trial Chamber found that Kamara was not liable for committing, planning, instigating or otherwise aiding and abetting any of the Bombali District Crimes,[30] and by implication, that he was not responsible for ordering any of the Bombali District Crimes other than the killing of five girls in Karina.[31] The Trial Chamber also found that Kamara was not liable for having ordered, planned or instigated any of the Freetown and Western Area Crimes,[32] and by implication, that he was not liable for having aided and abetted any of the Freetown and Western Area Crimes other than in respect of three specific incidents.[33]

14. In respect of all of these crimes, the findings of the Trial Chamber in respect of the individual responsibility of **Kanu** were as follows. The Trial Chamber found Kanu responsible under Article 6(1) for the three enslavement crimes in Bombali District and (in the Prosecution's submission) for the three enslavement crimes in both Freetown and Western Area,[34] but failed to make any express finding as to Kanu's liability under Article 6(3) for these crimes.[35] Apart from the three enslavement crimes, Kanu was found to be individually responsible under Article 6(3) of the Statute for all of the Bombali District Crimes,[36] and (in the Prosecution's submission) for all of the Freetown and Western Area Crimes.[37] However, the Trial Chamber found that Kanu was not liable for committing, ordering, instigating or otherwise aiding and abetting any of the Bombali District Crimes,[38] or of planning any of the Bombali District Crimes other than the three

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[28] **Trial Chamber's Judgement**, paras 1915-1916. See also **Sentencing Judgement**, para. 70.
[29] **Trial Chamber's Judgement**, paras 1934-1935, 1939-1940, and 1941 respectively.
[30] **Trial Chamber's Judgement**, paras 1914, 1917-1918, 1920.
[31] **Trial Chamber's Judgement**, paras 1915-1916.
[32] **Trial Chamber's Judgement**, para. 1937.
[33] **Trial Chamber's Judgement**, paras 1939-1941.
[34] **Trial Chamber's Judgement**, paras 2096-2098; **Sentencing Judgement**, para 94; and see paragraphs 178-182 below.
[35] The title above para. 2089 of the **Trial Chamber's Judgement** indicates that the Trial Chamber in the relevant section of its Judgement only considered Kanu's liability for the three enslavement crimes under Article 6(1).
[36] **Trial Chamber's Judgement**, para. 2044; **Sentencing Judgement**, para. 95.
[37] See paragraphs 178-182 below.
[38] **Trial Chamber's Judgement**, paras 2028, 2030-2031.

enslavement crimes.[39] In respect of the Freetown and Western Area Crimes, the Trial Chamber found Kanu individually responsible under Article 6(1) for committing amputations of three victims,[40] looting one vehicle,[41] ordering three specific incidents,[42] and for instigating the killing of an unspecified number of victims.[43] By implication, the Trial Chamber found that Kanu was not liable for ordering, instigating or aiding and abetting any of the other Freetown and Western Area Crimes, and expressly found that he was not responsible for planning any of the Freetown and Western Area Crimes other than the three enslavement crimes.[44]

15. The Prosecution's First Ground of Appeal is that the Trial Chamber erred in law and in fact:

(1) in not finding Brima, Kamara and Kanu each individually responsible, under Article 6(1) of the Statute, of planning, instigating, ordering, or otherwise aiding and abetting in the planning, preparation or execution of ***all*** Bombali District Crimes and, Freetown and Western Area Crimes; and

(2) in not finding Brima, Kamara and Kanu each individually responsible, under Article 6(3) of the Statute, for ***all*** Bombali District Crimes and, Freetown and Western Area Crimes.

16. The Prosecution submits that on the Trial Chamber's findings, or alternatively, on the Trial Chamber's findings and the evidence accepted by the Trial Chamber in making those findings, the only conclusion open to any reasonable trier of fact is that all of the Bombali District Crimes and Freetown and Western Area Crimes were committed as part of a single planned and systematic campaign. (See Section B below.) The Prosecution submits that the Trial Chamber erred in law and in fact in considering only the individual responsibility of each of the Accused for specific aspects of, or specific incidents occurring within that planned and systematic attack and campaign, and in failing to consider the individual responsibility of each Accused for planning, instigating, ordering, and

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[39] **Trial Chamber's Judgement**, para. 2029.
[40] **Trial Chamber's Judgement**, paras 2050, 2053-2055.
[41] **Trial Chamber's Judgement**, para. 2057.
[42] **Trial Chamber's Judgement**, para. 2058, 2060-2061.
[43] **Trial Chamber's Judgement**, para. 2063.
[44] **Trial Chamber's Judgement**, para. 2062.

otherwise aiding and abetting the campaign of crimes as a whole. (See Section C below.) The Prosecution submits that on the Trial Chamber's findings, or alternatively, on the Trial Chamber's findings and the evidence accepted by the Trial Chamber, the only conclusion open to any reasonable trier of fact is:

(1) that each of the three Accused is individually responsible under Article 6(1) for planning, instigating, ordering, or otherwise aiding and abetting that campaign of crimes as a whole (see Sections D, E and F below); and

(2) that each of the three Accused is individually responsible under Article 6(3) for that campaign of crimes as a whole (see Section G below).

B. The campaign in Bombali District and Freetown and the Western Area

17. The Trial Chamber found that in April/May 1998, various AFRC commanders met with SAJ Musa in Krubola/Kurubonla, in Koinadugu District.[45] The purpose of the meeting was "to discuss the future and develop a new military strategy".[46] The Trial Chamber expressly found that it was agreed at that meeting that AFRC troops who had recently arrived in Koinadugu District from Kono District[47] "should act as an advance troop which would establish a base in north western area Sierra Leone ***in preparation for an attack on Freetown***".[48]

18. The Trial Chamber further found that Brima was at that meeting in Koinadugu District, at which it was agreed that Brima would lead the advance team north east to establish an AFRC base ***in Bombali District***, and that SAJ Musa and his troops

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[45] **Trial Chamber's Judgement**, paras 190, 1551, 1924. Different witnesses recalled this meeting to have been held at either Mongor Bendu, or at a place known as either "Krubola" or "Kurubonla" (Trial Chamber's Judgement, footnote 736, and see also footnote 337). The actual location is immaterial, but it is evident from later references to this meeting by the Trial Chamber that the Trial Chamber found it to have been held in Krubola/Kurubonla: Trial Chamber's Judgement, paras 1551, 1924.

[46] **Trial Chamber's Judgement**, para. 190 (and see also para. 379).

[47] As to which, see **Trial Chamber's Judgement**, para. 189.

[48] **Trial Chamber's Judgement**, para. 190 (emphasis added) (and see also paras 369, 379, 1551).

would follow later.[49] In Mansofinia (in Koinadugu District), Brima subsequently addressed the AFRC troops, and said that "We are going back to Freetown".[50]

19. The Prosecution submits that the Trial Chamber therefore found, or alternatively, that the only conclusion open to any reasonable trier of fact from the Trial Chamber's findings and the evidence accepted by the Trial Chamber, is that a single overall plan was formulated at a meeting in Koinadugu District in April/May 1998. This plan was that an advance team led by Brima would go from Koinadugu District to Bomabli District and establish an AFRC base there, that the advance team would subsequently be joined there by another group of AFRC troops led by SAJ Musa, and that from that base in Bombali District the combined AFRC troops would then attack Freetown.

20. The Trial Chamber's findings establish that this plan was carried into effect. The Trial Chamber found that about three days after the meeting at which the plan was adopted, an AFRC advance team under the overall control of Brima left Mansofinia in Koinadugu District, and travelled to Camp Rosos in Bombali District,[51] via a route that passed various locations in Kono District, Koinadugu District and Bombali District.[52] In respect of the Criminality of this Campaign, the Appeals Chamber is referred to the other paragraphs of this ground dealing with the Mansofinia Address. This journey took about 3 months, and the advance team arrived in Camp Rosos in about July 1998.[53] Some time between July and August 1998, the advance team was joined at Camp Rosos by a second group of AFRC troops, under the command of someone named "0-Five",[54] who had been sent from Koinadugu District by SAJ Musa.[55] After they had been in Camp Rosos for about 3 months, due to attacks on them by ECOMOG forces, the AFRC

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[49] **Trial Chamber's Judgement**, para. 379 makes this clear. See also *ibid.*, para. 1551 referring to the evidence of George Johnson that at Mansofinia in April 1998, Brima and Kanu told Kamara "that the troops should be restructured and that a camp, later Camp Rosos, should be made at the Bombali Axis". The Trial Chamber found (*ibid.*, para. 370) that the witness George Johnson was "generally credible and reliable".

[50] **Trial Chamber's Judgement**, para. 1694 (referring to the evidence of witness TF1-033), and paras 1693, 1995 and 238, indicating that the Trial Chamber accepted the evidence of this witness.

[51] **Trial Chamber's Judgement**, paras 378, 381, 1548.

[52] **Trial Chamber's Judgement**, paras 192, 381, 1548.

[53] **Trial Chamber's Judgement**, paras 192, 384.

[54] **Trial Chamber's Judgement**, para. 382.

[55] **Trial Chamber's Judgement**, paras 196, 382.

troops moved to another base at "Colonel Eddie Town" in about September 1998.[56] Subsequently, in about October 1998, SAJ Musa himself left Koinadugu District, "to join the advance team and prepare for an attack on Freetown";[57] he arrived in Colonel Eddie Town in November 1998.[58] In about December 1998, the AFRC troops then began their advance towards Freetown, passing through several locations,[59] and ultimately invaded Freetown on 6 January 1999.[60]

21. The AFRC troops remained in Freetown for about 3 weeks, this period being known as the "**Freetown invasion**".[61] In the period immediately following the Freetown retreat, the AFRC forces reorganised and established bases in the Western Area, including Newton and Benguema, where they remained until early 1999.[62] After this, the AFRC troops divided into two, with one group going to Kenema in Bombali District, and the other to Port Loko District.[63]

22. The Prosecution submits that the Trial Chamber therefore found, or alternatively, that the only conclusion open to any reasonable trier of fact on the Trial Chamber's findings and the evidence that if accepted is, that all of the operations of the AFRC from the time that they left Mansofinia until and including the Freetown invasion constituted a single operation pursuant to the plan that was made at the meeting in Koinadugu District attended by SAJ Musa and Brima. This operation is referred to below as the "**Bombali-Freetown Campaign**". It is further submitted that the only conclusion open to any reasonable trier of fact is that the Freetown retreat and subsequent regrouping of the AFRC troops in the Western Area formed part of the same Bombali-Freetown Campaign, in the sense that the campaign continued but under the changed circumstance that the AFRC troops found that they were unable to hold Freetown. This is evident from the fact that after the Freetown retreat, when the AFRC forces were regrouped in the

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[56] **Trial Chamber's Judgement**, paras 193, 384, 1548.
[57] **Trial Chamber's Judgement**, para. 197 (also para. 1548).
[58] **Trial Chamber's Judgement**, para. 198, 1548.
[59] **Trial Chamber's Judgement**, para. 198.
[60] **Trial Chamber's Judgement**, para. 202.
[61] **Trial Chamber's Judgement**, paras 204-205.
[62] **Trial Chamber's Judgement**, paras 208, 421.
[63] **Trial Chamber's Judgement**, para. 208.

Western Area, they launched a second attack on Freetown which was unsuccessful.[64]

23. The Trial Chamber found that throughout the Bombali-Freetown Campaign, from the time that the AFRC forces left Mansofinia in Koinadugu District until they left the Western Area after the Freetown retreat, they committed massive crimes in a systematic manner.

24. The Trial Chamber found that during the journey of the AFRC advance team from Mansofinia to Camp Rosos, "the civilian population was routinely targeted and attacked by soldiers and fighters on that route" in a large number of different locations.[65] The Trial Chamber's Judgement makes findings about horrific crimes that were committed by the AFRC advance team in locations such as Bornoya,[66] Karina,[67] Mateboi,[68] and Gbendembu.[69] The Trial Chamber found that "the evidence establishes a consistent pattern of attack against the civilian population during this time".[70] The Trial Chamber further found that "the occurrence of the crimes was widespread and involved a typical *modus operandi* of attacks against civilians",[71] and noted the "frequency and pattern" of these crimes.[72] The Trial Chamber also found that none of the civilians in the attacked villages were armed, that the villages were not military targets, and that the AFRC did not attack them in order to gain territory, since after each village was attacked, "the troops moved on to the next village", where the attacks continued.[73] It found further that these crimes "were carried out in the context of a series of attacks in which civilians were deliberately targeted for allegedly failing to sufficiently support the AFRC",[74] and that the primary purpose of these attacks was "to spread terror

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[64] **Trial Chamber's Judgement**, paras 421, 473, 476, 621.
[65] **Trial Chamber's Judgement**, para. 192, 1548.
[66] **Trial Chamber's Judgement**, paras 883-885.
[67] **Trial Chamber's Judgement**, paras 886-894.
[68] **Trial Chamber's Judgement**, paras 895.
[69] **Trial Chamber's Judgement**, paras 896.
[70] **Trial Chamber's Judgement**, para. 1549.
[71] **Trial Chamber's Judgement**, para. 1731.
[72] **Trial Chamber's Judgement**, para. 1731.
[73] **Trial Chamber's Judgement**, para. 1569.
[74] **Trial Chamber's Judgement**, para. 1568.

among the civilian population"[75] and to collectively punish persons "for allegedly supporting the President Ahmed Tejan Kabbah".[76]

25. The Trial Chamber also found that during this journey, "the troops were accompanied ... by hundreds of civilians abducted from targeted villages".[77] The Trial Chamber in particular found that during this period the AFRC troops kept women in sexual slavery,[78] abducted children for military purposes and us ed child soldiers,[79] and abducted civilians and used them for forced labour and forced them to undergo military training.[80]

26. When the AFRC troop arrived in Camp Rosos, the commission of crimes by the AFRC troops continued there.[81] There was also evidence of crimes committed at Colonel Eddie Town, after the AFRC troops subsequently moved there.[82]

27. During the Freetown invasion and Freetown retreat, and subsequently in the Western Area, massive crimes were found to have been committed by the AFRC troops.[83] The Trial Chamber also found that during this period the AFRC troops kept women in sexual slavery,[84] abducted large numbers of civilians and used them for forced labour,[85] abducted children for military purposes and used child soldiers.[86] The Trial Chamber found that the crimes committed in this period "were part of a planned and deliberate attack ... in which protected persons were

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[75] **Trial Chamber's Judgement**, para. 1571.
[76] **Trial Chamber's Judgement**, para. 1573.
[77] **Trial Chamber's Judgement**, para. 193.
[78] **Trial Chamber's Judgement**, paras 1134-1145.
[79] **Trial Chamber's Judgement**, paras 1252-1254, 1256-1258, 1271, 1277.
[80] **Trial Chamber's Judgement**, para. 1363.
[81] **Trial Chamber's Judgement**, paras 895, 896, 1565-1566 (killings), 1031-1040, 1567 (rapes), (mutilations), 1252, 1254, 1717-1719 (abducting children for military purposes and forcing them to undergo military training), 1360-1363, 1822 (abduction of civilians and using them as forced labour and requiring them to undergo military training), 1569 (stating generally that "Once the troops arrived in Camp Rosos the attacks continued against civilians in the area"), 1568, 1569. See also paras 1222-1224 (mutilations).
[82] **Trial Chamber's Judgement**, paras 1271 (child soldiers), 1821-1824 (enslavement-labour); Prosecution Final Trial Brief, para. 1548.
[83] **Trial Chamber's Judgement**, paras 902-951 (killings), 1061-1067 (rapes), 1429 (looting), 1229-1243 (mutilations). The Trial Chamber found that during the Freetown retreat, the AFRC forces were responsible for "massive civilian casualties" (*ibid.*, para. 207).
[84] **Trial Chamber's Judgement**, paras 1150-1170.
[85] **Trial Chamber's Judgement**, para. 1389.
[86] **Trial Chamber's Judgement**, paras 1277-1278, 1577, 1783.

specifically targeted".[87] As in the case of the crimes committed during the journey from Mansofinia to Camp Rosos, these crimes were found by the Trial Chamber to have been carried out with the primary purpose of spreading terror among the civilian population,[88] and to collectively punish protected persons for allegedly supporting the Kabbah government, ECOMOG, or other factions aligned to the Kabbah government, or for failing to support the AFRC/RUF.[89]

28. The Trial Chamber further found that at Mansofinia, just before the AFRC troops were about to embark on the Bombali-Freetown Campaign, Brima gave an address to the AFRC troops (the "**Mansofinia Address**"). The Trial Chamber found that in this address, Brima declared "Operation Spare No Soul" and instructed troops to kill, maim or amputate any civilian with whom they came into contact, and that towns and villages were to be burned and women and girls were "free to satisfy [the soldier's] sexual desires".[90] In this address, Brima also stated that civilians had been involved in attacking the AFRC, and that "the AFRC should now do the same to civilians".[91]

29. As to the ongoing criminality of the Bombali-Freetown Campaign, the Trial Chamber found that again two days prior to the attack on Freetown, at Orugu village or Allen Town,[92] Brima met with commanders and addressed the troops (the "**Orugu Address**"). At this meeting, Brima gave a general order that Freetown should be looted and burnt down, and that anyone who opposed the AFRC troops should be considered a collaborator and should be killed,[93] and stated that "the Sierra Leone People's Party government was responsible for denying the success of the rebel troops".[94] The Trial Chamber's findings as to how the Orugu Address was implemented by the troops under Brima's command are dealt with below.

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[87] **Trial Chamber's Judgement**, para. 1609.
[88] **Trial Chamber's Judgement**, para. 1610.
[89] **Trial Chamber's Judgement**, paras 1611-1612.
[90] **Trial Chamber's Judgement**, paras 238, 1550, 1552, 1691-1695, 1725, 1830.
[91] **Trial Chamber's Judgement**, para. 1693.
[92] One witness said that this event occurred at Orugu village, and another at Allen Town. The Trial Chamber was "satisfied that both witnesses were referring to the same meeting as very little distance separates the two locations": **Trial Chamber's Judgement**, para. 399.
[93] **Trial Chamber's Judgement**, paras 398-399, 402, 473, 532, 614-615, 902, 1580, 1773, 1790, 1945, 2068.
[94] **Trial Chamber's Judgement**, para. 1580.

30. The Prosecution submits that from these findings, or alternatively on the basis of these findings and the evidence that the Trial Chamber accepted in making these findings, it could not be open to any reasonable trier of fact to conclude that any of the crimes committed during the Bombali-Freetown Campaign were isolated incidents. The only conclusion open to any reasonable trier of fact is that the crimes committed in the single operation referred to in this brief as the Bombali-Freetown Campaign were an integral part of the plan for the Bombali-Freetown Campaign, and were committed in execution of the Bombali-Freetown Campaign. On the findings of the Trial Chamber, the AFRC (or at least Brima), as he indicated in the Mansofinia Address, had another name for this operation, namely "Operation Spare No Soul".[95]

C. The errors in the approach of the Trial Chamber to the evaluation of Article 6(1) liability

31. The approach taken by the Trial Chamber in determining the Article 6(1) liability of the three Accused for these crimes is apparent from the structure of the sections of the Trial Chamber's Judgement dealing with their individual responsibility for these crimes.[96] It can be seen that the Trial Chamber, when considering the Article 6(1) liability of each Accused, looked at each District in which crimes were committed separately. In respect of each separate District, the Trial Chamber then considered each Article 6(1) mode of liability separately. In respect of each Article 6(1) mode of liability, the Trial Chamber then considered separately individual crimes or incidents that it had previously found in the Judgement to have been committed. In respect of each such individual crime or incident, the Trial Chamber then sought to determine whether there was any evidence specifically relating to that particular Article 6(1) mode of liability for

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[95] **Trial Chamber's Judgement**, para. 1693.

[96] The Article 6(1) liability of Brima for the Bombali District Crimes and the Freetown and Western Area crimes is dealt with in the Trial Chamber's Judgement in paragraphs 1701 to 1720, and 1746 to 1786, respectively; the Article 6(1) liability of Kamara for these crimes is dealt with in paragraphs 1912 to 1920, and 1930 to 1941, respectively, and the Article 6(1) liability of Kanu for these crimes is dealt with in paragraphs 2026 to 2031, and 2046 to 2064, respectively.

that particular Accused in relation to that specific crime or incident. In these sections of the Trial Chamber's Judgement, the Trial Chamber in fact only deals with those specific crimes or incidents for which it considered that there ***was*** evidence relating a particular Article 6(1) mode of liability for that particular Accused in relation to that specific incident. Other incidents are simply not mentioned at all in this part of the Trial Chamber's Judgement.

32. An example of this approach can be seen in the Trial Chamber's treatment of the Article 6(1) liability of Brima for the Bombali District Crimes. The Article 6(1) liability of Brima for the Bombali District Crimes is contained in paragraphs 1703 to 1720 of the Trial Chamber's Judgement. Under the mode of liability "committing", the Trial Chamber gave consideration to one single incident only, namely the killing of 12 civilians in a mosque in Karina.[97] The Trial Chamber did not expressly address at all whether Brima was individually responsible for "committing" any of the other Bombali District Crimes. Under the mode of liability "ordering", the Trial Chamber gave consideration to four incidents only, namely the giving of an order to terrorise and kill the civilian population at Karina,[98] the giving of an order to terrorise the civilian population around Rosos,[99] the giving of an order for killings at Mateboi and Gbendembu,[100] and the giving of an order to recruit children for military purposes.[101] The Trial Chamber did not expressly address at all whether Brima was individually responsible for "ordering" any of the other Bombali District Crimes. The Trial Chamber also found that Brima was individually responsible for "planning" the three enslavement crimes in Bombali District.[102] By implication, the Trial Chamber found that Brima was not responsible for committing, ordering or planning any of the other Bombali District Crimes, and the Trial Chamber expressly held that "the Prosecution has not adduced any evidence that the Accused Brima planned,

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[97] **Trial Chamber's Judgement**, paras 1703-1709 (Brima was found responsible for this).
[98] **Trial Chamber's Judgement**, paras 1710-1711 (Brima was found responsible for this).
[99] **Trial Chamber's Judgement**, paras 1712-1713 (Brima was found responsible for this for issuing orders specifically intended to terrorise the civilian population).
[100] **Trial Chamber's Judgement**, paras 1714-1716 (Brima was found responsible for this).
[101] **Trial Chamber's Judgement**, paras 1717-1719 (Brima was found responsible for this).
[102] **Trial Chamber's Judgement**, paras 1820-1837.

instigated or otherwise aided and abetted ***any*** of the crimes committed in Bombali District".[103]

33. The Trial Chamber adopted a similar approach in determining the Article 6(1) responsibility of Brima for the Freetown and Western Area Crimes, and the Article 6(1) responsibility of Kamara and Kanu for the Bombali District Crimes and the Freetown and Western Area Crimes. Indeed, the Trial Chamber adopted the same approach in relation to determining the Article 6(1) responsibility for all Accused in respect of all crimes which the Trial Chamber found to have been committed in the part of the Trial Chamber's Judgement dealing with the individual responsibility of the Accused.[104]

34. In short, the approach of the Trial Chamber involved a rather myopic examination of individual incidents and individual modes of liability under Article 6(1), in which the Trial Chamber only found an Accused individually responsible under Article 6(1) in cases where there was direct evidence relating specifically to a particular Article 6(1) mode of liability of a particular Accused in respect of a specific crime or incident. The Prosecution submits that this approach of the Trial Chamber to the evaluation of the evidence of Article 6(1) liability was wrong in law and in fact for a number of reasons.

35. The first reason why the Trial Chamber's approach is erroneous is that it implicitly assumes that liability under Article 6(1) will only exist where there is evidence that an Accused specifically planned, instigated, ordered, committed or otherwise aided and abetted a specific crime or incident.

36. In some cases, of course, an Accused may well plan, instigate, order, or otherwise aid and abet a specific crime or incident. For example, in the middle of a large scale atrocity in which many victims are killed, an Accused may give a specific order to kill one person. That one specific order, considered in isolation, may well establish the Article 6(1) responsibility of the Accused for ***ordering*** the

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[103] **Trial Chamber's Judgement**, para. 1720 (emphasis added). The reference in this quote to there being no evidence that the Prosecution ***planned*** any of the crimes committed in Bombali District obviously excludes the enslavement crimes, which are dealt with separately in paragraphs 1820-1837 of the Trial Chamber's Judgement.

[104] **Trial Chamber's Judgement**, Part XI, "Responsibility of the Accused", paras 1635-2098.

killing of only that one victim out of the large number of victims that were killed in the atrocity as a whole.

37. However, an Accused can also order or instigate the large scale atrocity itself. In such a case, the Accused will be liable under Article 6(1) for ordering or instigating the killing of all of the victims who died in the atrocity.[105] In a case such as this, the order or act of instigation may be of a general nature, not specific to any particular location or time. To give a hypothetical example, an order given by the leader of a country to kill all members of a particular ethnic group and to destroy their villages may lead to a large number of attacks on different towns and villages over a protracted period of time. It cannot be said that the accused in such a case did not order or instigate all of the ensuing attacks and the crimes committed during these attacks, merely because the order or instigation was not specific to the particular locations or times in which the attacks were committed, or merely because the accused, at the time of the order or instigation, was not in a position to know precisely what locations would be attacked, or when, or which particular individuals would become victims, as a result of the ensuing attacks.[106]

38. Similarly, in cases where an accused, for instance "plans" such a large scale and widespread atrocity, it is not necessary, in order for the accused to be individually responsible under Article 6(1) for planning, that the Accused also personally planned the details of every individual attack that was to occur, or each specific individual who was to be a victim, in the execution of the plan. It is sufficient that the Accused "designed" the commission of the atrocity as a whole, and that the crimes were actually committed by others "within the framework of that design".[107]

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[105] See, for example, ***Nahimana* Trial Judgement**, in which an accused was found, through broadcasts on the radio station RTLM, to have *instigated* the entire widespread and systematic attack against the Tutsi population that occurred in 1994. See, for instance, the following paragraphs of that judgement: paras 486-488, 949-950, 970-977A, 1057-1062, especially paras 1062 ("Both *Kangura* and RTLM instigated killings on a large-scale "), 1063 ("For RTLM broadcasts in 1994 that caused the killing of Tutsi civilians, the Chamber finds Nahimana guilty of crimes against humanity (extermination) under Article 3(b), pursuant to Article 6(1) of the Statute of the Tribunal"), 1081.

[106] See also paragraph 124 below.

[107] ***Galić* Trial Judgement**, para. 168; ***Akayesu* Trial Judgement**, para. 480; ***Blaškić* Appeal Judgement**, para. 279; ***Kordić* Trial Judgement**, para. 386.

39. The Prosecution submits that the approach of the Trial Chamber, by focusing too narrowly on specific Article 6(1) modes of liability in specific locations, failed to appreciate the legal consequences of each Accused's conduct as a whole. An example that demonstrates this is the treatment given by the Trial Chamber to the Mansofinia Address, in which Brima, at the outset of the Bombali-Freetown Campaign, announced the launch of "Operation Spare No Soul". The Trial Chamber found that in this address, Brima announced to the AFRC troops that they were "going back to Freetown", and instructed troops to kill, maim or amputate any civilian with whom they came into contact, and that towns and villages were to be burned and women and girls were free to satisfy the soldier's sexual desires.[108] Indeed, through the use of his phrase "minus you, plus you", he threatened any of the AFRC troops who did not comply with this order with death.[109]

40. The Prosecution submits that the only conclusion that could be drawn by any reasonable trier of fact from the Trial Chamber's findings in respect of the Mansofinia Address is that the instruction that Brima gave was intended by Brima, and was clearly understood by the AFRC troops, as applying to the whole of the Bombali-Freetown Campaign. This conclusion is reinforced, for instance, by the Trial Chamber's finding that at Kamagbengbe, prior to the arrival of the AFRC troops at Rosos, a number of civilian abductees who had tried to escape were immediately executed by Brima's subordinates, on the basis of the order given by Brima in the Mansofinia Address.[110] Indeed, the Trial Chamber expressly found that Brima's orders "remained effective and applicable to incidents that occurred some time after their issuance".[111]

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[108] **Trial Chamber's Judgement**, paras 1693-1694 (referring to the evidence of TF1-033), and 1695 (in which the Trial Chamber clearly accepts this evidence). It is absolutely clear that the Trial Chamber accepted this evidence also in paragraph 238 of the **Trial Chamber's Judgement**.

[109] **Trial Chamber's Judgement**, paras 592-593, 618, 1550, 1691.

[110] **Trial Chamber's Judgement**, para. 1725.

[111] **Trial Chamber's Judgement**, para. 1725.

41. Notwithstanding this express finding, the Trial Chamber failed to find that Brima had *ordered* the killing of these civilians at Kamagbengbe,[112] and failed to even address whether Brima, by giving the Mansofinia Address, had ordered or instigated any or all of the other crimes that were committed during the Bombali-Freetown Campaign.

42. The second reason why the Trial Chamber's approach is erroneous is that in parts of the Trial Chamber's Judgement at least, there is an apparent failure to appreciate that a single act (or omission) of an Accused may constitute an Article 6(1) mode of liability in relation to more than one crime. For instance, by giving an order to commit one crime, an accused may at the same time also be instigating the commission of other crimes.

43. The third reason why the Trial Chamber's approach is erroneous is that in some instances the Trial Chamber failed to appreciate the legal significance of conduct of the Accused which the Trial Chamber found to have been proved. To give an example, the Trial Chamber found that Brima ordered two AFRC commanders to attack Gbendembu (in Bombali District). After this attack had been carried out, one of the commanders reported back to Brima that Gbendembu had been attacked and that the troops had captured arms and ammunition and killed 25 civilians. Brima commended the commander on "a job well done".[113] The Prosecution submits that the giving of such an approving commendation to troops for committing this crime is clearly at the very least evidence of instigating[114] and/or aiding and abetting the troops in the commission of similar crimes in the future.[115]

44. Similarly, the Trial Chamber found that an order given by Brima at Rosos "created a climate of criminality which endured in the months following the

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[112] The paragraphs of the **Trial Chamber's Judgement** dealing with Brima's responsibility for ordering crimes in Bombali district (paras 1710-1719) make no mention of the killing of these civilians in Kamagbengbe.

[113] **Trial Chamber's Judgement**, para. 896, 1564, 1715.

[114] **Trial Chamber's Judgement,** para. 769: "Both acts and omissions may constitute instigating which covers express as well as implied conduct."

[115] ***Blaškić* Trial Judgement**, para. 337; ***Čelebići* Trial Judgement**, para. 341. See the findings in the **Trial Chamber's Judgement** on applicable law, para. 777 (aiding and abetting).

order".[116] The Prosecution submits that the creation of such a "climate of criminality" that endured for months is clearly at the very least ***evidence*** of the instigation and/or aiding and abetting of all of the crimes committed by the AFRC troops in those ensuing months.[117] Yet the Trial Chamber expressly found that there was ***no*** evidence that Brima instigated or aided and abetted ***any*** of the crimes in Bombali District.[118] The Prosecution submits that it is clearly erroneous for the Trial Chamber to find that there was ***no*** evidence.

45. The fourth reason why the Trial Chamber's approach is erroneous is that the Trial Chamber appears to have proceeded on the assumption that it was only able to find an Accused to have satisfied the elements of one single Article 6(1) mode of liability in respect of a given crime. Thus, in respect of each crime of which an Accused was found to be individually responsible under Article 6(1), if the Trial Chamber found that the Accused was individually responsible for, say, "ordering" the crime, it declined to make any finding of whether the Accused also planned, instigated or aided and abetted that crime.

46. By way of example, the Trial Chamber found that Brima was individually responsible under Article 6(1) for "ordering" certain specific crimes in Bombali District,[119] but then failed to give any detailed consideration to whether Brima had also planned, instigated or aided and abetted those particular crimes. It simply stated, with no analysis or reasoning, that there was not "any evidence" that Brima had planned, ordered or instigated those crimes.[120]

47. The Prosecution acknowledges that where an accused is found on the evidence to satisfy more than one Article 6(1) mode of liability in respect of a particular crime, the ***disposition*** of the Trial Chamber's Judgement need not necessarily enter a formal conviction against the accused in respect of all of those modes of liability in respect of that crime.[121] For instance, the Trial Chamber found that

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[116] **Trial Chamber's Judgement**, para. 1713.
[117] ***Blaškić*** **Trial Judgement**, para. 337; ***Čelebići*** **Trial Judgement**, para. 341. See also **Trial Chamber's Judgement,** paras 769 and 777
[118] **Trial Chamber's Judgement**, para. 1720.
[119] **Trial Chamber's Judgement**, paras 1710-1719.
[120] **Trial Chamber's Judgement**, para. 1720.
[121] ***Stakić*** **Trial Judgement**, paras 443, 445; ***Krstić*** **Trial Judgement**, paras 601-602; ***Blaškić*** **Trial Judgement**, paras 278 and 282.

where an accused is found guilty of having *committed* a crime, he or she cannot at the same time be convicted of having *planned* the same crime,[122] even though his or her involvement in the *planning* may be considered an aggravating factor.[123] Similarly, there is case law to the effect that a conviction for *ordering* a particular crime will not be entered where the accused has *committed* the same crime.[124] However, this does not prevent the Trial Chamber, ***in its findings in the body of its Judgement***, from holding that the evidence satisfied the requirements of more than one Article 6(1) mode of liability for a particular crime. Where the requirements of more than one Article 6(1) mode of liability are satisfied for a particular crime, the Trial Chamber may convict the accused under one Article 6(1) mode of liability only, but then take into account in sentencing that other Article 6(1) modes of liability were also established for that crime. Thus, for instance, if an accused is convicted of *committing* a crime, the fact that the accused also *planned* the crime can be taken into account as an aggravating factor in sentencing.[125]

48. It follows from this that if an Accused satisfies more than one Article 6(1) mode of liability in respect of a particular crime, the Trial Chamber ***should*** make express findings to that effect in its reasoning in the body of its Judgement. This is because if an accused is convicted for a particular crime on the basis of one Article 6(1) mode of liability only, without any finding as to whether the accused also satisfied any other Article 6(1) mode of liability in respect of that particular crime, any other modes of liability that are satisfied cannot be taken into account in sentencing. Furthermore, if an Accused is found guilty on one Article 6(1) mode of liability (say "ordering), without any findings being made by the Trial Chamber in respect of other Article 6(1) modes of liability, this creates potential problems on appeal. If in such a case, the Appeals Chamber decided on appeal that the elements of "ordering" were not satisfied, the conviction would be

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[122] **Trial Chamber's Judgement**, para. 767. **Rule 98 Decision**, para. 285, referring to ***Kordić* Trial Judgement**, para. 386; see also ***Brđanin* Trial Judgement**, para. 268.

[123] **Trial Chamber's Judgement**, para. 767; ***Stakić* Trial Judgement**, para. 443.

[124] ***Stakić* Rule 98*bis* Decision**, para. 109; ***Stakić* Trial Judgement**, para. 445; ***Blaškić* Trial Judgement**, paras 278 and 282.

[125] **Trial Chamber's Judgement**, para. 767; ***Stakić* Trial Judgement**, para. 443.

quashed, without any consideration having been given to whether the Accused satisfied any other Article 6(1) mode of liability in respect of that crime.

49. This conclusion is in fact supported by the way that the Trial Chamber itself dealt with the Article 6(1) liability of Brima for the three enslavement crimes. The Trial Chamber ultimately found that Brima was individually responsible for "planning" the three enslavement crimes.[126] However, in the course of its reasoning, it also found that Brima had "ordered" these crimes,[127] and although the Trial Chamber does not say so expressly, it appears from the Judgement that the Trial Chamber also considered that in relation to the three enslavement crimes Brima satisfied the elements of "instigating",[128] "aiding and abetting",[129] and even "committing".[130]

50. In short, the Prosecution submits that it is always a question of fact, to be determined on the basis of ***all of the evidence in the case as a whole***, and ***all of the conduct of the Accused as a whole***, as to precisely what crimes were committed pursuant to orders of an accused, and what crimes were instigated, planned or aided and abetted by an accused. The Prosecution submits that the Trial Chamber erred in failing to consider all of the evidence in this case as a whole, and the conduct of each of the Accused as a whole, when determining the Article 6(1) liability of each of the Accused in respect of all of the Bombali District Crimes and Freetown and Western Area Crimes. The Trial Chamber further failed to consider all modes of liability under Article 6(1) in its findings, which might have impacted on the sentencing of the three Accused as aggravating factors.

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[126] **Trial Chamber's Judgement**, paras 1835-1837.
[127] **Trial Chamber's Judgement**, paras 1834, 1717-1719, 1783.
[128] **Trial Chamber's Judgement**, para. 1829 ("The Trial Chamber has found that, on a number of occasions, the Accused Brima publicly addressed the troops and advocated criminal conduct").
[129] **Trial Chamber's Judgement**, para. 1827, 1834 ("his contribution was substantial").
[130] **Trial Chamber's Judgement**, para. 1834 ("The Trial Chamber is satisfied that the Accused...implemented the system to abduct and enslave civilians..."); see also para. 1827 ("the Accused Brima...designed the commission of the three crimes (enslavement, sexual slavery and recruitment and use of child soldiers) and ... although these crimes were ***largely committed*** by his subordinates, his contribution was substantial" (emphasis added).

D. The individual Article 6(1) responsibility of Brima for the Bombali District Crimes and Freetown and the Western Area Crimes

(i). Planning

51. The Trial Chamber found (correctly it is submitted), that "planning" implies that ***one or several*** persons contemplate designing the commission of a crime at both the preparatory and execution phases.[131] Unlike the case of conspiracy, a crime can be planned by a single individual,[132] and there is therefore no requirement to plead or prove that any other person planned the crime together with the accused. The existence of the plan may be proved by circumstantial evidence.[133] Responsibility is incurred when the level of the accused's participation is substantial, even when the crime is actually committed by another person.[134] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[135] The *mens rea* requires that the accused acted with direct intent in relation to his or her own planning, or with the awareness of the substantial likelihood that a crime would be committed in the execution of that plan. Planning with such awareness has to be regarded as accepting that crime.[136]

52. The Prosecution has submitted above[137] that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence that the Trial Chamber accepted, the only conclusion open to any reasonable trier of fact is that the Bombali-Freetown Campaign was a planned operation, and that the commission of crimes was an integral part of that plan and operation.

53. The Prosecution further submits that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence that the Trial

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131 **Trial Chamber's Judgement**, para. 765 and the authorities there cited; ***Rutaganda* Trial Judgement**, para. 37; ***Naletilić and Martinović* Trial Judgement**, para. 59.

132 ***Akayesu* Trial Judgement**, para. 480.

133 **Trial Chamber's Judgement**, para. 765 and the authority there cited; ***Naletilić and Martinović* Trial Judgement**, para. 59.

134 **Trial Chamber's Judgement**, para. 765 and the authority there cited.

135 **Trial Chamber's Judgement**, para. 766 and the authority there cited.

136 **Trial Chamber's Judgement**, para. 766 and the authorities there cited.

137 See paragraphs 22 and 30 above.

Chamber accepted, the only conclusion open to any reasonable trier of fact is that Brima, together with others, planned the entire Bombali-Freetown Campaign, including the commission of widespread and systematic atrocities as part of that plan.

54. The Prosecution submits that this follows from the following findings in particular.

55. The Trial Chamber found that Brima was the overall commander of the AFRC advance team that travelled from Mansofinia to Bombali District,[138] that he was the overall commander of the troops in Freetown,[139] and that he continued to be in a superior-subordinate relationship with the AFRC troops that committed crimes in Freetown even after the AFRC Headquarters was dislodged from State House.[140] The only period in which he was not the overall commander was during an indeterminate (but relatively brief) period between his arrest in Colonel Eddie Town until the death of SAJ Musa on 23 December 1998 (shortly before the Freetown invasion began).[141]

56. Brima was one of those who participated in the meeting with SAJ Musa in Krubola/Kurubonla, held "to discuss the future and develop a new military strategy",[142] and at which the Bombali-Freetown Campaign was planned.[143] The participants at this meeting "defined the new objectives of the AFRC rebel movement".[144] The necessary implication is that this meeting was a strategic planning meeting, at which the overall strategic plan and objectives of the Bombali-Freetown campaign were decided upon.

57. When he was in Mansofinia, immediately prior to the commencement of the Bombali-Freetown Campaign, Brima, in front of all the soldiers, restructured the troops, made promotions and delineated the responsibilities of the various commanders[145]. This is when Brima gave the Mansofinia Address. The Trial

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[138] **Trial Chamber's Judgement**, paras 378, 383.
[139] **Trial Chamber's Judgement**, para. 1789.
[140] **Trial Chamber's Judgement**, para. 1805.
[141] **Trial Chamber's Judgement**, paras 198-201, 388, 420, 472, 601, 602.
[142] **Trial Chamber's Judgement**, para. 190 (and see also para 379).
[143] See paragraph 17 above; **Trial Chamber's Judgement**, paras 190, 1551.
[144] **Trial Chamber's Judgement**, para. 462.
[145] **Trial Chamber's Judgement**, paras 576-577, 1551, 1924.

Chamber found that from Mansofinia, as the AFRC troops advanced through Bombali District, the AFRC faction was "well-structured and organised",[146] "had a well-developed chain of command",[147] and that the AFRC faction "had a ***planning*** and orders process".[148]

58. The Trial Chamber accepted the evidence of TF1-033 that as the AFRC soldiers moved from Mansofinia to Camp Rosos, Brima "was always at the helm of our affairs when he says 'move' everybody is on his toes".[149]

59. While the AFRC troop was in Rosos, according to Witness George Johnson, who the Trial Chamber found to be credible,[150] the three Accused were based at the headquarters, and the headquarters "was in charge of ***planning all operations*** and giving military orders".[151]

60. Following the death of SAJ Musa and prior to the Freetown invasion, the Trial Chamber found that Brima restructured the troops and appointed himself as Commander in Chief.[152]

61. The Trial Chamber found that at the beginning of the Freetown invasion, shortly after the Orugu Address, the movement of the AFRC troops was "ordered and strategic", and that commanders reported the progress of their troops to Brima.[153] Witness TF1-334, whose evidence the Trial Chamber accepted,[154] referred to a number of occasions where the AFRC troops captured new ground and then waited for the brigade senior command, including Brima, to arrive and tell them what to do next, and at one point stated that he and the other soldiers "will not do anything without the command of Gullit [Brima]".[155]

62. Based on these and other findings and other evidence, the Trial Chamber ultimately found that:

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[146] **Trial Chamber's Judgement**, para. 468.
[147] **Trial Chamber's Judgement**, para. 585, a finding based on the evidence and findings in paras 576-585.
[148] **Trial Chamber's Judgement**, para. 591 (emphasis added), a finding based on the evidence and findings in paras 586-591.
[149] **Trial Chamber's Judgement**, paras 366, 367, 378.
[150] **Trial Chamber's Judgement**, paras 370-371.
[151] **Trial Chamber's Judgement**, para. 586 (emphasis added); see also Trial Chamber's Judgement, paras 590-591.
[152] **Trial Chamber's Judgement**, paras 396-397, 420, 602-608.
[153] **Trial Chamber's Judgement**, para. 1795.
[154] **Trial Chamber's Judgement**, paras 357-360.
[155] **Trial Chamber's Judgement**, para. 1791.

> ... the Accused Brima was the overall commander of both the AFRC troops that moved from Mansofinia, Koinadugu District to Camp Rosos, Bombali District and of the AFRC troops that later invaded Freetown on 6 January 1999. As the overall commander, the Accused ***Brima was substantially involved in planning the various operations in these Districts***.[156]

63. The operations of the AFRC troops that Brima was found by the Trial Chamber to have been substantially involved in included attacks against villages that were not military targets.[157] The Trial Chamber found that the operations of the AFRC troops in this period involved "a series of attacks in which civilians were deliberately targeted for allegedly failing to sufficiently support the AFRC",[158] the primary purpose of these attacks being "to spread terror among the civilian population".[159]

64. The crimes committed during the Bombali-Freetown campaign generally were found by the Trial Chamber to have been "systematic", and to follow a *modus operandi*,[160] and the only conclusion open to any reasonable trier of fact was that they were committed pursuant to a plan. One example demonstrating this is the fact that for the attack on Freetown, a new AFRC battalion was created with the express aim of creating fear among the civilian population by amputating civilians' hands.[161]

65. Reference has been made above to the Mansofinia Address,[162] in which Brima, at the outset of the Bombali-Freetown Campaign, announced the launch of "Operation Spare No Soul", told the troops that they were "going back to Freetown", and instructed troops to kill, maim or amputate any civilian with whom they came into contact, that towns and villages were to be burned and women and girls were free to satisfy the soldier's sexual desires, and that civilians should be abducted.[163]

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[156] **Trial Chamber's Judgement**, para. 1828 (emphasis added).
[157] **Trial Chamber's Judgement**, para. 1569.
[158] **Trial Chamber's Judgement**, para. 1568.
[159] **Trial Chamber's Judgement**, para. 1571.
[160] **Trial Chamber's Judgement**, paras 233-236, 1549, 1731; see paragraph 22 above.
[161] **Trial Chamber's Judgement**, paras 1771, 1775.
[162] See paragraphs 28, 39-41 above.
[163] **Trial Chamber's Judgement**, paras 238, 1550, 1552, 1691-1695, 1725, 1830.

66. Reference has been made above to the Orugu Address,[164] given by Brima immediately before the Freetown invasion:

> A number of witnesses testified that 'Gullit' [Brima] chaired a meeting of commanders at Orugu village on 4 January 1999 at which he gave the order to attack Freetown. The Chief of Staff, the Accused Kanu, ran the meeting and reiterated the orders to the troops. Specifically, the troops were ordered to loot Freetown and burn down the Kissy and Eastern police stations, capture State House, open Pademba Road prison, kill anyone who opposed the troops and abduct civilians in order to attract the attention of the international community. ... these orders were carried out.
>
> The Trial Chamber considers that the transmission of these orders to the troops and their subsequent implementation, in addition to the smaller operations described immediately above, proves the existence of ***a functioning planning and orders process*** within the AFRC faction from Colonel Eddie Town to State House in Freetown.[165]

67. The Trial Chamber found that while SAJ Musa appears to have been the overall strategist for the AFRC, once Brima left Mansofinia he had no contact with Musa until he reached Camp Rosos, that even then communication was cursory, and that Brima was not subject to higher level supervision or command during this period.[166] The Trial Chamber thereby necessarily accepted that during the journey from Mansofinia to Bombali District (until Brima's arrest), and following the death of SAJ Musa, Brima was the "overall strategist" for the AFRC troops in Bombali District and Freetown.

68. One example of this relates to the attack on Karina, in respect of which the Trial Chamber found:

> ... that at Kamagbengbeh in June of 1998, 'Gullit' [Brima] tried to divide the troops and sent one group to attack Kambai and another

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[164] See paragraphs 29, 61 above.

[165] **Trial Chamber's Judgement**, paras 614-615 (footnotes omitted, emphasis added). The Trial Chamber clearly accepted this evidence. At para. 1773 of the Trial Chamber's Judgement, it said: "Witness TF1-334 was present when 'Gullit' [Brima] announced that it was time to attack Freetown and that the Sierra Leone People's Party government was responsible for denying the success of the rebel troops. He ordered that Freetown should be looted and burnt down, that anyone who opposed the troops should be considered a "collaborator" and should be killed." The Trial Chamber said that this evidence was corroborated by the evidence of TF1-033, and was "unchallenged and ... credible".

[166] **Trial Chamber's Judgement**, para. 383.

> to attack Karina. The troops argued against this division and 'Gullit' [Brima] agreed instead to focus the attack on Karina. TF1-334 testified that 'Gullit' [Brima] called Karina a strategic point and said that it was the home town of President Ahmed Tejan Kabbah. 'Gullit' [Brima] told the junta forces that they should demonstrate their power in Karina. He ordered the troops to burn down Karina, to capture strong male civilians, and to amputate civilians. 'Gullit' [Brima] stated that ***he wanted the attack on Karina to shock the whole country and the international community***. Kamara and Kanu were present during this speech and during the subsequent attack on Karina. There were no ECOMOG or Kamajor troops in Karina at the time.[167]

69. The Trial Chamber expressly found that the discussion at Kamagbengbeh concerning the attack on Karina was "a strategic discussion between commanders which could constitute planning of the attack on Karina and the crimes committed therein".[168]

70. A second example of this relates to the period after the AFRC lost control of State House in Freetown. A number of witnesses, whose evidence the Trial Chamber accepted,[169] testified that after Brima received information that the people of Fourah Bay had killed one of his soldiers, he announced "that he would lead the AFRC troops to Fourah Bay to burn houses and kill people in retaliation".[170] An attack on the Fourah Bay area then took place, in which numerous civilians were killed or amputated.

71. Brima himself routinely gave general and specific orders for the commission of crimes.[171]

72. AFRC troops routinely reported back to Brima after operations,[172] and such reports included information about crimes committed during the operations.[173]

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[167] **Trial Chamber's Judgement**, para. 1553.
[168] **Trial Chamber's Judgement**, para. 1917.
[169] **Trial Chamber's Judgement**, paras 924, 925.
[170] **Trial Chamber's Judgement**, para. 919; also paras 920-923.
[171] See paragraph 79 below.
[172] **Trial Chamber's Judgement**, para. 589, 2037 (report about Gbinti), 613 (report about Waterloo), 1732 ("the troops systematically reported to their commanders, and often to ...Brima himself").
[173] **Trial Chamber's Judgement**, paras 940, 1600 (report about Kissy Mental Home), 1715 (report about Gbendembu), 1732 ("the troops systematically reported to their commanders, and often to ...Brima himself"). See also para. 1771 (Brima ordered amputations, and as a result a subordinate came back with a bag full of hands).

The Trial Chamber made findings of Brima commending the troops on receiving these reports about crimes.[174] It was not unusal for Brima to brief the entire force.[175]

73. In relation to the three enslavement crimes, the Trial Chamber was "satisfied that the only reasonable inference is that a substantial degree of planning and preparation were required to commit the crimes".[176] It expressly found that Brima "directly participated in and made a substantial contribution ***to the planning*** and execution of the said crimes",[177] and that Brima "***planned***, ordered, organised and implemented the system to abduct and enslave civilians which was in fact committed by AFRC troops in Bombali and Western Area".[178] It ultimately concluded that Brima is individually criminally responsible under Article 6(1) of the Statute for ***planning*** the commission of each of the enslavement crimes in Bombali District and Freetown and the Western Area.[179] Given the other findings of the Trial Chamber, and in particular the findings referred to in paragraphs 55-72 above, the Prosecution submits that no reasonable trier of fact could conclude that Brima, while responsible for the planning of the three enslavement crimes during the Bombali-Freetown Campaign, was not also responsible for planning the other crimes that were committed during the Bombali-Freetown Campaign.

74. The Prosecution submits that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence that the Trial Chamber accepted, the only conclusion open to any reasonable trier of fact was that Brima participated substantially in the planning of all of the crimes that were committed during the course of the Bombali-Freetown Campaign. In particular, it is submitted that no reasonable trier of fact could find that Brima was substantially involved in ***planning the various operations*** of the AFRC in Bombali District and Freetown,[180] but that he was not substantially involved in

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[174] **Trial Chamber's Judgement**, para. 1715.
[175] **Trial Chamber's Judgement**, para. 590.
[176] **Trial Chamber's Judgement**, para. 1826.
[177] **Trial Chamber's Judgement**, para. 1830 (emphasis added).
[178] **Trial Chamber's Judgement**, para. 1834 (emphasis added).
[179] **Trial Chamber's Judgement**, paras 1835-1837.
[180] See paragraph 62 above. See also paras 22, 59 above.

planning the crimes that were committed in the course of, and as part of, those operations.

75. The Prosecution submits that the only conclusion open to any reasonable trier of fact is that Brima participated substantially in the planning of the Bombali-Freetown Campaign as a whole, of which the commission of crimes was an integral part, that from the outset Brima designated the criminal conduct constituting those crimes, that all of the crimes committed during the Bombali-Freetown Campaign were within the framework of that design, that Brima's planning was a factor substantially contributing to those crimes, and that Brima acted with direct intent in relation to his own planning or with the awareness of the substantial likelihood that the crimes would be committed in the execution of that plan.

(ii). Ordering

76. Reference has been made in paragraphs 55 and 62 above to the findings of the Trial Chamber that Brima was the overall commander of the AFRC troops during the Bombali-Freetown Campaign (apart from a period when SAJ Musa was in command). The Trial Chamber expressly found that he was in a position to give orders to the AFRC troops, and that his orders were obeyed.[181] The Trial Chamber further found that "the Accused Brima's exercise of effective control was not sporadic, but constant. His orders remained effective and applicable to incidents that occurred some time after their issuance".[182]

77. Reference has already been made in paragraphs 28, and 39 to 41 above to the Mansofinia Address that was given by Brima at the outset of the Bombali-Freetown Campaign. This was a general instruction to the AFRC troops as to how to conduct themselves during the entire campaign, and the troops were threatened with death by Brima if they did not comply with the order.[183] In the Mansofinia Address, Brima instructed troops that during the Bombali-Freetown

[181] **Trial Chamber's Judgement**, para. 1724.
[182] **Trial Chamber's Judgement**, para. 1725.
[183] See paragraph 39 above; **Trial Chamber's Judgement**, paras 592-593, 618, 1550, 1691.

Campaign they should kill, maim or amputate any civilian with whom they came into contact, and that towns and villages were to be burned and women and girls were free to satisfy the soldier's sexual desires.[184] At the same time, Brima ordered the troops as they moved northwards to capture strong civilians.[185] This initial order given in the Mansofinia address continued to be executed by AFRC troops during the Bombali-Freetown Campaign.[186] The Prosecution submits that the only conclusion open to any reasonable trier of fact is that Brima, in giving the Mansofinia Address, ordered all of the killings, amputations, rapes and abductions that were committed during the Bombali Freetown Campaign.

78. Reference has also been made at paragraph 29 above to the Orugu address given by Brima two days prior to the invasion of Freetown, which, in effect, reaffirmed that the order given in the Mansofinia Address would continue to apply throughout the Freetown invasion.

79. In the course of the Bombali-Freetown Campaign, Brima also gave a number of other general orders,[187] as well as numerous more specific orders to commit particular attacks[188] or even to commit individual crimes.[189] The Trial Chamber

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[184] **Trial Chamber's Judgement**, paras 1693-1694 (referring to the evidence of TF1-033), and 1695 (in which the Trial Chamber clearly accepts this evidence). The Trial Chamber accepted this evidence also in paragraph 238 of the Trial Chamber's Judgement.

[185] **Trial Chamber's Judgement**, paras 1355, 1691, 1830; see also para. 1834 (Brima, *inter alia*, "ordered" the system to abduct and enslave civilians).

[186] See paragraph 40 above.

[187] **Trial Chamber's Judgement**, para. 238 makes a finding with respect to *inter alia* "Operation Fearful" and "Operation Clear the Area" which respectively mandated the killing of any civilian in the vicinity and the looting and burning of surrounding villages. In making this finding, the Trial Chamber relied on the evidence of TF1-334 (Trial Chamber's Judgement, para. 238, footnote 467), who testified that "Operation Clear the Area" was ordered by Brima (TF1-334, Transcript 23 May 2005, pp. 104-106; 24 May 2005, pp. 2-5). In Rosos, in June 1998, Brima ordered that civilians should be cleared from the area within 15 miles from Rosos, that they should be executed rather than brought back to the Camp and that the surrounding villages should be burned and looted.

[188] **Trial Chamber's Judgement**, para. 588 ("On one occasion while at Rosos ... 'Gullit' [Brima] then issued a public order in front of the assembled troops that they should attack Gbomsamba and return with no civilians but with military equipment. He also stated that civilians should be amputated and the town burned down to record their presence there."); para. 589 ("The attack on Gbinti while the troops were at Rosos was similarly orchestrated"); paras 939, 1599-1600 ("... the Accused Brima, in the presence of commanders including the Accused Kamara and Kanu, ordered troops to go out from the mental home and "clear up" the area. Brima stated that civilians were to be killed and amputated and houses burned as punishment for their support of ECOMOG"); para. 1731 (referring to "the evidence that the Accused Brima ordered attacks on civilians on several occasions"). In Kamagbengeh in June of 1998, the First Accused ordered the AFRC troops to attack Karina and to deliberately target civilians in order to "shock the whole country and the international community".

found, for instance, that Brima ordered his subordinates to perpetrate crimes against the civilian population in Karina with the specific intent of instilling terror in the civilian population.[190] These more specific orders cannot be considered in isolation as merely orders to commit the particular attack or the particular crime in question: rather, in the context of the findings of the Trial Chamber as whole, the only conclusion that could be drawn by any reasonable trier of fact is that they were orders that reinforced and reiterated the general order that had been given in the Mansofinia Address.

80. The Prosecution submits that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence that the Trial Chamber accepted, the only conclusion open to any reasonable trier of fact was that Brima *ordered* all of the crimes committed in Bombali District and Freetown and the Western Area, particularly through the general order given in the Mansofinia Address and reiterated in the Orugu Address, but also through more specific orders given throughout the Bombali-Freetown Campaign.

(iii). Instigating

81. The Trial Chamber set out the law of "instigating" as an Article 6(1) mode of liability in paragraphs 769-771 of the Trial Chamber's Judgement. The Prosecution takes no issue with the Trial Chamber's definition of this mode of liability.

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[189] **Trial Chamber's Judgement,** paras 905, 908, 910, 911, 1779 (order to execute civilians in State House Area), 920, 925, 1770 (order to kill civilians at Fourah Bay), 939, 941, 1780, 942, 1599, 1237 (order to burn houses and kill civilians at Kissy Mental Home), 1777 (orders to kill collaborators in Freetown), 1781 (order to massacre civilians in Rogbalan Mosque), 1239 , 1771, 1772, 1773 (order to amputate civilians at Kissy Mental Home), 1421, 1778 (order to loot at State House), 1580 (order to loot, burn and kill civilians during Freetown invasion), 1059, 1272, 1380, 1381, 1449, 1452, 1583, 1607, 1774, 1783 (orders to abduct civilians during the invasion and retreat of Freetown), 1063, 1064, 1602, 1775, 1776 (order to commit atrocities during the retreat of Freetown, orders to burn houses, amputate and kill civilians), 1608 (order to burn down Calaba Town), 1355, 1451 (order to capture civilians at Mansofinia), 1553, 1559, 1560, 1710, 1711 (order to burn down Karina, to kill, amputate or capture civilians in Karina), 1565, 1566, 1568 (order to kill civilians, burn and loot villages, at Rosos), 1358, 1717, 1719, 1783 (order to distribute children among commanders and to train them as soldiers).

[190] **Trial Chamber's Judgement**, para. 1711.

82. The Prosecution submits that in making the Mansofinia Address,[191] Brima ordered all of the killings, amputations, and rapes that were committed during the Bombali-Freetown Campaign. The Prosecution submits that as well as ordering these crimes, Brima, by making this address, also *instigated* all of these crimes, as well as all of the other crimes that were committed during the Bombali-Freetown campaign. The Trial Chamber accepted the evidence of Witness TF1-033, who testified that in the Mansofinia Address, Brima said:

> "You all know what befell on us when the ECOMOG forces removed us from power in Freetown. Our colleagues, soldiers, sympathisers, relatives, were killed by civilians as well as ECOMOG soldiers. So for that reason, we are going back to Freetown. We are going back to Freetown and ***we should all return that fell on us*** [...] So ***we are not going to spare any civilian, only those we desire to be with us***. [...] Young girls and women are free to satisfy your sexual desire. ***This is Operation Spare No Soul***."[192]

83. In giving this order, Brima warned the soldiers "Minus you, plus you", which meant that if a soldier failed to go by those orders, he would face death.[193] The Trial Chamber found that the use of this phrase "was not a one-off warning to the troops, but rather a well-known rule of the Accused Brima".[194]

84. The Trial Chamber also found that, on a number of subsequent occasions, the Accused Brima publicly addressed the troops and advocated criminal conduct.[195] Reference has been made in paragraphs 78-79 above to the numerous general and specific orders that Brima gave throughout the Bombali-Freetown Campaign for crimes to be committed. Reference has also been made at paragraph 29 above to the Orugu Address, in which Brima announced to AFRC troops "that it was time to attack Freetown and that the Sierra Leone People's Party government was responsible for denying the success of the rebel troops", and ordered "that

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[191] As to which, see paragraphs 28, 39-41, 65, 77-79 above.
[192] **Trial Chamber's Judgement**, para. 1694 (emphasis added).
[193] **Trial Chamber's Judgement**, paras 592-593, 618, 1550, 1691.
[194] **Trial Chamber's Judgement**, para. 593, referring to the evidence of TF1-334, who the Trial Chamber found credible (**Trial Chamber's Judgement** para. 359; see also para. 599).
[195] **Trial Chamber's Judgement**, para. 1829; See also para. 1552: "The Trial Chamber recalls the evidence of witness TF1-033 that Brima addressed his troops publicly in Yaya and advocated attacks on civilians. The Trial Chamber is satisfied that the witness was in fact referring to the speech made by the Accused Brima at Mansofinia and therefore makes no further findings on this evidence."

Freetown should be looted and burnt down, that anyone who opposed the troops should be considered a "collaborator" and should be killed". In Freetown, after it became clear that ECOMOG troops had taken over, Brima ordered the troops "to go as far as they could" burning and killing people.[196]

85. The Trial Chamber also referred, for instance, to the evidence of Witness TF1-033, whose evidence the Trial Chamber accepted, that when Brima heard that 25 civilians were killed in the attack on Gbendembu, he commended his men for "a job well done".[197] By this act, Brima was thereby clearly instigating those and other AFRC troops to continue to commit such crimes in the future.

86. The Trial Chamber expressly found that Brima's declaration at Camp Rosos of "Operation Clear the Area" was a generalised instruction that "created a climate of criminality which endured in the months following the order".[198] The Prosecution submits that the only conclusion open to any reasonable trier of fact from the findings of the Trial Chamber is that all of the addresses and orders calling for the commission of crimes that Brima gave throughout the Bombali-Freetown Campaign, beginning with the Mansofinia Address at the very beginning of that campaign, created and maintained this enduring climate of criminality. The Prosecution submits that a commander will be liable for "instigating" crimes in circumstances where a commander has created an environment permissive of criminal behaviour by subordinates, that contributes to such crimes actually being committed by subordinates.[199]

87. The Prosecution submits that the Trial Chamber's finding that there was not "any evidence" that Brima instigated any of the Bombali District Crimes (apart from the three enslavement crimes) is patently erroneous. This finding is also inconsistent, for instance, with one of the Trial Chamber's own findings in relation to Kanu. At paragraph 2063 of the Trial Chamber's Judgement, the Trial Chamber refers to an incident in which Kanu, at a meeting chaired by Brima, reminded the AFRC troops present "about orders to burn down police stations and

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[196] **Trial Chamber's Judgement**, para. 1775.
[197] **Trial Chamber's Judgement**, para. 896, 1564, 1715.
[198] **Trial Chamber's Judgement**, para. 1713.
[199] ***Blaškić* Trial Judgement**, para. 337; ***Galić* Trial Judgement**, paras 168-170; **Prosecution Final Trial Brief**, para. 418

kill 'targeted persons'/collaborators". The Trial Chamber found (correctly it is submitted) that by this conduct, ***Kanu*** instigated the ensuing killings.[200] It failed to find, however that by giving the original order, ***Brima*** also instigated those crimes.

88. The Prosecution submits that from this evidence, which the Trial Chamber found to be credible and reliable, considered in the light of all of the other findings by the Trial Chamber, the only conclusion that could be drawn by any reasonable trier of fact is that Brima instigated all of the crimes that were committed during the Bombali-Freetown Campaign. On the basis of the Trial Chamber's findings, the only conclusion open to any reasonable trier of fact is that Brima's acts of instigation substantially contributed to all of the crimes committed by the AFRC troops throughout the Bombali-Freetown Campaign, and that Brima acted with the direct intent or with awareness of the substantial likelihood that all of these crimes would be committed.

(iv). Aiding and abetting

89. The Trial Chamber set out the law of "aiding and abetting" as an Article 6(1) mode of liability in paragraphs 775-777 of the Trial Chamber's Judgement. The Prosecution takes no issue with the Trial Chamber's definition of this mode of liability.

90. In particular, it is noted that the Trial Chamber accepted (correctly it is submitted) that persistent failure by a superior to prevent or punish subordinates over a period of time, in addition to entailing responsibility under Article 6(3), may also be a basis for liability for aiding and abetting.[201]

91. In this respect, the Trial Chamber specifically found that Brima never took any steps to prevent or punish the commission of crimes by his subordinates (indeed, for the reasons given above, he was actively instigating the commission of these crimes), and that his failure to do so was "indicative of the tolerance and

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[200] **Trial Chamber's Judgement**, para. 2062

[201] **Trial Chamber's Judgement**, para. 777; ***Blaškić* Trial Judgement**, para. 337.

institutionalised nature of the commission of these crimes within the AFRC forces".[202] The Prosecution submits that the only conclusion that could be drawn by any reasonable trier of fact from the findings of the Trial Chamber is that the enduring climate of criminality that was created by Brima's conduct as a whole[203] provided encouragement and moral support to the AFRC troops who committed the crimes and had a substantial effect on the perpetration of all of the crimes.

92. The Trial Chamber also accepted (correctly it is submitted) that the presence at the scene of a crime by a person who is in a position of authority may be regarded as an important indication for encouragement or support.[204]

93. In respect of one specific incident, the Trial Chamber in fact found that Brima's presence at the scene of the crime and failure to admonish the troops had a substantial effect on the commission of the crimes, and amounted to aiding and abetting the killings in that incident.[205] However, the Trial Chamber failed to make similar findings in respect of various other incidents where the Trial Chamber found that crimes were committed in Brima's presence,[206] or that orders to commit crimes were given in Brima's presence,[207] or that crimes were committed in circumstances where the AFRC troops knew that Brima had prior knowledge of the crimes about to be committed,[208] or that crimes were reported to Brima who expressly or tacitly approved of them.[209]

94. The Prosecution submits that based on all of the findings of the Trial Chamber, or alternatively, the findings of the Trial Chamber and the evidence accepted by the Trial Chamber, the only conclusion open to any reasonable trier of fact is that Brima's conduct, from the time of the Mansofinia Address and throughout the Bombali-Freetown Campaign as a whole, provided encouragement and moral support to the AFRC troops to commit all of the crimes that were committed during that campaign, that this encouragement and moral support had a

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[202] **Trial Chamber's Judgement**, para. 1741.
[203] See paragraphs 44 and 86 above.
[204] **Trial Chamber's Judgement**, para. 775.
[205] **Trial Chamber's Judgement**, paras 1785-1786.
[206] **Trial Chamber's Judgement**, paras 1583, 1774.
[207] **Trial Chamber's Judgement**, paras 1238, 1601.
[208] See paragraphs 77-79 above.
[209] See paragraphs 43, 72 above.

substantial effect on the perpetration of all of the crimes, and that Brima knew, or was aware of the substantial likelihood, that his acts would assist the commission of the crimes by the perpetrators, and that Brima is therefore individually responsible for aiding and abetting all of the Bombali District Crimes, and Freetown and the Western Area Crimes.

E. The individual responsibility of Kamara for the Bombali District Crimes and Freetown and the Western Area Crimes

(i). Planning

95. The Prosecution refers to paragraphs 51-52 above.

96. The Prosecution submits that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence that the Trial Chamber accepted, the only conclusion open to any reasonable trier of fact is that Kamara, together with Brima and others, planned the entire Bombali-Freetown Campaign, including the commission of widespread and systematic atrocities that were part of that plan.

97. The Prosecution submits that this follows from the following findings in particular.

98. The Trial Chamber found that Kamara was Brima's Deputy commander at Mansofinia and throughout the journey to Colonel Eddie Town,[210] and that he was Brima's Deputy throughout the Freetown invasion and Freetown retreat.[211] The only period in which he was not the deputy commander was during an indeterminate (but relatively brief) period between his arrest in Colonel Eddie Town until the death of SAJ Musa on 23 December 1998 (shortly before the Freetown invasion began).[212] Prior to the Bombali-Freetown Campaign, Kamara

[210] **Trial Chamber's Judgement**, paras 380, 465, 468, 1926.
[211] **Trial Chamber's Judgement**, paras 472, 474, 602, 1944.
[212] **Trial Chamber's Judgement**, paras 198-201, 388, 472, 601, 602 and 611.

had been the commander of the AFRC troops in Kono District, until Brima arrived there and took over.[213]

99. Kamara was one of the participants,[214] together with Brima and SAJ Musa, at the meeting held in Krubola/Kurubonla, "to discuss the future and develop a new military strategy",[215] and to "define the new objectives of the AFRC rebel movement".[216] He was "one of the senior AFRC faction commanders" at that meeting.[217] The necessary implication is that this meeting was a strategic planning meeting, at which the overall strategic plan and objectives of the Bombali-Freetown campaign were decided upon.[218]

100. The Trial Chamber found that from Mansofinia, as the AFRC troops advanced through Bombali District, the AFRC faction was "well-structured and organised",[219] "had a well-developed chain of command",[220] and that the AFRC faction "had a ***planning*** and orders process".[221]

101. The Prosecution refers to paragraphs 57, 61 and 63-64 above.

102. The Trial Chamber found that at Rosos, Kamara was based at "headquarters", from where operations were planned and orders were issued.[222] The Trial Chamber also referred to the evidence of TF1-334, whose evidence the Trial Chamber accepted,[223] that in this period Kamara was one of the commanders who made decisions regarding the brigade, and referred to the evidence that he "played a role at a senior level in military operations in Bombali District".[224] The Trial Chamber found that he "participated in decision making" in Bombali District.[225] Another witness, George Johnson, who the Trial Chamber found to be credible,[226]

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[213] **Trial Chamber's Judgement**, para. 1672.
[214] **Trial Chamber's Judgement**, paras 379, 462, 466, 1924.
[215] **Trial Chamber's Judgement**, para. 190 (and see also para 379).
[216] **Trial Chamber's Judgement**, para. 462.
[217] **Trial Chamber's Judgement**, para. 466.
[218] See paragraphs 17-19 above.
[219] **Trial Chamber's Judgement**, para. 468.
[220] **Trial Chamber's Judgement**, para. 585, a finding based on the evidence and findings in paras 576-584.
[221] **Trial Chamber's Judgement**, para. 591 (emphasis added), a finding based on the evidence and findings in paras 586-590.
[222] **Trial Chamber's Judgement**, para. 1924; see also para. 466.
[223] **Trial Chamber's Judgement**, para. 359.
[224] **Trial Chamber's Judgement**, paras 466, 1924.
[225] **Trial Chamber's Judgement**, para. 1925.
[226] **Trial Chamber's Judgement**, paras 370-371.

also gave evidence that all three Accused were based at the headquarters, and the headquarters "was in charge of ***planning all operations*** and giving military orders".[227]

103. One witness testified that in this period, the witness reported to both Brima ***and*** Kamara,[228] and that Kamara was one of "the persons responsible for direct command of the brigade".[229] Another witness testified that Kanu's role as chief of staff was to enforce orders given by Brima ***and Kamara***.[230] The Trial Chamber accepted the evidence of these two witnesses.[231]

104. During the Bombali District period, Kamara led AFRC troops on operations in which crimes were committed,[232] was present during operations when crimes were committed,[233] or was present when Brima gave orders to commit crimes.[234] He gave orders himself during such operations,[235] and was present when subordinate commanders reported back on crimes that had been committed.[236]

105. Immediately prior to the invasion of Freetown, Kamara was one of the participants at the meeting at which Brima gave the Orugu Address (as to which, see paragraphs 29, 66 and 78 above), and at which the invasion of Freetown was discussed.[237] Prior to the capture of State House, he spoke to Sam Bockarie (the leader of the RUF forces) on the radio.[238]

106. The Trial Chamber found that at the beginning of the Freetown invasion, the movement of the AFRC troops was "ordered and strategic".[239]

107. The Trial Chamber further found that Kamara was one of the senior commanders at the AFRC headquarters at State House in Freetown from the time of its capture

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[227] **Trial Chamber's Judgement**, para. 586 (emphasis added); see also para. 591.
[228] **Trial Chamber's Judgement**, para. 576 (referring to the evidence of TF1-334).
[229] **Trial Chamber's Judgement**, para. 579 (referring to the evidence of TF1-334).
[230] **Trial Chamber's Judgement**, para. 586 (referring to the evidence of George Johnson).
[231] The Trial Chamber found TF1-334 a credible witness at para. 359 and George Johnson a credible witness at para. 370.
[232] **Trial Chamber's Judgement**, paras 588-589.
[233] **Trial Chamber's Judgement**, paras 850, 1034, 1561.
[234] **Trial Chamber's Judgement**, paras 588, 589, 1553, 1559, 1710.
[235] **Trial Chamber's Judgement**, para. 1915.
[236] **Trial Chamber's Judgement**, paras 895, 1556.
[237] **Trial Chamber's Judgement**, paras 473, 902, 1945.
[238] **Trial Chamber's Judgement**, paras 473, 1945.
[239] **Trial Chamber's Judgement**, para. 1795.

on 6 January 1999,[240] and that he attended meetings there when AFRC operations were discussed,[241] including at a meeting when Brima announced that the burning of Freetown should start.[242] The Trial Chamber expressly found that during this period, Kamara "***participated in decision making***".[243]

108. One witness stated that during the Freetown invasion "it was normal practice for the commanders[244] to have a discussion, after which 'Five-Five' [Kanu] … would inform the troops on the details of the operation".[245]

109. Kamara participated in operations during the Freetown invasion in which crimes were committed,[246] and gave orders during the course of these operations.[247] He was present when Brima gave orders to commit crimes.[248]

110. Following the retreat from Freetown, the Accused Kamara took part in a second attack on Freetown that took place with the participation of RUF commanders.[249] The Trial Chamber also referred to evidence (which it apparently accepted) that at Newton, following the Freetown retreat, Kamara, together with Brima and Kanu, participated in negotiations with UNAMSIL officials and Archbishop Ganda over the possible release of children to help secure a ceasefire.[250]

111. The Prosecution submits that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence that the Trial Chamber accepted, the only conclusion that any reasonable trier of fact could draw was that Kamara was one of the senior commanders of the AFRC forces in Bombali District who participated substantially in the planning of the Bombali-

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[240] **Trial Chamber's Judgement**, paras 473, 1794, 1945.
[241] **Trial Chamber's Judgement**, paras 473, 1945.
[242] **Trial Chamber's Judgement**, paras 473, 1945.
[243] **Trial Chamber's Judgement**, para. 1948. (emphasis added)
[244] Which, in view of the Trial Chamber's other findings, must have included Kamara.
[245] **Trial Chamber's Judgement**, para. 922; referring to the evidence of TF1-184, whose evidence the Trial Chamber accepted: see para. 926.
[246] **Trial Chamber's Judgement**, paras 473, 1945 (operation to release prisoners), 919, 923, 1231, 1939, 1941, 1592 (attack on Fourah Bay). See also Trial Chamber's Judgement, para. 1936.
[247] **Trial Chamber's Judgement**, paras 473, 1945, 1947 (giving of orders during the operation to release prisoners, and order to the AFRC troops to burn houses).
[248] **Trial Chamber's Judgement**, paras 919-926 (when Brima ordered the attack on Fourah Bay); paras 939, 1237, 1238, 1599, 1772, 1775 (when Brima issued an order at Kissy Mental Home to attack civilians); paras 1059, 1607 (when Brima issued an order at PWD Junction to abduct civilians); 1831, 1947 (when Brima gave an order to burn Freetown); 1803 (generally).
[249] **Trial Chamber's Judgement**, para. 473.
[250] **Trial Chamber's Judgement**, para. 1273.

Freetown operation, of which the crimes committed in the course of that campaign were an integral part. The only conclusion is that all of the crimes committed during the Bombali-Freetown Campaign were within the framework of the plan of which Kamara was one of the planners, that Kamara's planning was a factor substantially contributing to those crimes, and that Kamara acted with direct intent in relation to his own planning or with the awareness of the substantial likelihood that the crimes would be committed in the execution of that plan. The commission of crimes was an integral part of the military strategy of the AFRC troops during the Bombali/Freetown Campaign. The commission of crimes cannot be viewed separately from the rest of the military planning.

112. In particular, on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence accepted by the Trial Chamber, no reasonable trier of fact could find that Kamara "participated in decision making" of the senior commanders of the AFRC who conducted the Bombali-Freetown campaign,[251] but that he was not substantially involved in the decision making when it came to the crimes that were repeatedly committed in the course of, and as part of, that campaign. The only conclusion that any reasonable trier of fact could reach is that Kamara is individually responsible for "planning" all of the crimes that were committed in the course of that campaign.

(ii). Ordering

113. Reference has been made in paragraphs 98 above to the findings of the Trial Chamber that Kamara was Brima's deputy commander at Mansofinia and throughout the journey to Colonel Eddie Town, and that he was Brima's Deputy throughout the Freetown invasion and Freetown retreat (apart from an undefined but brief period when SAJ Musa was in command).

114. Reference has also been made above to the Mansofinia Address that was given by Brima at the outset of the Bombali-Freetown Campaign.[252] This was a general

[251] **Trial Chamber's Judgement**, paras 1925, 1948.
[252] See paragraphs 28, 39-41, 65, 77-79 and 82 above

instruction to the AFRC troops as to how to conduct themselves during the entire campaign, requiring them to kill, maim or amputate any civilian with whom they came into contact, and requiring that towns and villages be burned and that women and girls were free to satisfy the soldier's sexual desires.[253] Reference has also been made above to the Orugu Address given by Brima two days prior to the invasion of Freetown, which, in effect, reaffirmed that the order given in the Mansofinia Address would continue to apply throughout the Freetown invasion.[254]

115. Reference has further been made in paragraph 109 above to orders that Kamara gave during the Bombali-Freetown Campaign for AFRC troops to commit crimes.

116. The Prosecution submits that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence that the Trial Chamber accepted, the only conclusion that any reasonable trier of fact could reach was that in the particular factual circumstances that pertained during the Bombali-Freetown Campaign, the orders to commit crimes that Kamara gave were not merely orders to commit the specific crimes that were the subject of each of those orders, but were orders that reaffirmed and reinforced the general order given by Brima in the Mansofinia Address and repeated in the Orugu Address. On this basis, the Prosecution submits that Kamara is individually responsible, under Article 6(1) of the Statute, for ordering all of the crimes that were committed during the Bombali-Freetown Campaign.

(iii). Instigating

117. Reference is made to paragraph 81 above.

118. The Prosecution submits that on the basis of the findings made by the Trial Chamber, or alternatively, on the basis of those findings and the evidence

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[253] **Trial Chamber's Judgement**, paras 1693-1694 (referring to the evidence of TF1-033), and 1695 (in which the Trial Chamber clearly accepts this evidence). It is absolutely clear that the Trial Chamber accepted this evidence also in paragraph 238 of the Trial Chamber's Judgement.

[254] See paragraphs 29, 66, 78 and 105 above.

accepted by the Trial Chamber, the only conclusion open to any reasonable trier of fact is that Kamara, by his conduct, instigated all of the crimes committed during the Bombali-Freetown Campaign.

119. Reference is made to paragraphs 104-105 above. It is recalled in particular that Kamara was present at the giving of the Mansofinia Address and the Orugu Address, and when the order was given to attack Karina,[255] and was for instance present when Brima congratulated subordinates on a "job well done" after they reported to him the killing of 25 civilians.[256]

120. The Prosecution submits that the only conclusion that any reasonable trier of fact could reach is that Kamara's conduct:

(1) in openly performing the functions of deputy commander of the AFRC forces throughout the Bombali-Freetown Campaign, and in particular, in openly participating in decision making at the top command level without distancing himself from decisions made;[257]

(2) in leading or participating in operations in which crimes were committed, in being present during operations when crimes were committed or when orders were given to commit crimes or when subordinate commanders reported back on the commission of crimes; and

(3) in giving certain orders himself to commit crimes,

contributed significantly to the creation and maintenance of the enduring climate of criminality that existed throughout the Bombali-Freetown Campaign,[258] and that Kamara, together with Brima and others, thereby incited, solicited or otherwise induced the AFRC troops to commit all of the crimes that were perpetrated during the course of the Bombali-Freetown Campaign.[259] The Prosecution further submits that the only conclusion that could be reached by any reasonable trier of fact is that this instigation was a factor substantially contributing to the commission of the crimes, and that Kamara acted with direct intent or with the awareness of the substantial likelihood that the crimes would be

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[255] **Trial Chamber's Judgement**, paras 1551, 1559.
[256] See paragraphs 43 and 85 above.
[257] **Trial Chamber's Judgement**, para. 1948.
[258] See paragraphs 44, 86, 91 above.
[259] Compare **Trial Chamber's Judgement**, para. 769.

committed.[260] The only conclusion that any reasonable trier of fact could reach is that Kamara is individually responsible for "instigating" all of the crimes that were committed in the course of that campaign.

(iv). Aiding and abetting

121. The Prosecution refers to paragraphs 89-92 above.

122. The Trial Chamber specifically found that Kamara, who was in a superior-subordinate relationship with the AFRC troops who committed the crimes, had actual or imputed knowledge of the Bombali District Crimes and Freetown and Western Area Crimes and failed to prevent or punish the perpetrators.[261] For the reasons given in paragraphs 90-91 above, in addition to giving rise to Article 6(3) liability, this clearly had an encouraging effect on the AFRC troops to commit the crimes, and also renders Kamara liable, under Article 6(1), for aiding and abetting all of those crimes.[262]

123. More generally, Kamara, by performing the functions of deputy commander of the AFRC troops throughout the Bombali-Freetown Campaign,[263] necessarily made a substantial contribution to the execution of that campaign, of which the commission of the crimes was an integral part. He therefore necessarily made a substantial contribution to the commission of those crimes.

124. The case of Kamara can be compared for instance to the case of Milorad Krnojelac before the ICTY.[264] Krnojelac was the commander of the KP Dom camp in Foča, in which civilians were unlawfully detained in inhumane conditions and mistreated. The Trial Chamber in that case found that it was not proved that Krnojelac himself had any intent to detain the civilians,[265] or to

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[260] Compare **Trial Chamber's Judgement**, para. 770.
[261] **Trial Chamber's Judgement**, paras 1927, 1949.
[262] **Trial Chamber's Judgement,** para. 777
[263] The nature of this contribution is evident from the findings of the Trial Chamber referred to for instance, in paragraphs 98, 99, 104, 105, 109 above.
[264] See ***Krnojelac*** **Trial Judgement** and ***Krnojelac*** **Appeal Judgement**.
[265] ***Krnojelac*** **Trial Judgement**, para. 127.

subject them to inhumane living conditions,[266] or to beatings or torture. Furthermore, the Trial Chamber expressly found that Krnojelac was *not liable as a participant in a joint criminal enterprise.*[267] Nevertheless, the Trial Chamber convicted him as an aider and abettor of these crimes, because he had knowledge of the unlawful confinement, inhumane conditions and ill-treatment, and as warden did nothing to stop it, thereby encouraging the commission of these crimes by his subordinates.[268] The ICTY Appeals Chamber dismissed a defence appeal against these findings.[269]

125. The Prosecution submits that the case of Kamara is an *a fortiori* case of aiding and abetting, since his case, it is clear from his conduct referred to above that he clearly *did* have the intent that the crimes be committed during the Bombali-Freetown Campaign. The Bombali-Freetown Campaign, including the systematic crimes that were an integral part of that campaign, clearly could not have been carried out without the active participation of a number of commanders in addition to Brima. Kamara was the second most senior commander. He played an active role in that capacity, with the knowledge of the crimes that were to be committed, and were being committed, as part of that campaign. By performing his role as deputy commander, he materially assisted, and knew that he was materially assisting, in the carrying out of the campaign as a whole, of which the crimes were an integral part.

126. The Prosecutor further submits that the conduct of Kamara referred to in paragraph 109 above provided encouragement and moral support to the troops who committed these crimes and had a substantial effect on the perpetration of all of the crimes by those troops.

127. The Prosecution submits that based on all of the findings of the Trial Chamber, or alternatively, the findings of the Trial Chamber and the evidence accepted by the

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[266] ***Krnojelac* Trial Judgement**, para. 170.

[267] ***Krnojelac* Trial Judgement**, paras 127, 248, 315, 346, 427, 487, 525.

[268] ***Krnojelac* Trial Judgement**, paras 127, 171, 316, 489, 490, 496, 499, 513-516, 523, 525 (and compare paras 319 (holding that he was not liable as an aider and abettor of certain specific beatings committed *outside the camp* which he could not have known were being committed by guards under his command), 347, 428 and 491-492 (holding that he was not liable as an aider and abettor for specific crimes in circumstances where he did not know that the crimes committed included those specific crimes).

[269] ***Krnojelac* Appeal Judgement**, paras 35-53.

Trial Chamber, the only conclusion open to any reasonable trier of fact is that Kamara is individually responsible for "aiding and abetting" all of the Bombali District Crimes, and Freetown and Western Area Crimes.

F. The individual responsibility of Kanu for the Bombali District crimes and Freetown and the Western Area crimes

(i). Planning

128. The Prosecution refers to paragraphs 51-52 above.

129. The Prosecution submits that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence that the Trial Chamber accepted, the only conclusion that any reasonable trier of fact could have drawn is that Kanu, together with Brima and others, planned the entire Bombali-Freetown Campaign, including the commission of widespread and systematic atrocities as part of that plan.

130. The Prosecution submits that this follows from the following findings in particular.

131. The Trial Chamber found that during the journey of the AFRC forces from Mansofinia to Bombali District, Kanu was a senior commander of the AFRC fighting force who was able to command troops.[270] The Trial Chamber found that, in addition, he was the Commander of the AFRC fighting force in charge of abducted civilians including women and children.[271] In this period, he held the position of Brima's Chief of Staff, and the Trial Chamber found that he was active in this position.[272] The Trial Chamber found that he was also Chief of Staff

[270] **Trial Chamber's Judgement**, para. 2036.
[271] **Trial Chamber's Judgement**, para. 526.
[272] **Trial Chamber's Judgement**, paras 380, 532.

and the commander in charge of civilian abductees throughout the attack on Freetown on 6 January 1999 and the retreat to Newton.[273]

132. Kanu was one of the participants,[274] together with Brima and SAJ Musa, at the meeting held in Krubola/Kurubonla, "to discuss the future and develop a new military strategy",[275] and to "define the new objectives of the AFRC rebel movement".[276] The necessary implication is that this meeting was a strategic planning meeting, at which the overall strategic plan and objectives of the Bombali-Freetown campaign were decided upon.[277]

133. The Trial Chamber found that from Mansofinia, as the AFRC troops advanced through Bombali District, the AFRC faction was "well-structured and organised",[278] "had a well-developed chain of command",[279] and that the AFRC faction "had a ***planning*** and orders process".[280]

134. The Prosecution refers to paragraphs 57, 61 and 63-64 above.

135. During the Bombali District period, Kanu was a member of the headquarters group which was "in charge of planning all operations and giving military orders".[281] Witness TF1-334 (whose evidence the Trial Chamber accepted[282]) testified that Kanu ("Five-Five") was one of the individuals who was part of the "brigade administration", which was responsible for direct command of the brigade.[283] Witness TF1-334 also confirmed that the Accused Kanu, as chief of staff, was present when the Accused Brima gave orders to attack and burn Karina, amputate the citizens, and capture strong men, as a demonstration "to shock the whole country."[284]

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[273] **Trial Chamber's Judgement**, para. 535.
[274] **Trial Chamber's Judgement**, para. 1551.
[275] **Trial Chamber's Judgement**, para. 190 (and see also para. 379).
[276] **Trial Chamber's Judgement**, para. 462.
[277] See paragraph 56 above.
[278] **Trial Chamber's Judgement**, para. 468.
[279] **Trial Chamber's Judgement**, para. 585, a finding based on the evidence and findings in paras 576-585.
[280] **Trial Chamber's Judgement**, para. 591 (emphasis added), a finding based on the evidence and findings in paras 586-591.
[281] **Trial Chamber's Judgement**, para. 2038 (referring to evidence which the Trial Chamber accepted, at para. 2040).
[282] The Trial Chamber found TF1-334's testimony to be credible at para. 359.
[283] **Trial Chamber's Judgement**, para. 579.
[284] **Trial Chamber's Judgement**, para. 2038.

136. During the Bombali District period, Kanu also commanded troops on military operations,[285] and gave orders and *determined the tactics* to be employed in such operations.[286]

137. The Trial Chamber found that throughout the Bombali District period, Kanu was, in addition to being Chief of Staff, also the commander in charge of abducted civilians.[287] The Trial Chamber found that he planned, organised and implemented the system to abduct and enslave civilians which was committed by AFRC troops.[288] The Trial Chamber found that Kanu "presided over a system that institutionalised serious abuse of civilians",[289] and that he designed and implemented a system to control abducted girls and women.[290]

138. During the Bombali District period, Kanu led AFRC troops on operations in which crimes were committed, and made strategic or tactical decisions in the course of those operations,[291] was present during operations when crimes were committed,[292] or was present when Brima gave orders to commit crimes.[293] Immediately prior to the invasion of Freetown, Kanu was one of the participants at the meeting at which Brima gave the Orugu Address (as to which, see paragraphs 29, 66 and 78 above), and at which the invasion of Freetown was discussed.[294] Indeed, Kanu ran this meeting[295] at which Kanu reiterated Brima's orders to the commanders, and specifically reminded them about Brima's order to loot Freetown and burn down the Kissy and Eastern police stations, to capture State House, to open Pademba Road prison, and to kill anyone who opposed the

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[285] **Trial Chamber's Judgement**, paras 2036, 2039 (referring to evidence which the Trial Chamber accepted, at para. 2040).

[286] **Trial Chamber's Judgement**, paras 2037-2039 (referring to evidence which the Trial Chamber accepted, at para. 2040).

[287] **Trial Chamber's Judgement**, paras 1717, 1830, 2091, 2093. The Trial Chamber referred (at para. 1717) to the evidence of TF1-334, which it accepted, that "following the completion of the training period, the trainees were addressed by both the Accused Kanu and the Accused Brima. Brima then ordered that the male children be distributed to the various company commanders, while the girls and women were to be turned over to "their husbands" meaning the soldiers and commanders".

[288] **Trial Chamber's Judgement**, para. 2095.

[289] **Trial Chamber's Judgement**, para. 2042.

[290] **Trial Chamber's Judgement**, para. 2092.

[291] **Trial Chamber's Judgement**, paras 588-589, 2036-2037, 2039.

[292] **Trial Chamber's Judgement**, paras 850, 1555

[293] **Trial Chamber's Judgement**, paras 588, 589, 1553, 1559 1710, 2038.

[294] **Trial Chamber's Judgement**, paras 532, 902, 2063.

[295] **Trial Chamber's Judgement**, para. 2068.

troops and abduct civilians in order to attract the attention of the international community.[296]

139. The Trial Chamber found that at the beginning of the Freetown invasion, the movement of the AFRC troops was "ordered and strategic",[297] and that the AFRC faction had a functioning chain of command, ***planning*** and orders process, until the troops lost control of State House.[298]

140. The Trial Chamber found that throughout the Freetown invasion and Freetown retreat, until the retreat to Newton in the Western Area, Kanu continued in his positions of Chief of Staff and of commander in charge of civilians.[299] The Trial Chamber found that in addition to assisting the commander in an administrative capacity, Kanu's position of Chief of Staff placed him in a position of effective control over troops,[300] and that he was able to issue orders to the troops which were obeyed.[301] It further found that he was third in command in Freetown, and that the Operations Director, the Operations Commander, the Task Force Commander and the head of Military Police were all required to report to him.[302]

141. The Trial Chamber found that in Freetown, Kanu was based at State House, the headquarters of the AFRC fighting forces,[303] and that he was almost always at Brima's side during the Freetown invasion and retreat.[304] As Chief of Staff, Kanu's role was to enforce orders given by Brima, Kamara and the Operations Commander.[305] He attended meetings with Brima at which orders to commit crimes were issued,[306] and it was he who made an announcement over the local radio that the AFRC had captured State House.[307] While at State House, on at least one occasion, he issued an order of a strategic nature.[308]

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[296] **Trial Chamber's Judgement**, paras 532, 586, 902, 2063.
[297] **Trial Chamber's Judgement**, para. 1795.
[298] **Trial Chamber's Judgement**, paras 2067, 2072.
[299] **Trial Chamber's Judgement**, paras 2067, 2091, 2094, 2095.
[300] **Trial Chamber's Judgement**, paras 2069, 2072.
[301] **Trial Chamber's Judgement**, paras 2075-2076.
[302] **Trial Chamber's Judgement**, para. 2070.
[303] **Trial Chamber's Judgement**, paras 534, 1794, 2071.
[304] **Trial Chamber's Judgement**, para. 534.
[305] **Trial Chamber's Judgement**, para. 586.
[306] **Trial Chamber's Judgement**, paras 1831, 2071.
[307] **Trial Chamber's Judgement**, para. 2071.
[308] **Trial Chamber's Judgement**, para. 2074.

142. One witness stated that during the Freetown invasion "it was normal practice for the commanders[309] to have a discussion, after which 'Five-Five' [Kanu] ... would inform the troops on the details of the operation".[310] During the Freetown retreat, he also attended meetings with Brima at which strategic decisions were discussed.[311]

143. Kanu participated in operations during the Freetown invasion in which crimes were committed,[312] or led such operations,[313] and gave orders during the course of these operations,[314] including orders to commit crimes.[315] He was present when Brima gave orders to commit crimes,[316] and reissued orders that were given by Brima.[317] He also personally committed numerous crimes,[318] including, for instance, performing amputations of victims in front of the AFRC troops to demonstrate how it was done.[319]

144. The Trial Chamber referred to evidence (which it apparently accepted) that at Newton, following the Freetown retreat, Kanu, together with Brima and Kamara, participated in negotiations with UNAMSIL officials and Archbishop Ganda over the possible release of children to help secure a ceasefire.[320]

145. The Prosecution submits that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence that the Trial

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[309] Which, in view of the Trial Chamber's other findings, must have included Kanu.
[310] **Trial Chamber's Judgement**, para. 922; referring to the evidence of TF1-184, whose evidence the Trial Chamber accepted: see paras 901 and 1228.
[311] **Trial Chamber's Judgement**, para. 1831.
[312] **Trial Chamber's Judgement**, paras 919, 926, 1241, 2048.
[313] **Trial Chamber's Judgement**, paras 923, 931, 1590, 1781, 2058, 2061, 2073.
[314] **Trial Chamber's Judgement**, paras 610, 926, 1801, 2073.
[315] **Trial Chamber's Judgement**, paras 533 (generally), 902, 910, 922, 931, 1229-1230, 1238 (orders for amputations), 1589, 1601, 2060-2061 (ordered the amputations of up to 200 civilians); 1608 (ordered "the war candle to be put on" meaning that houses in Freetown should be burnt, and gave more specific orders for burning of property), 1781, 1803, 2058 (order to kill ECOMOG soldiers), 2074.
[316] **Trial Chamber's Judgement**, paras 939,1059, 1237 (order that civilians were to be killed and amputated and houses burned as punishment for their support of ECOMOG), 1599, 1607 (order to abduct civilians), 1771 (order to commit widespread amputations), 1772, 1775 (order to commit amputations, kill civilians and burn property), 1803 (generally), 1831.
[317] **Trial Chamber's Judgement**, paras 2058, 2059. As the Trial Chamber found (at para. 2059), correctly it is submitted, Kanu is not relieved of criminal responsibility for ordering this massacre simply because he was reissuing an order originally made by his commander.
[318] **Trial Chamber's Judgement**, paras 533 (generally), 910, 1229-1230 (amputations), 2057 (looting of at least one vehicle), 2058 (killed one ECOMOG soldier).
[319] **Trial Chamber's Judgement**, paras 921, 1229-1230, 1588, 1591, 2050, 2053, 2061.
[320] **Trial Chamber's Judgement**, para. 1273.

Chamber accepted, the only conclusion that any reasonable trier of fact could draw was that Kanu was one of the senior commanders of the AFRC forces throughout the Bombali-Freetown Campaign who participated substantially in the planning of the Bombali-Freetown Campaign, of which the commission of systematic crimes was an integral part. The only conclusion that any reasonable trier of fact could reach is that all of the crimes committed during the Bombali-Freetown Campaign were within the framework of the plan of which Kanu was one of the planners, that Kanu's planning was a factor substantially contributing to those crimes, and that Kanu acted with direct intent in relation to his own planning or with the awareness of the substantial likelihood that the crimes would be committed in the execution of that plan.

(ii). Ordering

146. Reference has been made in paragraphs 131, 135 and 137 above to the findings of the Trial Chamber that Kanu was a senior commander of the AFRC troops during the Bombali-Freetown Campaign, that he was the number three in command during the Freetown invasion, that he was in a superior-subordinate relationship with the AFRC troops that committed crimes during the Bombali-Freetown Campaign, and that as Chief of Staff he had the function of ensuring that Brima's orders were enforced.

147. Reference has also been made in paragraph 66 and 78 above to the Trial Chamber's finding that Kanu was one of the participants at the meeting at which Brima gave the Orugu Address. Kanu in fact ran this meeting, at which he reiterated Brima's orders to the commanders, and specifically reminded them about Brima's order to loot Freetown and burn down the Kissy and Eastern police stations, to capture State House, to open Pademba Road prison, to kill anyone who opposed the troops and to abduct civilians in order to attract the attention of the international community. The Trial Chamber found that by reissuing Brima's order at this meeting, Kanu prompted the perpetrators to kill civilians in Freetown, and that he was therefore liable for *instigating* these killings during the

Freetown invasion.[321] However, the Prosecution submits that in reissuing Brima's order at the meeting in Orugu, Kanu was, according to the law endorsed by the Trial Chamber[322] at the very least, ***ordering*** all of the crimes encompassed within that order throughout the Freetown invasion and Freetown retreat.

148. Reference has also been made above to the Mansofinia Address that was given by Brima at the outset of the Bombali-Freetown Campaign.[323] This was a general instruction to the AFRC troops as to how to conduct themselves during the entire campaign, requiring them to kill, maim or amputate any civilian with whom they came into contact, and requiring that towns and villages were to be burned and that women and girls were free to satisfy the soldier's sexual desires.[324] It is submitted that the order given by Brima, and reissued by Kanu, at the Orugu Address prior to the Freetown invasion was a general reaffirmation of the order given in the Mansofinia Address, and an order that the former order would continue to apply throughout the Freetown invasion.

149. Reference has also been made in paragraph 143 above to various orders that Kanu gave throughout the Bombali-Freetown Campaign for AFRC troops to commit crimes.

150. The Prosecution submits that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence that the Trial Chamber accepted, the only conclusion that any reasonable trier of fact could reach was that in the particular factual circumstances that pertained during the Bombali-Freetown Campaign, the orders to commit crimes that Kanu gave were not merely orders to commit the specific crimes that were the subject of each of those orders, but were orders that reaffirmed and reinforced the general order given by Brima in the Mansofinia Address. This general order was again repeated by Kanu in the Orugu Address. On this basis, the Prosecution submits that Kanu

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[321] **Trial Chamber's Judgement**, para. 2063.
[322] See **Trial Chamber's Judgement,** para 774: "an Accused may be responsible for 'reissuing illegal orders', i.e. for receiving a criminal order from a superior and, in turn, instructing subordinates to act upon it".
[323] See paragraphs 28, 39-41, 65, 77-79 and 82 above.
[324] **Trial Chamber's Judgement**, paras 1693-1694 (referring to the evidence of TF1-033), and 1695 (in which the Trial Chamber clearly accepts this evidence). It is absolutely clear that the Trial Chamber accepted this evidence also in paragraph 238 of the Trial Chamber's Judgement.

is individually responsible, under Article 6(1) of the Statute, for ordering all of the crimes that were committed during the Bombali-Freetown Campaign.

(iii). Instigating

151. Reference is made to paragraph 81 above.

152. The Prosecution submits that on the basis of the findings made by the Trial Chamber, or alternatively, on the basis of those findings and the evidence accepted by the Trial Chamber, the only conclusion open to any reasonable trier of fact is that Kanu, by his conduct, instigated all of the crimes committed during the Bombali-Freetown Campaign.

153. Reference is made to paragraphs 135-138, 140-144 above. It is recalled in particular that Kanu was present at the giving of the Mansofinia Address,[325] ran the meeting at which Brima gave the Orugu Address,[326] was present when Brima gave the speech ordering the attack on Karina,[327] and was for instance present when Brima congratulated subordinates on a "job well done" after they reported to him the killing of 25 civilians. He was also present, as Chief of Staff, when Brima gave the order to attack and burn Karina, amputate the citizens, and capture strong men, as a demonstration "to shock the whole country."[328]

154. The Prosecution submits that the only conclusion open to any reasonable trier of fact is that Kanu's conduct:

(1) in openly performing the functions that he did as Chief of Staff and a senior commander of the AFRC forces throughout the Bombali-Freetown Campaign;

(2) in leading or participating in operations in which crimes were committed, in being present during operations when crimes were committed or when

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[325] **Trial Chamber's Judgement**, para. 576.
[326] See paragraphs 66, 138 above.
[327] **Trial Chamber's Judgement**, paras 1553, 1559, 1710.
[328] **Trial Chamber's Judgement**, para. 2038.

orders were given to commit crimes or when subordinate commanders reported back on the commission of crimes; and

(3) in giving certain orders himself to commit crimes,

contributed significantly to the creation and maintenance of the enduring climate of criminality that existed throughout the Bombali-Freetown Campaign, and that Kanu, together with Brima and others, thereby incited, solicited or otherwise induced the AFRC troops to commit all of the crimes that were committed during the course of the Bombali-Freetown Campaign.[329] The Prosecution further submits that the only conclusion that could be reached by any reasonable trier of fact is that this instigation was a factor substantially contributing to the commission of the crimes, and that Kanu acted with direct intent or with the awareness of the substantial likelihood that the crimes would be committed.[330] The only conclusion open to any reasonable trier of fact is that Kanu is individually responsible for "instigating" all of the crimes that were committed in the course of that campaign.

155. The Trial Chamber in fact found that Kanu, through his participation at the meeting at which the Orugu Address was given, "prompted" the perpetrators to kill civilians in Freetown, and that the Prosecution had "proved this mode of liability against the Accused Kanu".[331] The Trial Chamber thus found that Kanu was responsible for instigating the killing of an unspecified number of victims in Freetown and the Western Area.[332] However, at the Orugu Address, Kanu in fact reissued Brima's order to loot, burn and kill and abduct civilians.[333] On the basis of the Trial Chamber's findings, he thereby, at the very least, *ordered* all of these crimes in Freetown (as opposed to merely "instigating" *killings*). However, by reissuing this order at the Orugu Address, the Prosecution submits that the only possible inference is that Kanu thereby also *instigated* all of the other crimes that were committed in Freetown and the Western Area.

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[329] Compare **Trial Chamber's Judgement**, para. 769.
[330] Compare **Trial Chamber's Judgement**, para. 770.
[331] **Trial Chamber's Judgement**, para. 2063.
[332] **Trial Chamber's Judgement**, para. 2063.
[333] See paragraph 66 above.

(iv). Aiding and abetting

156. The Prosecution refers to paragraphs 89-92, and 124-125 above

157. The Trial Chamber specifically found that Kanu, who was in a superior-subordinate relationship with the AFRC troops who committed the crimes, had actual or imputed knowledge of the Bombali District Crimes and Freetown and Western Area Crimes and failed to prevent or punish the perpetrators.[334] For the reasons given in paragraphs 90-91 above, in addition to giving rise to Article 6(3) liability, this clearly had an encouraging effect on the AFRC troops to commit the crimes, and also renders Kanu liable, under Article 6(1), for aiding and abetting all of those crimes.

158. More generally, Kanu, by performing the functions of Chief of Staff and a senior commander of the AFRC troops throughout the Bombali-Freetown Campaign, necessarily made a substantial contribution to the execution of that campaign, of which the commission of the crimes was an integral part. He therefore necessarily made a substantial contribution to the commission of those crimes.

159. The Prosecution further submits that the conduct of Kanu referred to in paragraphs 131-132, 135-138, 140-144, and 147-149 above provided encouragement and moral support to the troops who committed these crimes and had a substantial effect on the perpetration of all of the crimes by those troops.

160. The Prosecution submits that based on all of the findings of the Trial Chamber, or alternatively, the findings of the Trial Chamber and the evidence accepted by the Trial Chamber, the only conclusion open to any reasonable trier of fact is that Kanu is therefore individually responsible for "aiding and abetting" all of the Bombali District and Freetown and Western Area Crimes.

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[334] **Trial Chamber's Judgement**, paras 2044, 2080.

G. The Errors in the Trial Chamber's evaluation of Article 6(3) liability for the Bombali District Crimes and Freetown and the Western Area Crimes

(i). Brima

161. It is possible for an Accused to be individually responsible under both Article 6(1) of the Statute and under Article 6(3) of the Statute in respect of the same crime.[335]

162. The Trial Chamber determined that in this case, where the legal requirements pertaining to both Article 6(1) and Article 6(3) of the Statute are met in relation to a particular crime, the Trial Chamber would enter a conviction on the basis of Article 6(1) only, and would consider the Accused's superior position as an aggravating factor in sentencing.[336]

163. The Prosecution takes no issue in principle with the Trial Chamber taking this approach, subject to the submissions made below in relation to the Prosecution's Ninth Ground of Appeal. However, it is submitted that if a Trial Chamber adopts this approach, the Trial Chamber should make express findings in its reasoning in the body of the Judgement as to the Article 6(3) responsibility of the Accused for every crime. This is because if an Accused is found liable for a particular crime under Article 6(1), and convicted on that basis without any finding as to the Accused's Article 6(3) responsibility in respect of that crime, the additional Article 6(3) liability cannot be taken into account in sentencing.

164. The Trial Chamber found that Brima is individually responsible under Article 6(1) for the three enslavement crimes committed in Bombali District and Freetown and the Western Area.[337] Having made that finding, the Trial Chamber decided that it was not necessary to examine his responsibility for the three enslavement crimes under Article 6(3).

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[335] ***Kayishema* Trial Judgement**, para. 210. See Further Submissions in relation to the Prosecution's Ninth Ground of Appeal.

[336] **Trial Chamber's Judgement**, paras 800, 2110-2111.

[337] **Trial Chamber's Judgement**, paras 1820-1837, especially paras 1835-1837.

165. The Prosecution submits that the Trial Chamber's decision not to make any finding of Brima's responsibility for the three enslavement crimes under Article 6(3) was an error, for the reasons given in paragraphs 162-163 above. The Prosecution requests the Appeals Chamber to reverse this decision.

166. Having reversed the Trial Chamber's decision not to make any findings of Brima's Article 6(3) responsibility for the three enslavement crimes, the Prosecution submits that it is unnecessary for the Appeals Chamber to remit the case to the Trial Chamber for any further findings of fact on this issue. The Prosecution submits that on the basis of the findings contained in the Trial Chamber's Judgement, or alternatively, on the basis of those findings and the evidence that the Trial Chamber accepted in making those findings, the only conclusion open to any reasonable trier of fact is that Brima is responsible under Article 6(3) for all of the enslavement crimes committed in Bombali District and in Freetown and the Western Area.

167. The Trial Chamber found that the three enslavement crimes were committed by AFRC troops in Bombali District and in Freetown and the Western Area.[338] The Trial Chamber also found that there was a superior-subordinate relationship between Brima and the AFRC troops who committed these crimes in both Bombali District[339] and in Freetown and the Western Area.[340] Therefore, the only further facts that need to be found to establish Brima's Article 6(3) responsibility for these crimes are (1) Brima's actual or imputed knowledge of these crimes, and (2) Brima's failure to prevent or punish the troops who committed these crimes.

168. The Prosecution submits that on the basis of the findings contained in the Trial Chamber's Judgement, or alternatively, on the basis of those findings and the evidence that the Trial Chamber accepted in making those findings, the only conclusion open to any reasonable trier of fact is that Brima had actual knowledge of the three enslavement crimes, and that he failed to prevent or punish the troops

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[338] **Trial Chamber's Judgement**, paras 1134-1135 (sexual slavery in Bombali District), paras 1150-1170 (sexual slavery in Freetown and the Western Area), paras 1244-1278, especially paras 1276-1278 (recruitment and use of child soldiers in both Freetown and the Western Area), paras 1351-1374 (abductions and forced labour in Bombali District), paras 1375-1389 (abductions and forced labour in Freetown and the Western Area).

[339] **Trial Chamber's Judgement**, paras 1273-1278.

[340] **Trial Chamber's Judgement**, paras 1789-1805.

for committing these crimes. This necessarily follows, in particular, from the Trial Chamber's finding that Brima "planned, organised and implemented the system to abduct and enslave civilians",[341] that he "played a substantial role in the system of exploitation and cruelty",[342] that he had ordered the abduction of civilians, ordered the distribution of children among captured commanders, had addressed children after the completion of their military training and ordered that they be distributed to the various companies,[343] and that he "was in a position to shut down this system of exploitation entirely, to deter the excesses committed by his troops, and to alleviate the plight of the victims ... [but] failed to do so".[344] This also necessarily follows from the Trial Chamber's findings that the three enslavement crimes were on a "large scale" and of a "continuous and organised nature",[345] that they were "systemic",[346] and that they had an "established *modus operandi*" that was "so deeply entrenched that it was difficult to break".[347]

169. The Prosecution therefore requests the Appeals Chamber to revise the Trial Chamber's Judgement by adding a finding that Brima is individually responsible under Article 6(3) of the Statute for the three enslavement crimes in Bombali District and Freetown and the Western Area.

(ii). Kamara

(a) The Freetown and Western Area Crimes

170. In paragraphs 1942-1950 of the Trial Chamber's Judgement, the Trial Chamber deals with Kamara's individual responsibility for the crimes committed in Freetown and the Western Area (apart from the three enslavement crimes, the

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[341] **Trial Chamber's Judgement**, para. 1834.
[342] **Trial Chamber's Judgement**, para. 1828.
[343] **Trial Chamber's Judgement**, paras 1830-1831.
[344] **Trial Chamber's Judgement**, para. 1832.
[345] **Trial Chamber's Judgement**, para. 1826.
[346] **Trial Chamber's Judgement**, paras 1823, 1824.
[347] **Trial Chamber's Judgement**, para. 1825.

Trial Chamber's findings on which are dealt with in paragraphs 173-177 below). The Trial Chamber ultimately found at paragraph 1950 that "the Accused Kamara is liable as a superior under Article 6(3) for crimes committed in Freetown".

171. The Prosecution submits that it is not clear why the Trial Chamber ultimately found Kamara responsible under Article 6(3) for crimes in "Freetown", rather than the crimes in "Freetown and the Western Area". The Prosecution submits that it is clear from the findings in the section of the Trial Chamber's Judgement dealing with the Article 6(3) responsibility of Kamara in Freetown and the Western Area[348] that Kamara was also responsible under Article 6(3) for the crimes in the Western Area (but outside Freetown). The Trial Chamber found that Kamara remained the number two in command of the AFRC troops after the loss of State House and during the Freetown retreat, and that he took part in a second attack on Freetown.[349] The Trial Chamber also found that even after the loss of State House, Kamara continued to be in a position to give orders to AFRC troops.[350] On the findings of the Trial Chamber, and in light of the submissions made in paragraphs 95-127 above, the Prosecution submits that Kamara must also be individually responsible under Article 6(3) for the crimes that were committed in the Western Area but outside of Freetown.

172. The Prosecution requests the Appeals Chamber to revise the finding in paragraph 1950 of the Trial Chamber's Judgement, and to substitute a modified finding that Kamara was responsible under Article 6(3) for all of the Freetown and Western Area Crimes.

(b) The enslavement crimes

173. The Trial Chamber found that Kamara was individually responsible under Article 6(3) of the Statute for the three enslavement crimes committed in Kono District,[351] and that he was *not* individually criminally responsible under Article 6(3) of the Statute for the three enslavement crimes committed in Port Loko

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[348] **Trial Chamber's Judgement**, paras 1942-1950.
[349] **Trial Chamber's Judgement**, paras 472-474.
[350] **Trial Chamber's Judgement**, para. 1947.
[351] **Trial Chamber's Judgement**, paras 1973-1975.

District.[352] However, in the section of the Judgement dealing with the Article 6(3) responsibility of Kamara for the enslavement crimes, the Trial Chamber [353] gave *no consideration at all* to the Article 6(3) responsibility of Kamara for the enslavement crimes in Bombali District and Freetown and the Western Area. The Prosecution submits that the Trial Chamber's failure to give any consideration at all to this question was a clear error.

174. As in the case of Brima, the Prosecution submits that it is unnecessary for the Appeals Chamber to remit the case for any further findings of fact on this issue. The Prosecution submits that on the basis of the findings contained in the Trial Chamber's Judgement, or alternatively, on the basis of those findings and the evidence that the Trial Chamber accepted in making those findings, the only conclusion open to any reasonable trier of fact is that Kamara was individually responsible for the three enslavement crimes in Bombali District and in Freetown and the Western Area.

175. The Trial Chamber found that the three enslavement crimes were committed by AFRC troops in Bombali District and in Freetown and the Western Area.[354] The Trial Chamber also found that there was a superior-subordinate relationship between Kamara and the AFRC troops who committed these crimes in both Bombali District[355] and in Freetown.[356] For the reasons given in paragraphs 170-172 above, the Prosecution submits that there was a superior-subordinate relationship between Kamara and the AFRC troops who committed these crimes in the Western Area, but outside Freetown. Therefore, the only further facts that need to be found to establish Kamara's Article 6(3) responsibility for these crimes are (1) Kamara's actual or imputed knowledge of these crimes, and (2) Kamara's failure to prevent or punish the troops who committed these crimes.

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[352] **Trial Chamber's Judgement**, para. 1977.
[353] **Trial Chamber's Judgement**, paras 1970-1977.
[354] **Trial Chamber's Judgement**, paras 1134-1135 (sexual slavery in Bombali District), paras 1150-1170 (sexual slavery in Freetown and the Western Area), paras 1244-1278, especially paras 1276-1278 (recruitment and use of child soldiers in both Freetown and the Western Area), paras 1351-1374 (abductions and forced labour in Bombali District), paras 1375-1389 (abductions and forced labour in Freetown and the Western Area).
[355] **Trial Chamber's Judgement**, paras 1921-1928.
[356] **Trial Chamber's Judgement**, paras 1944-1950.

176. The Prosecution submits that on the basis of the findings contained in the Trial Chamber's Judgement, or alternatively, on the basis of those findings and the evidence that the Trial Chamber accepted in making those findings, the only conclusion open to any reasonable trier of fact is that Kamara had actual knowledge of the three enslavement crimes, and that he failed to prevent or punish the troops for committing these crimes. This necessarily follows from the Trial Chamber's findings that the three enslavement crimes were on a "large scale" and of a "continuous and organised nature",[357] that they were "systemic",[358] and that they had an "established *modus operandi*" that was "so deeply entrenched that it was difficult to break".[359]

177. The Prosecution therefore requests the Appeals Chamber to revise the Trial Chamber's Judgement by adding a finding that Kamara is individually responsible under Article 6(3) of the Statute for the three enslavement crimes in Bombali District and Freetown and the Western Area.

(iii). Kanu

(a) The Freetown and Western Area Crimes

178. In paragraphs 2065-2080 of the Trial Chamber's Judgement, the Trial Chamber deals with Kanu's individual responsibility for the crimes committed in Freetown and the Western Area (apart from the three enslavement crimes, the Trial Chamber's findings on which are dealt with in paragraphs 183-188 below). The Trial Chamber ultimately found at paragraph 2080 of the Trial Chamber's Judgement that "Kanu is liable as a superior under Article 6(3) for crimes committed in the Western Area".

179. The Prosecution submits that it is not clear why the Trial Chamber ultimately found Kanu responsible under Article 6(3) for crimes in "the Western Area", rather than the crimes in "Freetown and the Western Area". The Prosecution

[357] **Trial Chamber's Judgement**, para. 1826.
[358] **Trial Chamber's Judgement**, paras 1823, 1824.
[359] **Trial Chamber's Judgement**, para. 1825.

submits that this may in fact have been a typographical error. The Prosecution notes that as Freetown is in the Western Area of Sierra Leone, technically the wording of paragraph 2080 of the Trial Chamber's Judgement would cover the crimes committed in Freetown. However, the use of the expression "Western Area" as opposed to the expression "Freetown and the Western Area" which is used consistently elsewhere in the Judgement, raises an unfortunate ambiguity in this respect.

180. The Prosecution submits that it is clear from the findings in the section of the Trial Chamber's Judgement dealing with the Article 6(3) responsibility of Kanu in Freetown and the Western Area[360] that Kanu was responsible under Article 6(3) for the crimes in Freetown, as well as the crimes in the Western Area (but outside Freetown). The Trial Chamber found that Kanu was the third in command in Freetown,[361] that he "possessed the material ability to effectively control troops in Freetown until the loss of State House",[362] that the fact that he ordered the commission of crimes in Freetown is evidence of his ability to control AFRC troops subordinate to him,[363] and that "a superior-subordinate relationship existed between the Accused Kanu and the AFRC troops in Freetown".[364] The Trial Chamber further found that Kanu had reason to know of the commission of crimes committed before the loss of State House,[365] and that there is "no evidence that the Accused Kanu took any measures to prevent the troops under his control in Freetown from committing crimes against *[sic]* or punish the perpetrators of such crimes".[366] The Trial Chamber further found that Kanu retained his position as Chief of Staff and commander in charge of abducted civilians throughout the attack on Freetown and the retreat to Newton (in the Western Area).[367]

181. If the reference in paragraph 2080 to Kanu being liable under Article 6(3) for crimes in "the Western Area" is intended by the Trial Chamber to include

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[360] **Trial Chamber's Judgement**, paras 2067-2079.
[361] **Trial Chamber's Judgement**, para. 2070.
[362] **Trial Chamber's Judgement**, para. 2072.
[363] **Trial Chamber's Judgement**, para. 2075.
[364] **Trial Chamber's Judgement**, para. 2076.
[365] **Trial Chamber's Judgement**, para. 2077.
[366] **Trial Chamber's Judgement**, para. 2079.
[367] **Trial Chamber's Judgement**, para. 535.

Freetown, the Prosecution requests the Appeals Chamber to affirm that finding, and to find expressly that Kanu was also responsible under Article 6(3) for the crimes committed in Freetown.

182. If the Appeals Chamber finds that the reference in paragraph 2080 to Kanu being liable under Article 6(3) for crimes in "the Western Area" does not include Freetown, the Prosecution requests the Appeals Chamber to revise that finding, and to substitute a modified finding that Kanu was responsible under Article 6(3) for all of the Freetown and Western Area Crimes.

(b) The enslavement crimes

183. The Trial Chamber found that Kanu is individually responsible under Article 6(1) for the three enslavement crimes committed in Bombali District and Freetown and the Western Area.[368] However, the Trial Chamber gave no consideration at all to his responsibility for the three enslavement crimes under Article 6(3).

184. The Prosecution submits that the Trial Chamber's failure to make any finding of Kanu's responsibility for the three enslavement crimes under Article 6(3) was an error, for the reasons given in paragraphs 162-163 above. The Prosecution requests the Trial Chamber to reverse this decision.

185. As in the cases of Brima and Kamara, the Prosecution submits that it is unnecessary for the Appeals Chamber to remit the case for any further findings of fact on this issue. The Prosecution submits that on the basis of the findings contained in the Trial Chamber's Judgement, or alternatively, on the basis of those findings and the evidence that the Trial Chamber accepted in making those findings, the only conclusion open to any reasonable trier of fact is that Kanu was individually responsible for the three enslavement crimes in Bombali District and Freetown.

186. The Trial Chamber found that the three enslavement crimes were committed by AFRC troops in Bombali District and in Freetown and the Western Area.[369] The

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[368] **Trial Chamber's Judgement**, paras 2089-2098, especially paras 2096-2098.

[369] **Trial Chamber's Judgement**, paras 1134-1135 (sexual slavery in Bombali District), paras 1150-1170 (sexual slavery in Freetown and the Western Area), paras 1244-1278, especially paras 1276-1278

Trial Chamber also found that there was a superior-subordinate relationship between Kanu and the AFRC troops who committed these crimes in both Bombali District[370] and in Freetown and the Western Area.[371] Therefore, the only further facts that need to be found to establish Kanu's Article 6(3) responsibility for these crimes are (1) Kanu's actual or imputed knowledge of these crimes, and (2) Kanu's failure to prevent or punish the troops who committed these crimes.

187. The Prosecution submits that on the basis of the findings contained in the Trial Chamber's Judgement, or alternatively, on the basis of those findings and the evidence that the Trial Chamber accepted in making those findings, the only conclusion open to any reasonable trier of fact is that Kanu had actual knowledge of the three enslavement crimes, and that he failed to prevent or punish the troops for committing these crimes. This necessarily follows, in particular, from the Trial Chamber's finding that Kanu "planned, organised and implemented the system to abduct and enslave civilians",[372] that he "designed and implemented a system to control abducted girls and women",[373] and that he "was the Commander of the AFRC fighting force in charge of abducted civilians including women and children".[374] This is also evident from the evidence of TF1-334 and George Johnson, both of whom were found by the Trial Chamber to be credible witnesses,[375] that Kanu was in charge of military training at Camp Rosos, including the training of abducted civilian adults and children.[376] This also necessarily follows from The Trial Chamber's findings that the three enslavement crimes were on a "large scale" and of a "continuous and organised nature",[377] that

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(recruitment and use of child soldiers in both Freetown and the Western Area), paras 1351-1374 (abductions and forced labour in Bombali District), paras 1375-1389 (abductions and forced labour in Freetown and the Western Area).

370 **Trial Chamber's Judgement**, paras 2032-2044.

371 **Trial Chamber's Judgement**, paras 2065-2080, and see paragraphs 178-182 above.

372 **Trial Chamber's Judgement**, para. 2095.

373 **Trial Chamber's Judgement**, para. 2092.

374 **Trial Chamber's Judgement**, paras 526, 2067.

375 The Trial Chamber finds TF1-334's testimony reliable at para. 359 and George Johnson's testimony reliable at para. 370 of the Trial Chamber's Judgement.

376 **Trial Chamber's Judgement**, para. 525.

377 **Trial Chamber's Judgement**, para. 1826.

they were "systemic",[378] and that they had an "established *modus operandi*" that was "so deeply entrenched that it was difficult to break".[379]

188. The Prosecution therefore requests the Appeals Chamber to revise the Trial Chamber's Judgement by adding a finding that Kanu is individually responsible under Article 6(3) of the Statute for the three enslavement crimes in Bombali District and Freetown and the Western Area.

H. Crimes encompassed in other Grounds of Appeal

189. It follows from all of the above submissions that all three Accused in this case are individually responsible, under both Article 6(1) and Article 6(3) of the Statute, for all of the Bombali District Crimes and Freetown and Western Area Crimes, as defined in paragraph 9 above.

190. In certain of its other Grounds of Appeal in this appeal, the Prosecution submits that the Trial Chamber erred in not finding that certain other crimes were committed by AFRC troops in Bombali District and in Freetown and the Western Area. It follows from all of the above submissions that, to the extent that these other grounds of appeal are upheld by the Appeals Chamber, all three Accused in this case are individually responsible, under both Article 6(1) and Article 6(3) of the Statute, for all such crimes encompassed within those other grounds of appeal that were committed in Bombali District or in Freetown and Western Area.

I. Conclusion

191. For the reasons given above, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's findings that Brima, Kamara and Kanu are not individually responsible, under Article 6(1) and/or Article 6(3) of the Statute, for

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[378] **Trial Chamber's Judgement**, paras 1823, 1824.
[379] **Trial Chamber's Judgement**, para. 1825.

certain of the crimes in Bombali District and in Freetown and the Western Area, and to revise the Trial Chamber's Judgement by adding further findings:

(i) that Brima, Kamara and Kanu are each individually responsible under Article 6(1) of the Statute for planning, instigating, ordering, and/or otherwise aiding and abetting in the planning, preparation or execution of ***all*** of the crimes that the Trial Chamber found to have been committed in Bombali District and Freetown and the Western Area; and

(ii) that Brima, Kamara and Kanu are each individually responsible under Article 6(3) for all of those crimes.

192. The Prosecution also requests the Appeals Chamber to revise the Trial Chamber's Judgement by making a further finding that in respect of all of the crimes committed in Bombali District and Freetown and the Western Area that are encompassed within the Prosecution's other Grounds of Appeal, to the extent that the other Grounds of Appeal are upheld:

(i) Brima, Kamara and Kanu are each individually responsible under Article 6(1) of the Statute for committing, and/or planning, instigating, ordering, and/or otherwise aiding and abetting in the planning, preparation or execution of those crimes; and

(ii) Brima, Kamara and Kanu are each individually responsible under Article 6(3) of the Statute for those crimes.

193. The Prosecution also requests the Appeals Chamber to make any resulting amendments to the Disposition of the Trial Chamber's Judgement, and to increase the sentences imposed on Brima, Kamara and Kanu to reflect the additional criminal liability.

III. Prosecution's Second Ground of Appeal: The Trial Chamber's omission to make findings on crimes in certain locations

A. Introduction

194. In the Trial Chamber's Judgement, the Trial Chamber did not make findings as to whether certain crimes had been committed in certain locations, even though evidence had been presented at trial that such crimes had been committed in those locations.

195. The alleged crimes on which the Trial Chamber did not make findings, and to which this Ground of Appeal relates, are set out in Appendix B to this Appeal Brief.

196. In relation to some of these crimes,[380] the Trial Chamber expressly indicated that the reason why it would not make findings was that the location of the crime had not been *specifically* pleaded in the Indictment in the paragraphs relating to the relevant Count(s). In other instances, the Trial Chamber did not expressly give any reason for failing to consider the evidence of the crimes. However, as all of the crimes set out in Appendix B were in locations that had not been *specifically* pleaded in the Indictment in the paragraphs relating to the relevant Count(s), it can be inferred that the Trial Chamber adopted the same reasoning in relation to all of these crimes. The Trial Chamber said in its Judgement that it would "not make any finding on crimes perpetrated in locations not *specifically* pleaded in the Indictment".[381]

197. The Prosecution submits that the Trial Chamber thereby erred. The Prosecution submits that each of the crimes referred to in Appendix B was properly pleaded in the Indictment (see Section B below). Alternatively, the Prosecution submits that to the extent that any of these crimes was not adequately pleaded in the

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[380] Except where from the context another meaning is intended, in this Ground of Appeal the expression "crimes" is used to mean alleged crimes.

[381] **Trial Chamber's Judgement**, para. 38 (emphasis added).

Indictment, the defect in the Indictment was subsequently cured by the provision of timely, clear and consistent information by the Prosecution (see Section C below). The remedy sought by the Prosecution is dealt with in Section D below.

B. First error of the Trial Chamber: The finding that these crimes were not pleaded in the indictment

198. The Trial Chamber found that "the Prosecution has led a considerable amount of evidence with respect to killings, sexual violence, physical violence, enslavement and pillage which occurred in locations not charged in the indictment".[382] The Trial Chamber went on to hold that it would "not make any finding on crimes perpetrated in locations not specifically pleaded in the Indictment" and that such evidence would only be considered "for proof of the chapeau requirements of Articles 2, 3 and 4 where appropriate, that is the widespread or systematic nature of the crimes and an armed conflict".[383]

199. The Prosecution submits that the Trial Chamber erred in so finding. Even where a particular location was not *specifically* listed in relation to a particular Count in the Indictment, that location was nonetheless *pleaded* in the Indictment.

200. In the paragraphs of the Indictment alleging the specific crimes charged in the Indictment, each paragraph typically alleged that crimes of a particular nature were committed in a particular *District*.[384] Within each of these paragraphs, it was typically alleged that the crimes in question were committed in "various" locations within the District, "*including*" certain specified locations.[385] The use of

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[382] **Trial Chamber's Judgement**, para. 37.

[383] **Trial Chamber's Judgement**, para. 38.

[384] Thus, for instance, in the section of the Indictment dealing with unlawful killings (paragraphs 42-50), paragraph 43 dealt with unlawful killings in Bo District, paragraph 44 dealt with unlawful killings in Kenema District, paragraph 45 dealt with unlawful killings in Kono District, and so forth. There were some exceptions to this: see, for instance the section dealing with acts of terror and collective punishments (paragraph 41), and the section dealing with child soldiers (paragraph 65).

[385] **Indictment**, paras 44-50, 52, 54, 59-61, 69, 72, 73, 76, 77 and 79; see also paras 53 and 78 which use the expression "such as" instead of "including" with, obviously, the same meaning. There were some exceptions: see paras 55, 57, 62, 64, 70 and 71 of the Indictment, which alleged that the crimes were committed "in various locations in the District", but which did not specify any particular locations. In some instances, the locations were exhaustively mentioned: see paras 43, 67 and 75.

the word "including" made clear that the Indictment alleged that the relevant crimes were also committed in locations *in the relevant District* other than those expressly mentioned. All of the crimes referred to in Appendix B were therefore clearly encompassed within the plain meaning of the wording of the Indictment.

201. At the pre-trial stage in this case, Kamara filed a preliminary motion arguing that the Indictment was defective for lack of specificity in pleading the locations in which crimes were alleged to have been committed.[386]

202. Trial Chamber I, which decided Kamara's preliminary motion, had previously decided in the *Sesay* case that a similar form of pleading in the RUF Indictment was not defective. It held that:

> ... the Defence takes objection to the general formulation of the counts in certain particular respects. The main submission is that general formulations like "*such as*" or "*various locations*", or "*various areas...including*" do not specify or limit the reading of the counts but expand the Indictment without concretely identifying precise allegations against the Accused. The pith of the Defence submission is that these phrases are imprecise and non-restrictive. The Chamber's response to this submission is that it is inaccurate to suggest that the phrases "*various locations*" and "*various areas including*" in the relevant counts are completely devoid of details as to what is being alleged. Whether they are permissible or not depends primarily upon the context. For example, paragraphs 41, 44, 45 and 51 allege that the acts took place in various locations within those districts, a much narrower geographical unit than, for example, "*within the Southern or Eastern Province*" or "*within Sierra Leone.*" ***This is clearly permissible*** in situations where the alleged criminality was of what seems to be cataclysmic dimensions. By parity of reasoning, the phrase "*such as*" and "*including but not limited to*" would, in similar situations, be acceptable ***if the reference is, likewise, to locations but not otherwise***. It is, therefore, the Chamber's thinking that taking the Indictment in its entirety, it is difficult to fathom how the Accused is unfairly prejudiced by the use of the said phrases in the context herein ... The Defence protestation, is therefore, untenable."[387]

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[386] ***Kamara*** **Preliminary Motion**, p. 5.

[387] ***Sesay*** **Preliminary Motion Decision**, para. 23 (emphasis in bold added).

203. In its decision on the Kamara Preliminary Motion, Trial Chamber I followed its earlier decision in the *Sesay* case, and dismissed Kamara's objection to the way that the locations had been pleaded for the same reasons.[388]

204. At the pre-trial stage, Kanu also filed a preliminary motion alleging defects in the form of the indictment,[389] but did not argue in this motion that the way in which the locations had been pleaded was defective. Indeed, the Kanu preliminary motion appeared to accept the earlier ruling of Trial Chamber I in the *Sesay* case in this respect.[390] Consistently with its earlier ruling in *Sesay*, Trial Chamber I noted in its decision on the Kanu preliminary motion that:

> In so far as the phrase "*included but were not limited to*" is concerned, the Court's decision in *Sesay* left open the possibility that the said phrase could be impermissibly broad if it referred to "events" ***as distinct from*** *"locations"* ***and*** *"dates"*.[391]

205. Brima also filed a preliminary motion on defects in the form of the Indictment,[392] which was however rejected by Trial Chamber II on the ground that it had been filed out of time.[393] This preliminary motion in any event did not allege that the Indictment failed to plead locations with sufficient specificity.

206. Thus, the Prosecution was entitled to proceed at trial on the basis that the Indictment was not defective in pleading the locations of crimes in the way that it did, and that any Defence issue in this respect had been settled by pre-trial decisions of the Trial Chamber.

207. At the Rule 98 stage, the Defence did not raise any issue that the Indictment was defective in the way that it pleaded the locations of crimes.[394] In its Rule 98 Decision, the Trial Chamber said at paragraph 19:

> We note that when citing locations where the various criminal acts are alleged to have taken place the language used in the particulars of the Indictment is not exhaustive and often uses the preposition "including" when referring to those locations. ***Given the***

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[388] ***Kamara*** **Preliminary Motion Decision**, paras 40-43.
[389] ***Kanu*** **Preliminary Motion**.
[390] *Ibid.*, para. 13.
[391] ***Kanu*** **Preliminary Motion Decision**, para. 17 (emphasis in bold added).
[392] ***Brima*** **Preliminary Motion.**
[393] ***Brima*** **Preliminary Motion Decision**; See further paragraphs 359 below.
[394] See paragraph 232 below.

> ***"widespread" nature of the alleged crimes, it would in our view, be impracticable for the Indictment to name exhaustively every single location throughout the territory of Sierra Leone where these criminal acts allegedly took place. We do not understand the Indictment to be limited to only those villages or locations named in the particulars.*** Clearly the Prosecution may (as indeed it has done in some instances) adduce evidence of alleged crimes in other villages not specified in the Indictment, in order to demonstrate the "widespread or systematic" nature of the attack on the civilian population.

208. In paragraph 20 of the Rule 98 Decision, the Trial Chamber went on to say:

> We note that the locations specified in Annex A to the Prosecution Response are all within Districts named in the Counts in question. We also note that in all cases, the Prosecution has led evidence in relation to all the other locations specified in the Indictment. In some instances evidence was led in relation to villages or locations that were not specified in the Indictment but which are located within the Districts pleaded. ***Ultimately, the Trial Chamber will take all this evidence into account in determining whether or not the Prosecution evidence in relation to <u>each Count</u> is capable of supporting a conviction against the accused on that count.***[395]

209. Paragraph 19 of the Rule 98 Decision was referred to in paragraph 37 of the Trial Chamber's Judgement, in support of the proposition that "while such evidence may support proof of the existence of an armed conflict or a widespread or systematic attack on a civilian population, no finding of guilt for those crimes may be made in respect of such locations not mentioned in the indictment".[396] However, contrary to what this paragraph of the Trial Chamber's Judgement appears to suggest, the final sentence of paragraph 19 of the Rule 98 Decision quoted above cannot be taken as having given notice to the parties that the Trial Chamber had taken a decision not to consider evidence relating to locations not *specifically* pleaded in relation to a particular Count in the Indictment (but included in the general wording of the Indictment) otherwise than for the purpose

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[395] **Rule 98 Decision**, para. 20 (emphasis added).

[396] **Trial Chamber's Judgement**, para. 37, footnote 60 and accompanying text. See also Trial Chamber's Judgement, para. 38, footnote 63 and accompanying text.

of establishing whether there was a widespread and systematic attack against the civilian population.

210. This last sentence of paragraph 19 of the Rule 98 Decision appeared in a section of the Rule 98 Decision dealing with the issue of whether the Trial Chamber would, at the Rule 98 stage, only consider whether a Count *as a whole* should be dismissed under Rule 98, or whether the Trial Chamber would consider whether the Rule 98 standard was met in relation to *each individual location* in which alleged crimes under that Count were committed. This part of the Rule 98 Decision gave no indication that the Trial Chamber was giving consideration to any issue as to whether or not the Indictment was defective for failing to particularize locations adequately. The emphasized portions of the above quotes from paragraphs 19 and 20 of the Rule 98 Decision in fact *expressly reflect* the conclusion of Trial Chamber I in the *Sesay* Decision and in the decisions on the preliminary motions filed in the present case. The last sentence of paragraph 19 of the Rule 98 Decision indicated that the Trial Chamber would consider evidence of crimes in locations not specifically mentioned in relation to a particular Count in the Indictment when determining the "widespread or systematic" nature of the attack on the civilian population. However, the Trial Chamber did not expressly say that it would ***only*** consider such evidence for that purpose.

211. Even if the Trial Chamber had at the Rule 98 stage taken a decision that it would not consider evidence relating to locations not specifically pleaded in the Indictment (and the Prosecution was not obliged to assume that it had), the Prosecution submits that the Trial Chamber erred in law, or committed a procedural error, for the reasons given in paragraphs 366-369 and 371 below, namely that the Trial Chamber thereby reversed previous interlocutory decisions in the case, or decided *proprio motu* that the Indictment was defective, without first giving notice to the parties, and without first giving the parties the opportunity to argue the point. For the reasons given in paragraph 545-546 below, the Prosecution submits that the Trial Chamber's decision, in paragraph 39 of the Trial Chamber's Judgement, to "not make any finding on crimes perpetrated in locations not *specifically* pleaded in the Indictment" should be

reversed, unless any of the Accused in this case establishes not only that the pleading of locations in the Indictment was defective, but also discharges the burden of establishing that his ability to prepare his defence was actually materially impaired by that defect.

212. The Prosecution submits that the Indictment was in fact not defective in the way that it pleaded the locations of the crimes, for the reasons given by Trial Chamber I in the *Sesay* Decision and in its decisions on the Defence preliminary motions in this case, referred to above.

213. The Trial Chamber, in paragraph 37 of the Trial Chamber's Judgement, referred to a number of authorities in support of its finding that no finding of guilt may be made for crimes in respect of locations not specifically mentioned in the indictment.

214. The first was a decision of this Appeals Chamber in the *Norman* case.[397] The paragraph in that decision cited by the Trial Chamber did not in fact expressly address at all the question of whether an Accused could be convicted on a Count in respect of crimes committed in a location not specifically mentioned in an indictment but encompassed within the generality of its wording. Rather, that decision in the *Norman* case was concerned with the question whether new charges can be added by an amendment to the indictment after trial has commenced, and made general observations to the effect that the Prosecution must "be selective in deciding which charges to include in a trial Indictment".[398] That decision, it is submitted, was not on point. Indeed as the Appeals Chamber recognised in that case, under the Rules of the Special Court, an indictment is required to contain even less information than an indictment before the ICTY or

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[397] ***CDF* Indictment Appeal Decision**, para. 82.

[398] *Ibid.* This paragraph of the CDF decision states: "The overriding duty of a Prosecutor – what determines, in fact, his or her professional ability – is to shape a trial by selecting just so many charges that can most readily be proved and which carry a penalty appropriate to the overall criminality of the Accused. In national systems, this is reflected in Prosecution practices of selecting specimen charges or proceeding only on certain counts of a long Indictment. In international courts, where defendants may be accused of command responsibility for hundreds if not thousands of war crimes at the end of a war that has lasted for years, the need to be selective in deciding which charges to include in a trial Indictment is a test of Prosecution professionalism. In this respect, the Trial Chamber must oversee the Indictment, in the interests of producing a trial which is manageable".

ICTR. [399] At the Special Court, some information that would be pleaded in an indictment at the ICTY or the ICTR is provided instead by a Case Summary (which does not form part of the indictment) or by other subsequent notice.[400]

215. The second authority referred to in paragraph 37 of the Trial Chamber's Judgement was the Rule 98*bis* decision [= Special Court Rules, Rule 98] of the ICTY Trial Chamber in the *Brđanin* case.[401] The quoted paragraph from that decision dealt with a charge of persecution in the indictment, in which it was alleged that the accused was responsible for "the denial of fundamental rights to Bosnian Muslims and Bosnian Croats, including the right to employment, freedom of movement, right to proper judicial process, or right to proper medical care".[402] The Trial Chamber in the *Brđanin* case[403] decided that it would not consider acts of persecution consisting of the denial of rights other than those that had been specifically mentioned. This authority was also *not* dealing with the issue of the specificity with which locations of crime scenes must be pleaded in an indictment.

216. The third authority referred to in paragraph 37 of the Trial Chamber's Judgement was paragraph 397 of the *Brđanin* Trial Judgement.[404] In that paragraph of the *Brđanin* Trial Judgement, the ICTY Trial Chamber said that:

> ... the Trial Chamber finds that evidence was adduced with respect to a number of killings which were not charged in the Indictment. While such evidence may support the proof of the existence of an armed conflict or a widespread or systematic attack on a civilian population, no finding of guilt for the crimes of wilful murder or extermination may be made in respect of such uncharged incidents.[405]

217. However, the indictment in the *Brđanin* case was very different from the Indictment in the present case. In the *Brđanin* case, the killings were alleged in

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[399] *Ibid*, paras 49-53
[400] *Ibid*, paras 51-52
[401] **Trial Chamber's Judgement**, para. 37, footnote 62, referring to ***Brđanin* Rule 98*bis* Decision,** para. 88.
[402] See ***Brđanin* Rule 98*bis* Decision**, para 84.
[403] As well as the Trial Chamber in the ***Stakić* Trial Judgement**, referred to in ***Brđanin* Rule 98*bis* Decision** and in the footnote 62 of the Trial Chamber's Judgement.
[404] **Trial Chamber's Judgement**, para. 37, footnotes 60, 62 and 63, referring to ***Brđanin* Trial Judgement**, para. 397.
[405] ***Brđanin* Trial Judgement**, para. 397, footnote omitted.

paragraphs 38 and 41 of the *Brđanin* indictment.[406] Each of those paragraphs alleged, in a single paragraph, killings in a variety of different Municipalities [= Districts] in Bosnia and Herzegovina over a period of some 6 months. That is very different from the Indictment in the present case, in which each paragraph of the indictment deals with a single District of Sierra Leone *only*, and in which the timeframe for each paragraph is often much shorter. In any event, the *Brđanin* Trial Judgement was only a judgement at the Trial Chamber level, and must be considered in the context of other ICTY and ICTR case law at the Appeals and Trial Chamber levels.

218. The fourth and fifth authorities relied upon by the Trial Chamber were the decisions of Trial Chamber I on the Kamara and Kanu preliminary motions alleging defects in the form of the Indictment. For the reasons given in paragraphs 201-205 above, these decisions of Trial Chamber I in fact decided *the very opposite* of what the Trial Chamber decided in paragraph 37 of the Trial Chamber's Judgement.

219. The issue of the specificity with which locations must be pleaded in an indictment has been determined in decisions of the ICTY and ICTR at the Appeals Chamber level.[407]

220. The general principle is that the location of the crimes alleged to have been committed should be specified in the indictment, but that the degree of specificity required will depend on the nature of the Prosecution's case.[408] The case law acknowledges that in some cases, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes.[409] Where it is the Prosecution case that the Accused personally committed an act in a particular

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[406] ***Brđanin* Sixth Amended Indictment**, paras 38-41.

[407] As noted in paragraph 214 above, the Rules of the ICTY and the ICTR require a greater degree of specificity than is required by the Rules of the Special Court.

[408] ***Bagosora Appeal Decision*** para. 27; ***Kupreškić* Appeal Judgement**, para. 89; ***Krnojelac* Appeal Judgement**, para. 132; ***Blaškić* Appeal Judgement**, paras 210, 212-213, 216-218; ***Kvočka* Appeal Judgement**, para. 28; ***Naletilić and Martinović* Appeal Judgement**, para. 24; ***Cyangugu* Appeal Judgement**, paras 23-26.

[409] ***Kupreškić* Appeal Judgement**, para. 89; ***Krnojelac* Appeal Judgement**, para. 132, ***Brđanin and Talić* Form of Indictment Decision**, para. 22.

location, the Prosecution may be expected to plead that location in the indictment, even if that act was committed in the context of a large scale and widespread attack.[410] However, where crimes on a very large scale are alleged, and particularly where the accused was not personally present at all locations where crimes were committed, details of the precise locations of events need not be pleaded if the sheer scale of the alleged crimes makes it impracticable to do so.[411] All that is required is that the Prosecution should plead such details, if it is in a position to do so.[412]

221. The Trial Chamber's Judgement generally acknowledged these principles in this case,[413] but failed to apply them to the issue of the alleged lack of specificity in the pleading of locations. In the present case, the Trial Chamber expressly acknowledged "that the prolonged nature of these crimes, especially in the context of the Sierra Leone conflict where the perpetrators were often on the move between villages and Districts for a significant period of time, may make pleading particular locations difficult".[414]

222. Where an indictment does not plead the precise details of all locations of alleged crimes, the defence may apply for appropriate relief where evidence is presented of crimes committed in locations not specifically pleaded in the indictment. The measures that the defence could seek, and which the Trial Chamber could grant if it considered this necessary to prevent prejudice to the defence, would include an adjournment, or even the exclusion of the evidence in question.[415]

223. The Defence made no motions during the trial seeking such relief in respect of Prosecution evidence of crimes in locations not specifically pleaded in relation to

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[410] ***Ntakirutimana*** **Appeal Judgement**, paras 73-75, 95-96; ***Krnojelac*** **Appeal Judgement**, para. 132; ***Gacumbitsi*** **Appeal Judgement**, para. 50.

[411] ***Naletilić and Martinović*** **Appeal Judgement**, para. 24; ***Kvočka*** **Appeal Judgement**, para. 434; ***Bagosora*** **Appeal Decision**, para. 27; ***Ntakirutimana*** **Trial Judgement**, paras 49, 55, 57; ***Ndindabahizi*** **Appeal Judgement**, paras 16, 20; ***Niyitigeka*** **Appeal Judgement**, para. 193. See also ***Kupreškić*** **Appeal Judgement**, paras 89-92; ***Ntakirutimana*** **Appeal Judgement**, para. 25.

[412] ***Ntakirutimana*** **Appeal Judgement**, para. 25; ***Niyitigeka*** **Appeal Judgement**, para. 193. See also ***Ntakirutimana*** **Trial Judgement**, para. 58, ***Blaškić*** **Appeal Judgement**, para 209.

[413] **Trial Chamber's Judgement**, paras 28-31, especially the last sentence of para. 31: "But even in cases where personal participation is alleged, the nature or scale of the alleged crimes may render it impracticable to particularise the identity of every victim or the dates of commission".

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

[415] ***Ntakirutimana*** **Appeal Judgement**, para. 25. See also ***Naletilić and Martinović*** **Appeal Judgement**, para. 25.

a particular Count in the Indictment. In the circumstances, at this stage on appeal, the Defence has waived its right to argue now that it was thereby prejudiced. Curiously, the Trial Chamber itself expressly found that "that failure to object to the admissibility of evidence on material facts not pleaded in the Indictment constitutes a waiver and the Defence may not later raise an objection that it was not sufficiently put on notice".[416] The Trial Chamber did in fact apply this principle to the issue of the specificity of the pleading of locations in relation to the three enslavement crimes in the Indictment (charged in Counts 7, 9, 12 and 13).[417] However, the Trial Chamber failed to apply this principle to the issue of the specificity of the pleading of locations in relation to the other Counts.

224. In any event, the Defence did not thereby suffer any prejudice, for the reasons given in the paragraphs of Section C below.

225. It is therefore submitted that the Indictment was not defective for failing to specify all locations within a particular district in which alleged crimes were committed.

C. Second error of the Trial Chamber: The failure of the Trial Chamber to find that any defect had been cured

226. It is a well-established principle in international criminal tribunals that in some instances, a defect in an indictment can be deemed "cured" if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.[418] The question whether the Prosecution has cured a defect in the indictment has been said to be equivalent to the question whether the defect has caused any prejudice to the Defence or, whether the trial was "rendered unfair" by the defect.[419] As the Trial

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[416] **Trial Chamber's Judgement**, para. 49, citing ***Kayishema* Appeal Judgement**, para. 91; ***Ntakirutimana* Appeal Judgement**, para. 52.

[417] **Trial Chamber's Judgement**, paras 40-41.

[418] ***Cyangugu* Appeal Judgement**, para 28 See also ***Ntakirutimana* Appeal Judgement**, para. 27; ***Kvočka* Appeal Judgement**, para 33; ***Naletilić and Martinović* Appeal Judgement**, para 26; ***Kupreškić* Appeal Judgement**, para. 114. See also the references in footnote 58 of the Trial Chamber's Judgement.

[419] ***Ntakirutimana* Appeal Judgement**, para. 27.

Chamber put it in this case, "in assessing whether a defective indictment was cured, the issue is whether the accused was in a reasonable position to understand the charges against him or her".[420]

227. The Prosecution submits that if the Indictment was defective for failing to specify all locations in which alleged crimes were committed (and for the reasons given above, it is submitted that it was not), the Trial Chamber erred in failing to consider whether any such defects were subsequently cured.

228. The Trial Chamber found (correctly it is submitted) that in making this determination, a Trial Chamber must consider the Prosecution's pre-trial brief, its opening statement, and disclosed evidence such as witness statements or potential exhibits, and whether the Prosecution served any witness lists containing a summary of the facts and clearly identifying the charges in the indictment as to which each witness will testify.[421]

229. Appendix B to this Appeal Brief sets out in relation to each of the crimes to which this Ground of Appeal relates where that crime was dealt with in the Prosecution Pre-Trial Brief (Column 7), the Prosecution Supplemental Pre-Trial Brief (Column 8), the Prosecution Rule 98 Brief (Column 9), and the Prosecution Final Trial Brief (Column 10). The Prosecution notes that the Prosecution Supplemental Pre-Trial Brief also contained a 109 page annex of summaries of the evidence that each of the proposed Prosecution witnesses was expected to give.[422]

230. The Trial Chamber also considered (correctly it is submitted) that a failure in the Indictment to plead sufficient particulars will be deemed cured, or that the Defence will have waived its right to object, if the Defence fails to object when evidence is led by the Prosecution in relation to the crime in question,[423] and in

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[420] **Trial Chamber's Judgement**, para. 48, referring to ***Kordić* Appeal Judgement**, para. 142; ***Rutaganda* Appeal Judgement**, para. 303.

[421] **Trial Chamber's Judgement**, para. 48, referring to ***Naletilić and Martinović* Appeal Judgement**, paras 27, 45, and ***Gacumbtsi* Appeal Judgement**, paras 57-58. See also **Trial Chamber's Judgement**, para. 50(ii).

[422] **Prosecution Supplemental Pre-Trial Brief**, Annex A, Registry page nos. 1341-1450.

[423] **Trial Chamber's Judgement**, paras 50(iii), 1754, 1759, 2051.

particular, where the Defence cross-examines the witness on the specific incident in question.[424]

231. The Defence in this case raised no objections when witnesses presented evidence of crimes in locations not specifically pleaded in the Indictment. The Trial Chamber considered that "the Defence did in fact constantly complain about the vagueness of the Indictment throughout the trial, pursuant to Rule 72(B)(ii), the Pre-Trial Brief, the Motion for Judgement of Acquittal and the Final Brief".[425] However, apart from the *Kamara* Preliminary Motion, none of the Accused specifically complained about lack of specificity in the pleading of locations in the Indictment. The Defence complaints about vagueness related to other matters.[426] More importantly, the Defence never sought relief of the kind referred to in paragraph 223 above during the course of the trial.

232. Furthermore, as indicated in the table in Appendix B, in relation to all of the locations in question, the Defence either cross-examined the Prosecution witnesses giving the evidence (Column 4) or led its own evidence on the location (Column 5), and in most cases did both.

233. Furthermore, some of the locations not specifically mentioned in the Indictment in relation to one Count were specifically mentioned in relation to other Counts. For instance, Koinadugu Town was not specifically mentioned in paragraph 61 of the Indictment which alleged acts of physical violence in various locations in Koinadugu District. However, Koinadugu Town was mentioned in other paragraphs in the Indictment alleging other crimes committed in Koinadugu District, namely paragraphs 47 (unlawful killings) and 69 (alleging abductions and forced labour). The Indictment itself thus put the Defence on notice that Koinadugu Town was one of the locations where attacks against the civilian population allegedly occurred, from which it could be inferred that Koinadugu Town was one of the other locations in Koinadugu District in which physical violence was alleged to have occurred. In the table in Appendix B, Column 6

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[424] **Trial Chamber's Judgement**, para. 50(iii), 1763, 1769, 2051.
[425] **Trial Chamber's Judgement**, para. 24.
[426] See ***Brima* Final Trial Brief**, paras 126-156, ***Kamara* Final Trial Brief**, paras 37-40 and 89-103, and ***Kanu* Final Trial Brief**, paras 291 to 292. See also **Trial Chamber's Judgement**, paras 22-23.

indicates where locations not specifically pleaded in relation to one Count were nonetheless pleaded in relation to other Counts.

234. In the light of all of these factors, the Prosecution submits that any defects in the Indictment relating to the specificity of the pleaded locations were subsequently cured.

D. The requested remedy

235. It is submitted that the Trial Chamber clearly accepted the evidence referred to in paragraphs 1615-1627 of the Trial Chamber's Judgement, relating to the attacks to and from Gberi Bana in Port Loko District by AFRC troops under the command of Kamara, including the attack on Mamamah.[427] The Prosecution therefore requests the Appeals Chamber to revise the Trial Chamber's Judgement by adding a finding that Kamara's convictions on Counts 4 and 5 under Article 6(3) for unlawful killings in Port Loko District[428] also include his individual responsibility for these unlawful killings in Port Loko District.

236. The result of this revision of the Trial Chamber's Judgement is that if the Prosecution's Third Ground of Appeal is upheld, Kamara's convictions on Counts 4 and 5 (including in relation to the killings in Mamamah and other killings committed in the attacks to and from Gberi Bana) would be formally entered under Article 6(1) rather than Article 6(3), but with his Article 6(3) responsibility being taken into account in sentencing. The result would also be that Kamara's conviction on Counts 1 and 2 (acts of terror and collective punishments) would include his individual responsibility for the unlawful killings in Mamamah and other killings committed in the attacks to and from Gberi Bana. If the Prosecution's Fourth Ground of Appeal is upheld, Brima and Kanu would also be individually responsible under Article 6(1) for these unlawful killings and acts of terror and collective punishments, on the basis of joint criminal enterprise liability.

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[427] See also Section E of the Prosecution's Fourth Ground of Appeal below.
[428] See **Trial Chamber's Judgement**, para. 965, read together with para. 1969.

237. In respect of all of the other crimes set out in Appendix B to this Appeal Brief, the Prosecution requests the Appeals Chamber to remit the case to the Trial Chamber for further findings of fact on whether these crimes were committed and whether each of the Accused is individually responsible for these crimes.

IV. Prosecution's Third Ground of Appeal: Failure of the Trial Chamber to find Kamara individually responsible under Article 6(1) and Article 6(3) for all crimes committed in Port Loko District

A. Introduction

238. The Indictment charged all three Accused, under both Article 6(1) and Article 6(3) of the Statute, with numerous crimes committed in Port Loko District between February 1999 and April 1999.[429] As set out in detail below, the Trial Chamber found that various crimes were indeed committed by AFRC forces in Port Loko District during this period.

239. The AFRC troops remained in Freetown for about 3 weeks, but were forced to make a controlled retreat, due to attacks by ECOMOG forces.[430] This attack on Freetown by AFRC forces and their subsequent retreat are dealt with in further detail in the Prosecution's First Ground of Appeal above, where these events are referred to as the "Freetown invasion" and "Freetown retreat" respectively. Following the retreat from Freetown, Brima and Kamara took part in a second attack on Freetown with the participation of RUF commanders; this operation was unsuccessful.[431] The AFRC forces then reorganised and established bases in the Western Area, including Newton and Benguema,[432] while the RUF forces went to Lunsar.[433]

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[429] **Indictment**, para. 50 (Counts 3-5), para. 57 (Counts 6-9), para. 64 (Counts 10-11), para. 73 (Count 13). In relation to Count 12, paragraph 65 of the Indictment charged all three Accused with criminal responsibility for the recruitment and use of child soldiers "At all times relevant to this Indictment, throughout the Republic of Sierra Leone", which included Port Loko District. Counts 1 and 2 (terrorising the civilian population and collective punishments respectively) were based on all of the other crimes pleaded in the Indictment (Indictment, para. 41), and therefore included all of the crimes alleged in the Indictment to have been committed in Port Loko District.

[430] **Trial Chamber's Judgement**, para. 206.

[431] **Trial Chamber's Judgement**, paras 421, 473, 621, 1818.

[432] **Trial Chamber's Judgement**, paras 208, 421.

[433] **Trial Chamber's Judgement**, paras 622.

240. After this, the AFRC troops divided into two, with one group going to Makeni in Bombali District, and a smaller group going to Port Loko District.[434] The smaller group that moved to Port Loko District settled in the region of the Okra Hills, and became known as the "West Side Boys".[435] These troops remained in Port Loko District until the negotiation of the Lomé Peace Accord.[436]

241. The Trial Chamber's findings in respect of the individual responsibility for the three Accused for the crimes committed by the "West Side Boys" in Port Loko District were as follows.

242. In respect of **Brima** and **Kanu**, the Trial Chamber found that they were amongst the group of AFRC fighters who, after the Freetown retreat, moved from the Western District, apparently via Lunsar,[437] to Makeni in Bombali District.[438] The Trial Chamber found that insufficient evidence had been adduced for any findings to be made on Brima's activities in this period,[439] and that Kanu remained in the Western Area until he went to Makeni.[440] On the basis that it had not been proved that either Brima or Kanu were in Port Loko District at the material time, neither Brima nor Kanu were found individually responsible for any of the crimes in Port Loko District.[441]

243. The Prosecution does not, in this *Third* Ground of Appeal, appeal against these particular findings in respect of Brima and Kanu. The Prosecution theory at trial was, and in this appeal is, that Brima and Kanu are individually responsible for the crimes committed in Port Loko District under Article 6(1) of the Statute on the basis of joint criminal enterprise liability. This is dealt with in the Prosecution's *Fourth* Ground of Appeal below.

244. In respect of **Kamara**, the Trial Chamber considered his role in Port Loko District in paragraphs 475 to 500 of the Trial Chamber's Judgement. The Trial

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[434] **Trial Chamber's Judgement**, para. 208.
[435] *Ibid.*
[436] **Trial Chamber's Judgement**, para. 208.
[437] **Trial Chamber's Judgement**, paras 1818, 2087.
[438] **Trial Chamber's Judgement**, paras 424, 484, 622.
[439] **Trial Chamber's Judgement**, para. 424.
[440] **Trial Chamber's Judgement**, paras 536-537.
[441] In respect of Brima, see **Trial Chamber's Judgement**, paras 1811-1819. In respect of Kanu, see **Trial Chamber's Judgement**, paras 2082-2087.

Chamber found that after the Freetown retreat, Kamara went from the Western Area to Port Loko District with the group of AFRC fighters that became known as the "West Side Boys", and that this occurred in late February or early March 1999.[442]

245. The Trial Chamber found that it was satisfied beyond reasonable doubt that during the relevant period, Kamara was the overall commander of the AFRC forces in Port Loko District, and that he had substantial authority in this position.[443] It accordingly found that Kamara was individually responsible under Article 6(3) of the Statute for crimes committed by AFRC forces in Port Loko District.[444] However, it found, at paragraph 1955a of the Trial Chamber's Judgement, that the Prosecution did not adduce any evidence that Kamara committed, ordered, planned, instigated or otherwise aided and abetted any of the crimes committed in Port Loko District, and that the Prosecution did not prove any of these modes of individual criminal responsibility against Kamara for the crimes committed in Port Loko District. Accordingly, Kamara was not found individually responsible under Article 6(1) for any of the Port Loko District crimes.[445]

246. In this Third Ground of Appeal, the Prosecution appeals against this last finding in paragraph 1955a of the Trial Chamber's Judgement as an error of law and an error of fact. The Prosecution submits that on the Trial Chamber's findings, or alternatively, on the Trial Chamber's findings and the evidence accepted by the Trial Chamber in making those findings, the only conclusion open to any reasonable trier of fact is that Kamara is individually responsible, under Article 6(1) of the Statute, for committing, and/or ordering, planning, instigating and/or otherwise aiding and abetting all of the crimes committed by the AFRC troops under his command, known as the "West Side Boys", in Port Loko District between February and April 1999 (See Section C below). Additionally, the

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[442] **Trial Chamber's Judgement**, paras 484, 623.
[443] **Trial Chamber's Judgement**, paras 500, 1958.
[444] **Trial Chamber's Judgement**, paras 1956-1969.
[445] **Trial Chamber's Judgement**, paras 1953-1955a.

Prosecution submits that Kamara is individually responsible under Article 6(3) of the Statute for all of those crimes. (See Section D below.)

247. The Trial Chamber's findings on the crimes that were proved to have been committed in Port Loko District (leaving aside the question of the individual responsibility of the three Accused) are contained in the Trial Chamber's Judgement, at paragraphs 952-965 (unlawful killings), 1244-1278 (recruitment and use of child soldiers), 1171-1187 (sexual slavery), 1390-1394 (forced labour) and 1613-1632 (terrorising the civilian population and collective punishments).

248. In respect of ***unlawful killings***,[446] the Trial Chamber only made findings that three specific killing incidents had been proved to have occurred, in Manaarma, Nonkoba,[447] and Tendekum (or Tendakum)[448] respectively.

249. In respect of the killing incident in Manaarma, the Trial Chamber found that Kamara was individually responsible under Article 6(3) for the killing of an unknown number of civilians.[449] In this Third Ground of Appeal, the Prosecution argues that he should have been found individually responsible for those killings under Article 6(1) of the Statute, as well as under Article 6(3). (See Section E below)

250. However, in respect of the killing incidents in Nonkoba and Tendekum, the Trial Chamber found that it was unable to establish beyond reasonable doubt that these killings were attributable to the troops under the command of Kamara, and accordingly, Kamara was not found to be individually responsible for these incidents.[450] The Prosecution does not appeal against these findings of the Trial Chamber in respect of the Nonkoba and Tendekum killings.[451]

251. In respect of ***sexual slavery***,[452] the Trial Chamber was satisfied that the elements of this crime were established in Port Loko District.[453] However, the Trial

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[446] **Trial Chamber's Judgement**, paras 952-965.

[447] The Trial Chamber's findings in respect of the unlawful killings in Nonkoba are dealt with in paragraphs 208, 236, 964, 965, 1614, 1629 and 1630 of the Trial Chamber's Judgement.

[448] The Trial Chamber's findings in respect of the unlawful killings in Tendekum are dealt with in paragraphs 208, 236, 953, 1630 and 1961 of the Trial Chamber's Judgement.

[449] **Trial Chamber's Judgement**, paras 955-963, 965, 1969.

[450] **Trial Chamber's Judgement**, paras 964-965, 1952 (Nonkoba), 1961-1962 (Tendekum).

[451] Thus, the appeal points foreshadowed in para. 10(ii) and (iv) of the **Prosecution's Notice of Appeal** are not pursued by the Prosecution.

[452] **Trial Chamber's Judgement**, paras 1171-1187.

Chamber found that it was not established beyond a reasonable doubt that the perpetrators of these crimes were troops under the command of Kamara.[454] In this Third Ground of Appeal, the Prosecution also appeals against this finding, and maintains that Kamara should have been found individually responsible, under Article 6(1) and Article 6(3) of the Statute, for acts of sexual slavery in Port Loko District. (See Section F below)

252. In respect of ***forced labour***,[455] the Trial Chamber found that it was not established that civilians were enslaved in February 1999 in Port Loko District.[456] In this Third Ground of Appeal, the Prosecution does not appeal against this finding.

253. In respect of the ***recruitment and use of child soldiers***,[457] the Trial Chamber found the evidence insufficient to make a finding with regards to the conscription and/or use of child soldiers in Port Loko District between February and April 1999. In this Third Ground of Appeal, the Prosecution does not appeal against this finding.

254. In certain of its other Grounds of Appeal, the Prosecution submits that the Trial Chamber erred in not finding that certain other crimes were committed by AFRC troops in Port Loko District.[458] In this Third Ground of Appeal, the Prosecution submits that to the extent that these other grounds of appeal are upheld by the Appeals Chamber, Kamara is individually responsible, under both Article 6(1) and Article 6(3) of the Statute, for all crimes encompassed within those other grounds of appeal that are found to have been committed by AFRC troops under the command of Kamara in Port Loko District. (See Section G below)

255. In respect of Count 1 (***terrorising the civilian population***) and Count 2 (***collective punishments***), the Trial Chamber was not satisfied that the acts of violence for which Kamara was found to have been responsible were committed against protected persons or their property with the primary purpose of spreading terror among the civilian population or that they served as collective punishments

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[453] **Trial Chamber's Judgement**, para. 1187.
[454] **Trial Chamber's Judgement**, para. 1977.
[455] **Trial Chamber's Judgement**, paras 1390-1394.
[456] **Trial Chamber's Judgement**, para. 1394.
[457] **Trial Chamber's Judgement**, paras 1244-1278.
[458] See in particular the Prosecution Second Ground of Appeal at paras 236-237 above.

against protected persons.[459] Kamara was therefore found not to be individually criminally responsible on Counts 1 and 2 in respect of the crimes committed in Port Loko District. In this Third Ground of Appeal, the Prosecution also appeals against this finding, and maintains that Kamara should have been found individually responsible, under Article 6(1) and Article 6(3) of the Statute, on Counts 1 and 2 of the Indictment, in respect of the crimes found to have been committed by AFRC troops under the command of Kamara in Port Loko District. (See Section H below)

256. In addition to the arguments in this present Third Ground of Appeal, the Prosecution also argues in its Fourth Ground of Appeal below that Kamara is individually responsible for the crimes committed in Port Loko District under Article 6(1) of the Statute on the basis of joint criminal enterprise liability.

B. The errors in the approach of the Trial Chamber to the evaluation of the Article 6(1) liability of Kamara

257. The Trial Chamber accepted (correctly it is submitted) that in making findings on whether alleged crimes had been committed, or on whether the individual responsibility of a particular Accused in respect of those crimes had been established, the Trial Chamber was required to consider all of the evidence in the case as a whole.[460]

258. The Prosecution submits, however, that the approach taken by the Trial Chamber in assessing the evidence in relation to the Port Loko District crimes was in fact the same "myopic" approach that it adopted in relation to the Bombali District Crimes and the Freetown and Western Area Crimes, and indeed, in relation to all of the other crimes charged in the Indictment. This approach, and the reasons

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[459] **Trial Chamber's Judgement**, paras 1630-1632.

[460] **Trial Chamber's Judgement**, para. 98 ("in respect of each count charged against each of the Accused, the Trial Chamber has determined whether it is satisfied, ***on the basis of the whole of the evidence***, that every element of that crime and the criminal responsibility of the Accused for it have been established beyond reasonable doubt" (emphasis added)). See also, for instance, paras 704, 1439.

why the Trial Chamber erred in adopting it, are dealt with in Section C of the Prosecution's First Ground of Appeal.[461]

C. The individual Article 6(1) responsibility of Kamara for the Port Loko District Crimes

(i). Introduction

259. The Prosecution submits that the Article 6(1) responsibility of Kamara for the Port Loko District Crimes must be determined on the basis of the totality of the evidence in the case as a whole.[462]

260. The Prosecution submits that on the Trial Chamber's findings, or alternatively, on the Trial Chamber's findings and the evidence accepted by the Trial Chamber in making those findings, the only reasonable inference that could be drawn by any reasonable trier of fact is that Kamara planned, ordered, instigated or otherwise aided and abetted all of the crimes committed by the AFRC forces under his command in Port Loko District between February 1999 and April 1999.

(ii). Planned

261. Reference is made to paragraph 51-52 above.

262. The crimes committed by the AFRC forces in Port Loko District immediately followed the events of the Bombali-Freetown Campaign, which are the subject of the Prosecution's First Ground of Appeal.

263. The Trial Chamber found that throughout the Bombali-Freetown Campaign, the AFRC forces committed massive crimes in a systematic manner.[463] The Trial Chamber found that "the occurrence of the crimes was widespread and involved a

[461] See paragraphs 31-50 above
[462] See paragraph 258 above.
[463] See paragraphs 23-30 above.

typical *modus operandi* of attacks against civilians",[464] that these crimes "were carried out in the context of a series of attacks in which civilians were deliberately targeted for allegedly failing to sufficiently support the AFRC",[465] and that the primary purpose of these attacks was "to spread terror among the civilian population"[466] and to collectively punish persons "for allegedly supporting the President Ahmed Tejan Kabbah".[467] The Trial Chamber further found, for instance, that immediately prior to the invasion of Freetown by the AFRC forces in January 1999, Brima gave a general order that Freetown should be looted and burnt down, and that anyone who opposed the AFRC troops should be considered a collaborator and should be killed.[468]

264. During the Bombali-Freetown Campaign, Kamara was the second most senior commander of the AFRC forces involved in the campaign.[469] The Trial Chamber found that Kamara was responsible under Article 6(3) of the Statute for the crimes committed by AFRC forces throughout the Bombali-Freetown Campaign.[470]

265. The Trial Chamber further found it to be established beyond reasonable doubt that Kamara was the overall commander of the group of AFRC forces that went after the Freetown retreat to Port Loko District and became known as the "West Side Boys",[471] that he had substantial authority in this position,[472] and that he had effective control over these AFRC troops.[473] The Trial Chamber further found that in respect of the AFRC troops in Port Loko District, Kamara "gave orders to captains and troops which were carried out; appointed and promoted commanders; enforced discipline within the ranks and was in a position of *de jure*

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[464] **Trial Chamber's Judgement**, para. 1731.
[465] **Trial Chamber's Judgement**, para. 1568.
[466] **Trial Chamber's Judgement**, para. 1571.
[467] **Trial Chamber's Judgement**, para. 1573.
[468] **Trial Chamber's Judgement**, paras 398-399, 402, 473, 532, 614-615, 902, 1580, 1773, 1778, 1790, 1945, 2068.
[469] See paragraph 98 above.
[470] See paragraph 13 above. In the Prosecution's First Ground of Appeal above, the Prosecution contends that Kamara was additionally individually responsible, under Article 6(1) of the Statute, for planning, ordering, instigating and/or aiding and abetting all of the crimes committed by AFRC forces throughout the Bombali-Freetown Campaign.
[471] **Trial Chamber's Judgement**, paras 500, 1958.
[472] **Trial Chamber's Judgement**, para. 500 (see also paras 485-487).
[473] **Trial Chamber's Judgement**, para. 1959.

authority to other high level commanders including the Operations Commander who reported to him".[474]

266. The Trial Chamber further found that the AFRC faction in Port Loko District had a chain of command and a ***planning*** and orders process.[475] The evidence on which that finding of the Trial Chamber was based indicated that Kamara was in charge of meetings at which operations were planned, that he gave directions as to how operations were to be conducted, and that those who went on operations reported back to him afterwards.[476]

267. The Trial Chamber found that this group known as the "West Side Boys" "frequently targeted and attacked the civilian population".[477] In particular, the Trial Chamber expressly found that during the period in question "the AFRC troops, under the overall command of ... Kamara, conducted a series of attacks on the proximate villages" as it moved from Western Area to Gberi Bana in Port Loko District where it established a camp.[478]

268. The Trial Chamber's findings with respect to the attacks committed by the AFRC forces in Port Loko District in this period are contained in paragraphs 1613-1634 of the Trial Chamber's Judgement.[479] Its findings on these attacks were based primarily on the evidence of witness TF1-334, whose testimony the Trial Chamber expressly accepted,[480] and the testimony of George Johnson, who the Trial Chamber generally found to be a credible witness,[481] and whose testimony was found to generally corroborate that of TF1-334.[482] The Trial Chamber found that this evidence was also generally corroborated by the testimony TF1-023,[483] whose evidence the Trial Chamber clearly accepted elsewhere in its Judgement,[484]

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[474] **Trial Chamber's Judgement**, para. 1959 (footnote omitted).
[475] **Trial Chamber's Judgement**, paras 625-630, 1958.
[476] **Trial Chamber's Judgement**, paras 628-629.
[477] **Trial Chamber's Judgement**, para. 208
[478] **Trial Chamber's Judgement**, paras 1615-1616.
[479] In relation specifically to the attack on Manaarma, see also paras 954-963.
[480] **Trial Chamber's Judgement**, para. 1615 ("The Trial Chamber accepts the evidence of Prosecution Witness TF1-334"), and para. 1617 ("The Trial Chamber relies in particular on the evidence of Prosecution Witness TF1-334...").
[481] **Trial Chamber's Judgement**, para. 370.
[482] **Trial Chamber's Judgement**, para. 1617.
[483] **Trial Chamber's Judgement**, para. 1619.
[484] See, in particular, **Trial Chamber's Judgement**, paras 1377-1378.

and the testimony of the Defence witness DBK-129, on whose evidence the Trial Chamber also relied in other parts of the Judgement.[485] The Prosecution submits that it is therefore clear that the Trial Chamber accepted the account that these witnesses gave of the attacks committed in Port Loko District by the AFRC forces under the command of Kamara.

269. This evidence of this conduct of the AFRC troops, and of Kamara in particular, was as follows:

(i) The AFRC troops under the command of Kamara moved from the Western District, and established a base in Gberi Bana, in Port Loko District. As the AFRC troops were en route from Western District to Gberi Bana, Kamara ordered the troops to attack the village of Mamamah, and to kill civilians there and place their bodies on display, in order to spread fear. The order was carried out, and the remains of murdered civilians were put on display.[486]

(ii) Before the AFRC troops established their base in Gberi Bana, Kamara ordered some of his men to first go into Gberi Bana and to make it a "civilian free area"; this order was carried out, to the extent that at least 15 civilians were killed in the village.[487]

(iii) After the AFRC had established its base in Gberi Bana, Kamara gave a number of orders to attack villages in the surrounding area, in particular, an order that those areas where ECOMOG was based should be attacked, burnt down and that any civilian captured should be executed.[488]

(iv) From the AFRC base in Gberi Bana, Kamara ordered an operation to take place at Makolo, and stated that the troops should destroy the entire village, burn it down, and that any civilians that were encountered should be executed.[489]

(v) From the AFRC base in Gberi Bana, Kamara ordered an attack on Port Loko. During this operation, civilians were killed or amputated in villages

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[485] See, in particular, **Trial Chamber's Judgement**, paras 843, 954.
[486] **Trial Chamber's Judgement**, paras 1617-1620.
[487] **Trial Chamber's Judgement**, para. 1621.
[488] **Trial Chamber's Judgement**, para. 1622.
[489] **Trial Chamber's Judgement**, para. 1626.

on the way to Port Loko.[490] One of the attacked villages was Manaarma[491] (as to which, see Section E below).

270. The Prosecution submits that from these findings, or alternatively on the basis of these findings and the evidence that the Trial Chamber accepted in making these findings, it could not be open to any reasonable trier of fact to conclude that any of the crimes committed by the AFRC forces under the command of Kamara in Port Loko were isolated, spontaneous or unplanned incidents. The only conclusion open to any reasonable trier of fact is that the crimes committed by these AFRC forces in Port Loko District were committed by design, and were deliberately planned. Indeed, the Trial Chamber appears to have accepted that the crimes committed by the AFRC forces under Kamara's command in Port Loko District were a "continuation" of the crimes committed during the Bombali-Freetown Campaign,[492] and regarded the Port Loko District crimes as part of the widespread and systematic attack against the civilian population of Sierra Leone for the purposes of establishing the chapeau elements of Article 2 of the Special Court's Statute.[493]

271. The Prosecution further submits that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence that the Trial Chamber accepted, the only conclusion open to any reasonable trier of fact could have drawn is that Kamara, either alone or with others,[494] planned all of the Port Loko District crimes. In particular, the Prosecution submits that no reasonable trier of fact could find that Kamara's individual responsibility for planning these crimes had not been established beyond a reasonable doubt, once it is established that (1) the Port Loko District crimes committed by the AFRC forces under

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[490] **Trial Chamber's Judgement**, paras 1623-1625.

[491] **Trial Chamber's Judgement**, paras 954-963.

[492] See **Trial Chamber's Judgement**, para. 236, which refers to the crimes committed by AFRC forces during the Freetown invasion and Freetown retreat, and then states, in the final sentence, that witnesses testified that violence against civilians "continued" over the following months in Port Loko District.

[493] See **Trial Chamber's Judgement**, paras 236-238, in which the Trial Chamber includes the attacks in Port Loko District by troops under the command of Kamara (Gberi Bana and Manaarma) as part of the global violence that established the existence of a widespread and systematic attack against the civilian population.

[494] There is no need to prove that any other person was involved in the planning: see paragraph 51 above.

Kamara's command were systematic and planned;[495] (2) that the AFRC forces who committed these systematic and planned crimes had a chain of command and a planning and orders process;[496] (3) that Kamara was the overall commander of this group of AFRC forces and had effective control over them;[497] (4) that there was evidence that Kamara was in charge of meetings at which operations of these AFRC forces were planned;[498] (5) that Kamara specifically ordered the commission of crimes by AFRC forces on numerous occasions;[499] and (6) that there was evidence, which the Trial Chamber clearly accepted, that after the attack on Mamamah, as well as after the attack on Gberi Bana, when he had knowledge of the civilians who had been killed in the attack, Kamara congratulated his troops on a "job well done".[500]

(iii). Ordered

272. Reference is made to paragraphs 131, 135 and 137 above.

273. The evidence of Kamara ordering the commission of crimes in Port Loko District has already been referred to in paragraph 270 above.

274. For the reasons given in paragraph 269 above, it is submitted that the Trial Chamber accepted all of this evidence.

275. The Prosecution submits that ***at the very least***, on the basis of the findings of the Trial Chamber and the evidence accepted by the Trial Chamber in making those findings, the only conclusion open to a reasonable trier of fact is that Kamara ordered the particular crimes that were the subject matter of the specific orders that referred to in paragraphs 269 above (for instance, that by the order referred to

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[495] See previous paragraph.
[496] **Trial Chamber's Judgement,** paras 625-630, 1958.
[497] **Trial Chamber's Judgement**, para. 1959.
[498] **Trial Chamber's Judgement**, para. 1963.
[499] **Trial Chamber's Judgement**, para. 1959.
[500] **Trial Chamber's Judgement**, para. 1617 (referring to the evidence of TF1-334, on which evidence the Trial Chamber said that it "relies in particular", and which evidence the Trial Chamber found (at paras 1618-1619) to be corroborated by the evidence of other witnesses); and para. 1621 (referring again to the evidence of TF1-334).

in paragraph 269 (i) above, Kamara ordered the killings that were committed by the AFRC forces in Mamamah).

276. However, the Prosecution submits that the findings of the Trial Chamber and the evidence it accepted go further than this. The evidence which the Trial Chamber accepted was that Kamara gave certain orders of a generalised and non-specific nature. The evidence is that prior to the attack on Mamamah, Kamara ordered AFRC soldiers to "decorate" Mamamah Town, and to make the area "fearful"; as a result of this order, civilians were not only killed, but also mutilated.[501] Prior to the attack on Gberi Bana, Kamara ordered AFRC troops to make that village a "civilian free area".[502] At Gberi Bana, the evidence was that Kamara also gave a generalised order that "those areas where ECOMOG was based should be attacked, burnt down and that any civilian captured should be executed".[503]

277. The evidence before the Trial Chamber (which the Trial Chamber accepted[504]) also established that when Kamara gave the order for the attack on Port Loko, he specified that he "did not want to see any civilians there other than those who were captured with the troops".[505] By giving this order, Kamara thereby expressly also ordered the continuation of the enslavement of those civilians who were already being held by the AFRC forces.

278. The Prosecution submits that these generalised orders were intended, and were understood by the AFRC troops as intending, not only that certain specific crimes should be committed, but that atrocities should be committed in a generalised way, to include not only killings, but also amputations, burnings and other acts of violence. The Prosecution submits that this is the only conclusion open to any reasonable trier of fact, given especially that the troops to whom these orders were issued were the same troops who had shortly before participated in the Bombali-Freetown Campaign, which had been conducted by the AFRC troops on

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[501] **Trial Chamber's Judgement**, paras 1617-1619.
[502] **Trial Chamber's Judgement**, para. 1621.
[503] **Trial Chamber's Judgement**, para. 1622.
[504] See paragraphs 269 above.
[505] **Trial Chamber's Judgement**, para. 1623, referring to the evidence of TF1-334, Transcript 15 June 2005, p. 35, who testified that "He [Kamara] said he did not want to see any civilians in the camp other than the civilians that were with us before".

the basis of the instructions that had been given in the Mansofinia Address and the Orugu Address.[506]

279. The Prosecution therefore submits that on the findings of the Trial Chamber and the evidence that the Trial Chamber accepted, the only reasonable inference that any reasonable trier of fact could draw was that Kamara is individually responsible, under Article 6(1) of the Statute, for ordering all of the crimes that were committed by the AFRC forces under his command in Port Loko District.

(iv). Instigated

280. Reference is made to paragraph 81 above.

281. The Prosecution submits that on the basis of the findings made by the Trial Chamber, or alternatively, on the basis of those findings and the evidence accepted by the Trial Chamber, the only conclusion open to any reasonable trier of fact is that Kamara, by his conduct, instigated all of the crimes committed by the AFRC forces in Port Loko District.

282. Reference has been made in paragraphs 269, 276, 278 above to the orders that Kamara gave for the commission of crimes by AFRC forces in Port Loko District. The Prosecution has submitted in paragraphs 269, 276, 278 above that by these orders, Kamara not only ordered the particular crimes that were the subject matter of the specific orders that he gave, but that the generalised and non-specific orders he gave were orders to commit all of the crimes that were committed by AFRC forces under his command in Port Loko District.

283. The Prosecution submits to the extent that these orders given by Kamara did not amount to ***orders*** to commit all of those crimes, Kamara by giving such generalised orders, at the very least, ***instigated*** the commission of all of the other crimes committed by the AFRC forces under his command that he did not specifically order.

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[506] See paragraphs 28, 29 and 66 above.

284. The evidence before the Trial Chamber (which the Trial Chamber accepted[507]) further established that Kamara was present during the attacks on Mamamah Town, and that he participated in that attack.[508] Furthermore, after this attack on Mamamah, as well as after the attack on Gberi Bana, when he had knowledge of the civilians who had been killed in the attack, Kamara congratulated his troops on a "job well done".[509]

285. The Prosecution submits that the only reasonable inference that any reasonable trier of fact could draw from this evidence that the Trial Chamber accepted is that all of Kamara's conduct described above, performed in his capacity as the overall commander of the AFRC troops in Port Loko District, incited, solicited or otherwise induced the AFRC troops to commit all of the crimes that were committed by them in Port Loko District.[510] The Prosecution further submits that the only reasonable inference that could be drawn by any reasonable trier of fact is that this instigation was a factor substantially contributing to the commission of the crimes, and that Kamara acted with direct intent or with the awareness of the substantial likelihood that the crimes would be committed.[511] The only reasonable inference is that Kamara is individually responsible for "instigating" all of the crimes that were committed in the course of that campaign.

(v). Otherwise aided and abetted

286. Reference is made to paragraphs 88-92 above

287. The Trial Chamber specifically found that Kamara was in a superior-subordinate relationship with the AFRC troops who committed the crimes.[512] The Trial

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[507] See paragraphs 276-277 above.

[508] **Trial Chamber's Judgement**, para. 1617 (referring to the evidence of TF1-334 that Kamara ordered a house in Mamamah to be burned down and participated in the burning) and para. 1618 (referring to the evidence of George Johnson that Kamara ordered a house in Mamamah to be burned down in which a number of civilians including children were present, and forced a child who tried to escape from the burning house back in to the house by gunpoint). See also **Trial Chamber's Judgement**, para. 1617, final sentence, indicating that Kamara participated in the burning of Mile 38, which he had ordered.

[509] See footnote 501 above.

[510] Compare **Trial Chamber's Judgement**, para. 769.

[511] Compare **Trial Chamber's Judgement**, para. 770.

[512] **Trial Chamber's Judgement**, paras 1958-1965.

Chamber further expressly found that Kamara had actual or imputed knowledge of the crimes committed in Manaarma and failed to prevent or punish the perpetrators of those crimes, and that he was therefore individually responsible under Article 6(3) of the Statute for the crimes committed in Manaarma.[513] For the reasons given in paragraphs 297-305 below, the Prosecution submits that the only conclusion open to any reasonable trier of fact on the findings of the Trial Chamber and the evidence accepted by the Trial Chamber is that Kamara is also individually responsible under Article 6(3) of the Statute for all of the other crimes committed by the AFRC forces under his command in Port Loko District. For the reasons given in paragraphs 276-278, 284 above, in addition to giving rise to Article 6(3) liability, Kamara's conduct in failing to prevent or punish crimes committed repeatedly by his subordinates in Port Loko District clearly had in the circumstances of this case, an encouraging effect on the AFRC troops to commit those and all subsequent crimes in Port Loko District, and this conduct therefore also renders Kamara individually responsible, under Article 6(1), for aiding and abetting all of those crimes.

288. The Prosecution further submits, more generally, that all of the conduct of Kamara referred to in paragraphs 276-278 above provided encouragement and moral support to the troops who committed these crimes and had a substantial effect on the perpetration of all of those crimes by those troops.

289. The Prosecution therefore submits that based on all of the findings of the Trial Chamber, or alternatively, the findings of the Trial Chamber and the evidence accepted by the Trial Chamber, the only conclusion open to any reasonable trier of fact is that Kamara is therefore individually responsible for "aiding and abetting" all of the crimes committed by the AFRC forces in Port Loko District.

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[513] **Trial Chamber's Judgement**, paras 1966-1969.

(vi). Committed

290. It is not suggested in this Third Ground of Appeal that Kamara is responsible for personally committing all of the crimes committed by AFRC troops under his command in Port Loko District.[514] The Prosecution position, in this Third Ground of Appeal, is that Kamara is individually responsible, under Article 6(1) of the Statute, for all of the crimes committed by the AFRC forces under his command in Port Loko District, on the ground that he planned, ordered, instigated and/or otherwise aided and abetted those crimes.

291. However, although it is unnecessary to determine the matter for the purposes of the present ground of appeal, the Prosecution notes that on the evidence accepted by the Trial Chamber, Kamara is individually responsible for personally committing at least one of the crimes in Port Loko District. It is stated in the Trial Chamber's Judgement that:

> The Witness [George Johnson] ... testified that before the troops pulled out of Mamama, Kamara ordered a house burnt down. The Witness testified that [*sic*] were a number of civilians in the house, including some children aged 10 to 15. The Witness was present outside the house when one of the children trapped inside tried to escape. ***Kamara forced him at gunpoint back into the house and the child was burnt to death.***[515]

292. For the reasons given in paragraph 268 above, it is clear that the Trial Chamber accepted this evidence.

293. The Prosecution submits that on the basis of this evidence, viewed in the light of all of the evidence in the case as a whole, the only reasonable inference that could possibly be drawn is that Kamara, in forcing the child back into the burning house at gunpoint, had the intention that the child would be killed in the fire, or at the very least, that Kamara had the intention to cause the child serious bodily harm in the reasonable knowledge that his conduct would likely result in the child's death. The Prosecution submits that Kamara is therefore individually responsible for

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[514] However, if the Prosecution's Fourth Ground of Appeal below is upheld, Kamara would be responsible for "committing" all of those crimes by virtue of joint criminal enterprise liability.

[515] **Trial Chamber's Judgement**, para. 1618.

personally "committing" the killing of this child. In addition to ordering the burning and killing of the children inside the house, as well as other crimes in Port Loko District, it is submitted that this conduct of Kamara contributed to the instigation and aiding and abetting of other crimes in Port Loko District, for the reasons given in paragraphs 280-285 above.

(vii). Conclusion

294. The Trial Chamber ultimately found that the Prosecution "has not adduced any evidence that the Accused Kamara committed, ordered, planned, instigated or otherwise aided and abetted any of the crimes committed in the Port Loko District", and that accordingly he was not individually responsible under Article 6(1) for any of the Port Loko District crimes.
295. The Prosecution submits that this finding that the Prosecution did not adduce "any evidence" of Kamara's Article 6(1) liability for the Port Loko District crimes cannot be described as anything other than wrong. There is abundant evidence of Kamara having ordered, planned, instigated or otherwise aided and abetted these crimes. This evidence is set out in the Trial Chamber's Judgement, and is described in the paragraphs above.
296. For all of the reasons given above, the Prosecution submits that on the findings of the Trial Chamber and the evidence accepted by the Trial Chamber in reaching those findings, the only conclusion open to any reasonable trier of fact is that Kamara was the prime mover, or one of the prime movers, of all of the crimes committed by the AFRC forces under his command in Port Loko District, and that he is individually responsible under Article 6(1) of the Statute for having ordered, planned, instigated and/or otherwise aided and abetted all of those crimes.

D. The individual Article 6(3) responsibility of Kamara for the Port Loko District Crimes

297. The Trial Chamber found Kamara to be individually responsible as a superior under Article 6(3) of the Statute for the crimes committed in Manaarma in Port Loko District.[516] However, it did not make any express finding as to whether Kamara is also individually responsible under Article 6(3) of the Statute for any of the other crimes committed by AFRC forces in Port Loko District. This was because the Trial Chamber found (erroneously, it is submitted, for the reasons given below[517]) that the unlawful killings in Manaarma were the only crimes committed in Port Loko District that were attributable to troops under Kamara's command.[518]

298. For the reasons given in paragraphs 300-305 below, the Prosecution submits that the only conclusion open to any reasonable trier of fact is that other crimes committed in Port Loko District were also attributable to AFRC troops under the command of Kamara. The Trial Chamber should therefore have considered the individual Article 6(3) responsibility of Kamara for the crimes committed by AFRC troops under his command more generally.

299. The Prosecution submits that it is unnecessary for the Appeals Chamber to remit the case to the Trial Chamber for any further findings of fact on this issue. The Prosecution submits that on the basis of the findings contained in the Trial Chamber's Judgement, or alternatively, on the basis of those findings and the evidence that the Trial Chamber accepted in making those findings, the only conclusion open to any reasonable trier of fact is that Kamara is individually responsible under Article 6(3) of the Statute for all of the crimes committed in Port Loko District during the relevant period (February 1999 to April 1999) by the AFRC troops under his command.

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[516] **Trial Chamber's Judgement**, paras 1956-1969, especially para. 1969.
[517] See paragraphs 300-305 below.
[518] **Trial Chamber's Judgement**, para. 1961.

300. The Trial Chamber expressly found that there was a superior-subordinate relationship between Kamara and the AFRC troops in Port Loko District that became known as the "West Side Boys".[519]

301. The Prosecution submits that Kamara had, throughout this period, at the very least, imputed knowledge of all of the crimes committed by these AFRC troops. For imputed knowledge, it is sufficient that the accused was in possession of sufficient information, even general in nature, written or oral, of the likelihood of illegal acts of subordinates.[520] This information does not need to provide specific information about unlawful acts committed or about to be committed: for instance, it has been said in the case law that a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge for the purposes of Article 6(3).[521] More pertinently, a commander's knowledge of the *criminal reputation* of his subordinates will be sufficient to meet the knowledge requirement of Article 6(3) of the Statute if this amounted to information which would put him on notice of the "present and real risk" of offences within the jurisdiction of the Special Court.[522]

302. In the present case, the only inference that could be drawn by any reasonable trier of fact is that Kamara was well aware, even before the AFRC troops under his command moved to Port Loko District, of the criminal reputation of these troops. These were the same troops who had, immediately before moving to Port Loko District, participated in the Bombali-Freetown Campaign, in which widespread crimes were committed. The Trial Chamber expressly found that Kamara was aware of the crimes committed by these troops during the Bombali-Freetown Campaign.[523] The Prosecution submits that it was not open to any reasonable

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[519] **Trial Chamber's Judgement**, paras 1958-1965.
[520] See **Trial Chamber's Judgement**, paras 794-796 and the authorities there cited.
[521] ***Čelebići* Appeal Judgement**, paras 238, 241; ***Krnojelac* Appeal Judgement**, para. 154; ***Hadžihasanović and Kubura* Rule 98*bis* Decision**, para. 165.
[522] ***Brđanin* Trial Judgement**, para. 278, referring to ***Čelebići* Appeal Judgement**, paras 223 and 241; ***Halilović* Trial Judgement**, para. 68, especially footnote 164 and accompanying text.
[523] **Trial Chamber's Judgement**, paras 1925, 1949.

trier of fact to conclude otherwise than that Kamara had knowledge of the criminal reputation of the AFRC troops under his command in Port Loko District.

303. Furthermore, the findings of the Trial Chamber and evidence accepted by the Trial Chamber establish in any event that Kamara had *actual* knowledge of the crimes committed by the AFRC troops in Port Loko District. He was the overall commander of these troops. He specifically ordered the AFRC troops to commit crimes,[524] he was present during the attack on Mamamah when crimes were committed,[525] and he received reports back from the troops on other crimes that had been committed in Port Loko District.[526] Even if he did not have actual knowledge of ***all*** of the crimes committed by the AFRC forces in Port Loko District (and there is no evidence to suggest that he did not), on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that he at the very least certainly had actual knowledge of ***many*** of these crimes, and this actual knowledge necessarily gave him imputed knowledge of all of the other crimes committed in Port Loko District.

304. The only further fact that needs to be found to establish Kamara's Article 6(3) responsibility for all of the crimes committed by the troops under his command in Port Loko District is his failure to prevent or punish the troops who committed these crimes. In this respect, the Trial Chamber expressly found that in Port Loko District the AFRC faction did not have a disciplinary system, and that the imposition of discipline was solely at the discretion of Kamara.[527] There was no evidence before the Trial Chamber that Kamara ever took any measures to prevent or punish any of the crimes committed by the AFRC troops in Port Loko District. On the contrary, the evidence was that he ordered the commission of crimes,[528] and congratulated the troops on a "job well done" after attacks in which

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[524] 275-276. See ***Kayishema* Trial Judgement,** paras 505, 515 (where crimes are committed pursuant to the accused's orders, it is self-evident that the accused knew or had reason to know that the attacks were imminent and failed to take reasonable measures to prevent them).

[525] **Trial Chamber's Judgement,** para. 476

[526] See paragraph 271.

[527] **Trial Chamber's Judgement**, paras 633-634.

[528] See paragraphs 275-276. See ***Kayishema* Trial Judgement**, paras 505, 515 (where crimes are committed pursuant to the accused's orders, it is self-evident that the accused knew or had reason to know that the attacks were imminent and failed to take reasonable measures to prevent them; in such a case, the Trial Chamber need not examine further whether the accused failed to punish the perpetrators).

crimes were committed.[529] Furthermore, for the reasons given in paragraphs 257-296 above, it is submitted that Kamara is himself individually responsible, under Article 6(1) of the Statute, for planning, ordering, instigating and/or aiding and abetting all of the crimes committed by the AFRC troops under his command in Port Loko District. The Prosecution therefore submits that it was not open to any reasonable trier of fact to conclude otherwise than that Kamara failed to prevent or punish any of the crimes committed by those AFRC troops in Port Loko District.

305. The Prosecution therefore submits that on the basis of the findings contained in the Trial Chamber's Judgement and the evidence that the Trial Chamber accepted in making those findings, the only conclusion open to any reasonable trier of fact is that Kamara is individually responsible under Article 6(3) of the Statute for all of the crimes committed by AFRC forces under his command in Port Loko District.

E. The errors in the Trial Chamber's evaluation of the individual responsibility of Kamara for unlawful killings

306. In respect of the charges of unlawful killings (Counts 3-5 in the Indictment), the only killing incident in Port Loko District that the Trial Chamber found to be attributable to troops under Kamara's command was the incident in Manaarma.

307. The Trial Chamber's findings in respect of the Manaarma killings are dealt with in paragraphs 208, 236, 955-963, 965, 1614, 1628 and 1630 of the Trial Chamber's Judgement. The Trial Chamber's findings in respect of the individual responsibility of Kamara for these unlawful killings is dealt with in paragraphs 1951-1977 of the Trial Chamber's Judgement.

308. The Trial Chamber found Kamara to be individually responsible under Article 6(3) of the Statute for these unlawful killings.[530] For all of the reasons given in

[529] See paragraph 271.
[530] **Trial Chamber's Judgement**, paras 1958-1969.

paragraphs 257-296 above, the Prosecution contends that Kamara should also have been found individually responsible under Article 6(1) of the Statute for planning, ordering, instigating and/or otherwise aiding and abetting these killings.

309. Without prejudice to the general submission in the previous paragraph, the Prosecution notes that the killings in Manaarma were committed by the AFRC troops en route from their base in Gberi Bana to Port Loko, as they were engaged in an operation to attack ECOMOG forces in Port Loko.[531] Witness TF1-334, whose evidence the Trial Chamber accepted,[532] testified that Kamara had ordered that attack on Port Loko, and that in so doing, he ordered that any village that the troops reached on the way should be burnt down and civilians killed, and that he did not want to see any civilians there other than those who were captured by the troops.[533] This alone is sufficient to establish that Kamara is individually responsible under Article 6(1) for "ordering" the killings in Manaarma.

310. The Witness George Johnson (also known as "Junior Lion") gave a slightly different account. According to him, the attack on Port Loko was meant to be an attack purely on the Malian ECOMOG forces, and was not meant to be an operation to kill civilians. He testified that when he arrived in villages on the way to Port Loko, he observed civilians who had been killed or amputated, and said he believed these killings to have been the responsibility of an AFRC advance troop who went before him, under the command of a soldier called "Cyborg".[534] George Johnson testified that he complained to Kamara about the conduct of "Cyborg", but that Kamara took no action.[535]

311. It is not clear whether the Trial Chamber accepted this aspect of George Johnson's evidence, since it expressly found that "the group of rebels that attacked Manaarma were AFRC soldiers under the command of 'Junior Lion' aka George Johnson".[536]

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[531] **Trial Chamber's Judgement**, paras 958-963.
[532] See paragraph 268.
[533] **Trial Chamber's Judgement**, para. 1623.
[534] **Trial Chamber's Judgement**, paras 958, 1624.
[535] **Trial Chamber's Judgement**, paras 1624, 1964.
[536] **Trial Chamber's Judgement**, para. 963. See also **Trial Chamber's Judgement**, para. 493, referring to the evidence of witness DBK-012, who "testified that Johnson organised the operation to Port Loko to combat ECOMOG, called a muster parade prior to the attack, gave the order to launch the offensive at

312. However, the Prosecution submits that it is in any event immaterial whether the killings in Manaarma were committed by the AFRC troops under the command of George Johnson, or by an advance group of AFRC troops under the command of "Cyborg". The Prosecution submits that for all of the reasons given in paragraphs 286-289 above, the only reasonable inference that could be drawn by any reasonable trier of fact is that Kamara planned, ordered, instigated and/or otherwise aided and abetted these killings. Whether or not he specifically ordered civilians to be killed in Manaarma, the orders that he gave of a general nature (as to which, see paragraph 276-277 above) amounted to ordering these killings. In any event, for the reasons given in paragraphs 280-289 above, his conduct as a whole in Port Loko District at the very least amounted to instigating and/or aiding and abetting these killings.

F. The errors in the Trial Chamber's evaluation of the individual responsibility of Kamara for sexual slavery

313. In respect of sexual slavery,[537] the Trial Chamber was satisfied that the elements of this crime were established in Port Loko District.[538] However, the Trial Chamber found that it was not established beyond a reasonable doubt that the perpetrators of these crimes were troops under the command of Kamara.[539] In this Third Ground of Appeal, the Prosecution appeals against this finding, and maintains that Kamara should also have been found individually responsible, under Article 6(1) and Article 6(3) of the Statute, for acts of sexual slavery in Port Loko District.

314. The evidence of sexual slavery committed by troops under the command of Kamara is in fact dealt with by the Trial Chamber in part in the section of the Trial Chamber's Judgement dealing with sexual slavery in Freetown and the

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Manaarma, ordered the witness to kill a woman who was suspected of having distributed arms and ammunition to the Gbethis, and was present during the offensive against ECOMOG in Port Loko".

[537] **Trial Chamber's Judgement**, paras 1171-1187.

[538] **Trial Chamber's Judgement**, para. 1187.

[539] **Trial Chamber's Judgement**, para. 1977.

Western Area.[540] At paragraphs 1153-1160 of the Trial Chamber's Judgement, the Trial Chamber deals with the evidence of TF1-023, whose evidence the Trial Chamber accepted,[541] and in respect of whom the Trial Chamber found the elements of sexual slavery to be satisfied.[542] This witness testified that she was captured in Cabala Town on 22 January 1999, and was held captive by an AFRC commander known as "Colonel X" as his "wife", who had sex with her without her consent.[543] This witness was with Colonel X during the Western District period following the Freetown retreat, and was ultimately taken by Colonel X to Four Mile,[544] which is in *Port Loko* District.[545] At Four Mile, Colonel X left her and went to Makeni.[546] This suggests that Colonel X left to join the group of AFRC fighters (that included Brima and Kanu) who went from the Western District to Makeni in Bombali District when the AFRC forces split after the Freetown retreat.[547]

315. When Colonel X departed, he left this witness "in the care of" another AFRC captain, "Captain Y", who took her to Mile 38 in Port Loko District,[548] and then Magbeni,[549] which is also in Port Loko District,[550] from where she eventually escaped.[551] The Prosecution submits that the only reasonable inference that can be drawn from the findings of the Trial Chamber as a whole is that Colonel Y was amongst the group of AFRC fighters under the command of Kamara who went to the "West Side" in Port Loko District when the AFRC forces split after the Freetown retreat.

316. The Trial Chamber found that the AFRC troops leaving Freetown went through Benguema (Western Area), Waterloo (Western Area), Newton (Western Area),

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[540] **Trial Chamber's Judgement**, paras 1150-1170.
[541] **Trial Chamber's Judgement**, para. 1159.
[542] **Trial Chamber's Judgement**, para. 1159.
[543] **Trial Chamber's Judgement**, paras 1153-1154.
[544] **Trial Chamber's Judgement**, para. 1154.
[545] **Trial Chamber's Judgement**, para. 1615.
[546] **Trial Chamber's Judgement**, para. 1157.
[547] See paragraph 240 above.
[548] **Trial Chamber's Judgement**, para. 1157. See also at para. 1615 (confirming that Mile 38 is in Port Loko District).
[549] **Trial Chamber's Judgement**, para. 1157.
[550] **Trial Chamber's Judgement**, para. 1615.
[551] **Trial Chamber's Judgement**, para. 1157.

Mamamah (Port Loko District), Mile 38 (Port Loko District), Magbeni (Port Loko District) and ultimately made a camp at a village called Gberi Bana (Port Loko District).[552] The Trial Chamber further found that during this period the AFRC troops were under the overall command of Kamara.[553]

317. The description given by TF1-023 of being taken to Mile 38 and then to Magbeni is consistent with the route taken by the troops under the command of Kamara. Furthermore, the Trial Chamber expressly relied on the evidence of TF1-023 "that in approximately March of 1999, in Mile 38, he [*sic*] witnessed 'Bazzy' [Kamara] ordered [*sic*] the rebels to attack civilians in Mamama Village in order to spread fear",[554] which confirms that the Trial Chamber was satisfied that TF1-023 was with the troops under the command of Kamara.

318. TF1-023 further testified that when she was being held by Colonel X at Four Mile, she was with a group of armed rebels under the command Brigadier "Bazzy", and that she would see "Bazzy" regularly when he would visit Colonel X.[555] George Johnson, who the Trial Chamber also found to be a credible and reliable witness,[556] also confirmed "that Kamara was in command of a group of AFRC troops that went to Four Mile" and subsequently to Gberi Bana.[557] Witness TF1-167 further confirmed that Kamara retreated to Four Mile before moving on to Mamamah, and that Kamara was in command during this period.[558]

319. TF1-023 testified that after she was left "in the care of" CaptainY, the latter "tried to look after her and to ensure that she did not come to any harm".[559] However, the only reasonable inference that can be drawn from the findings of the Trial Chamber and the evidence that it accepted was that this witness nonetheless remained in forced captivity until she was "able to escape" in Magbeni.[560] Even

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[552] **Trial Chamber's Judgement**, para. 1615. See also para. 476, referring to the evidence of George Johnson, who the Trial Chamber found to be a credible and reliable witness (**Trial Chamber's Judgement**, para. 370).
[553] **Trial Chamber's Judgement**, para. 1616.
[554] **Trial Chamber's Judgement**, para. 1619.
[555] **Trial Chamber's Judgement**, para. 1154.
[556] **Trial Chamber's Judgement**, para. 370.
[557] **Trial Chamber's Judgement**, para. 486.
[558] TF1-167, Transcript, 16 September 2005, pp. 63-64.
[559] **Trial Chamber's Judgement**, para. 1157.
[560] **Trial Chamber's Judgement**, para. 1157.

if she was not subjected to sexual slavery (as opposed merely to forced captivity) from the time that Colonel X left until the time of her escape, it remains the case that she was held in sexual slavery in Port Loko District in Four Mile by Colonel X, who was at the time one of the AFRC forces under the overall command of Kamara.

320. Furthermore, the Prosecution submits that on the findings of the Trial Chamber and the evidence accepted by the Trial Chamber in making those findings, the only reasonable inference that could be drawn by any reasonable trier of fact is that TF1-023 was not the only victim of sexual slavery by the AFRC forces in Port Loko District under the command of Kamara.

321. As the Trial Chamber acknowledged, the crime of sexual slavery was of a prolonged nature, and the evidence of some witnesses related to events which took place over time, sometimes spanning the indicted period of more than one District.[561]

322. The Trial Chamber found that the AFRC forces kept women in sexual slavery throughout the Bombali-Freetown Campaign.[562] The Trial Chamber found that sexual slavery continued throughout the Freetown retreat.[563]

323. The Trial Chamber found witness TF1-334 to be a credible and reliable witness,[564] and in particular, expressly accepted the evidence of this witness in respect of crimes of sexual slavery committed by the AFRC forces following the Freetown retreat.[565] This witness testified that abducted civilians were referred to as "families",[566] that there were about 300 of them at Benguema, young men, young women and young children,[567] and that most of the abducted young girls became "wives" of the various commanders, sleeping with them and cooking for

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[561] **Trial Chamber's Judgement**, para. 1076.
[562] See paragraphs 27-28.
[563] See **Trial Chamber's Judgement**, paras 1161-1167.
[564] The Trial Chamber found this witness to be credible and reliable (**Trial Chamber's Judgement**, para. 281, 358-359, 1617, 1705). In numerous parts of the Trial Chamber's Judgement, the Trial Chamber relies on the evidence of this witness. For a few examples, see **Trial Chamber's Judgement**, paras 843, 859, 882, 867, 901, 1043, 1102, 1152, 1206, 1228 and 1288.
[565] **Trial Chamber's Judgement**, para. 1165.
[566] TF1-334, Transcript, 14 June 2005, pp. 115-116. See also **Trial Chamber's Judgement**, para. 1164, first sentence.
[567] TF1-334, Transcript, 14 June 2005, pp. 115-116. See also **Trial Chamber's Judgement**, para. 1162.

them.[568] This witness further testified that after Brima and Kamara split, all of the family members were with Kamara at Mile 38,[569] and that the family members moved with Kamara to Gberibana after it had been cleared of civilians.[570]

324. TF1-334 also gave evidence (which the Trial Chamber accepted[571]) that when Kamara gave the order in Gberi Bana for the attack on Port Loko, he specified that "he did not want to see any civilians there other than those who were captured with the troops", by which he meant that he "did not want to see any civilians in the camp other than the civilians that were with us before".[572] This further confirms that the captured civilians that were with the AFRC forces during the Freetown retreat moved with the forces under the command of Kamara to Port Loko District.

325. The Prosecution submits that on the findings of the Trial Chamber, and/or the evidence accepted by the Trial Chamber in making those findings, in particular the evidence of TF1-023 and TF1-334 referred to above, no reasonable trier of fact could conclude that there could be any doubt that the women who were held in sexual slavery by AFRC forces during the Freetown retreat continued to be held in sexual slavery by the AFRC forces under the command of Kamara in Port Loko District.

326. The order given by Kamara referred to in paragraph 324 above indicates that Kamara was not only aware of the women being held in sexual slavery by the forces under his command, but also that he failed to prevent or punish the troops who were holding the women in sexual slavery, and indeed, that he positively ordered the continuation of this state of affairs.

327. This conclusion is reinforced by the fact that the Trial Chamber found Kamara to be individually responsible under Article 6(3) of the Statute for crimes of sexual slavery committed previously, in 1998, in Kono District by AFRC forces under

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[568] TF1-334, Transcript, 14 June 2005, pp. 120-122. See also **Trial Chamber's Judgement**, paras 1162-1164. See also TF1-334, Transcript, 15 June 2005, pp. 14 (during the retreat at Newton the wives were still with their commanders, and would pound rice, launder, cook, and sleep with the commanders).

[569] TF1-334, Transcript, 15 June 2005, p. 22.

[570] TF1-334, Transcript, 15 June 2005, p. 29.

[571] See paragraph 323 above.

[572] **Trial Chamber's Judgement**, para. 1623, referring to the evidence of TF1-334, Transcript 15 June 2005, p. 35.

his effective control.[573] The conclusion is also reinforced by the fact that sexual slavery was committed by AFRC troops throughout the Bombali-Freetown Campaign, during the time that Kamara was the second most senior commander of the AFRC forces involved in the campaign.[574] This conclusion would be yet further reinforced if the Appeals Chamber upholds Prosecution's contention, for the reasons given in paragraphs 313-326 above, that Kamara is individually responsible, under both Article 6(1) and Article 6(3) of the Statute, for the crimes of sexual slavery committed during the Bombali-Freetown Campaign.

328. There was furthermore also other evidence before the Trial Chamber that Kamara approved of, and participated in, sexual crimes committed by the AFRC forces. The Trial Chamber accepted the evidence of TF1-334 that during the Freetown invasion in January 1999, he saw "soldiers" bring an unknown number of abducted women to State House where they were raped, that the most beautiful ones were brought to the senior commanders including "Bazzy" (Kamara), and that "Bazzy" stayed with his girl until Westside (that is, Port Loko District).[575] TF1-334 also testified that Kamara raped his cousin at Gberibana who had been abducted by the troop during the retreat from Freetown.[576]

329. For all of these reasons, and for the reasons given in paragraphs 259-305 above, it is submitted that Kamara is individually responsible, under both Article 6(1) and Article 6(3) of the Statute, for the acts of sexual slavery committed by the troops under his command in Port Loko District.

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[573] **Trial Chamber's Judgement**, paras 1973-1976.
[574] See paragraph 98.
[575] **Trial Chamber's Judgement**, para. 1045.
[576] TF1-334, Transcript, 15 June 2005, pp. 49-56.

G. The effect of the Prosecution's other Grounds of Appeal on the individual responsibility of Kamara for the Port Loko crimes

330. In certain of its other Grounds of Appeal in this appeal, the Prosecution submits that the Trial Chamber erred in not finding that certain other crimes were committed by AFRC troops in Port Loko District.[577]

331. To the extent that the Appeals Chamber allows these other Grounds of Appeal, and finds that other crimes were committed by AFRC forces under the command of Kamara in Port Loko District (or rules that the matter must be remitted to the Trial Chamber for further findings of fact in this respect), the question will remain of Kamara's individual responsibility for those additional crimes in Port Loko.

332. The Prosecution submits that if, following the decision of the Appeals Chamber on the Prosecution's other Grounds of Appeal, it is found that any additional crimes were committed by AFRC troops under the command of Kamara in Port Loko District, Kamara is necessarily individually responsible for those crimes under both Article 6(1) and Article 6(3) of the Statute, for the reasons given in paragraphs 257-305 above.

333. The Prosecution therefore requests the Appeals Chamber to find that, to the extent that the decision on any of the Prosecution's other Grounds of Appeal leads to findings that additional crimes were committed by AFRC forces under the command of Kamara in Port Loko District, Kamara is individually responsible, under both Article 6(1) and Article 6(3) of the Statute, for those crimes.

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[577] See in particular paras. 235-236.

H. The errors in the Trial Chamber's evaluation of the individual responsibility of Kamara for Counts 1 and 2 in respect of the Port Loko crimes

334. The Trial Chamber's findings on whether the elements of Counts 1 and 2 were satisfied in Port Loko District (leaving aside the question of the individual responsibility of the three Accused) are contained in paragraphs 1613-1632 of the Trial Chamber's Judgement. The Trial Chamber was not satisfied that the elements of these crimes were established in Port Loko Distict. Kamara was therefore found not to be individually responsible on Counts 1 and 2 in respect of the crimes committed in Port Loko District.[578]

335. In this Third Ground of Appeal, the Prosecution also appeals against this finding, and maintains that Kamara should have been found individually responsible, under Article 6(1) and Article 6(3) of the Statute, on Count 1 (terrorising the civilian population) and Count 2 (collective punishments) of the Indictment, in respect of the crimes committed in Port Loko District.

336. In determining whether the elements of Counts 1 and 2 were satisfied in Port Loko District, the Trial Chamber considered only four incidents, namely the attacks on the way to and from Gberi Bana,[579] the attack on Manaarma,[580] and the attack on Nonkoba.[581]

337. As to the attack on Nonkoba, the Trial Chamber found that this was not attributable to troops under the command of Kamara, and the Prosecution does not appeal against this specific finding.[582]

338. As to the attack on Manaarma, the Trial Chamber found Kamara to be individually responsible under Article 6(3) for the unlawful killings in Manaarma (as to which, see paragraphs 287 above). The Manaarma attack was in fact

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[578] See **Trial Chamber's Judgement**, especially para. 1951 (indicating that Counts 1 and 2 are not amongst those for which the individual responsibility of Kamara is considered in relation to Port Loko District).
[579] **Trial Chamber's Judgement**, paras 1615-1627.
[580] **Trial Chamber's Judgement**, para. 1628.
[581] **Trial Chamber's Judgement**, para. 1629.
[582] See paragraph 250 above.

committed during one of the operations of the AFRC forces under the command of Kamara from its base in Gberi Bana.

339. As to the other attacks committed by the AFRC forces under the command of Kamara to and from Gberi Bana (apart from Manaarma), the Trial Chamber found these attacks to be established on the evidence, but made no findings on Kamara's individual responsibility for these attacks, a matter which is one of the subjects of the Prosecution's Second Ground of Appeal.[583]

340. In relation to these other attacks to and from Gberi Bana, the Trial Chamber expressly found that as they moved from Freetown to the base that they established in Gberi Bana in Port Loko District, "the AFRC troops, under the overall command of ... Kamara, conducted a series of attacks on the proximate villages".[584]

341. The evidence of these attacks that the Trial Chamber considered was the testimony of witness TF1-334, whose evidence the Trial Chamber expressly accepted,[585] and the testimony of George Johnson, who the Trial Chamber generally found to be a credible witness,[586] and whose testimony was found to generally corroborate that of TF1-334.[587] The Trial Chamber found that this evidence was also generally corroborated by the testimony TF1-023,[588] whose evidence the Trial Chamber clearly accepted elsewhere in its Judgement,[589] and the testimony of the Defence witness DBK-129, on whose evidence the Trial Chamber also relied in other parts of the Judgement.[590] It is clear that the Trial Chamber accepted the account that these witnesses gave of the attacks committed by the AFRC forces under the command of Kamara.

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[583] See paragraphs 235-236 above.
[584] **Trial Chamber's Judgement**, para. 1616.
[585] **Trial Chamber's Judgement**, paras 281, 358-359, 1617, 1705. In numerous parts of the Trial Chamber's Judgement, the Trial Chamber relies on the evidence of this witness. For a few examples, see **Trial Chamber's Judgement**, paras 843, 859, 882, 867, 901, 1043, 1102, 1152, 1206, 1228 and 1288.
[586] **Trial Chamber's Judgement**, para. 370.
[587] **Trial Chamber's Judgement**, para. 1618.
[588] **Trial Chamber's Judgement**, para. 1619.
[589] See, in particular, **Trial Chamber's Judgement**, paras 1377-1378.
[590] See, in particular, **Trial Chamber's Judgement**, paras 843, 954.

342. These attacks included attacks on Mamamah (or Mammah),[591] Mile 38,[592] Gberi Bana itself,[593] and Makolo,[594] in each of which civilians were killed.

343. The Trial Chamber found at paragraph 1630 of the Trial Chamber's Judgement that the only acts of violence that were established beyond a reasonable doubt and which were "particularised in the Indictment" were the incidents in Manaarma, Nonkoba and Tendekum. As the latter two incidents were not found to be attributable to troops under the command of Kamara, the only incident ultimately taken into account by the Trial Chamber in determining whether the elements of Counts 1 and 2 were established in Port Loko was the Manaarma incident. It appears therefore that the other attacks to and from Gberi Bana were excluded from consideration on the ground that they had not been particularised in the Indictment.[595] This finding is part of the subject of the Prosecution's Second Ground of Appeal.

344. The Trial Chamber gives no clear reasons why it reached the conclusion that it was not satisfied that the acts of violence in Manaarma were committed with the primary purpose of spreading terror amongst the civilian population or inflicting collective punishments,[596] other than to note that "spreading terror was not the only purpose and in fact, may not have been the primary purpose of the attacks ordered by the Accused Brima or others"[597] and that there was insufficient evidence linking these acts of violence "with the attacks ordered by the Accused Brima".[598] The Prosecution presumes that the references in these quotes to "the Accused Brima" are typographical errors, and are intended to refer to "the Accused Kamara", given that the Trial Chamber found that these troops were under the overall control of Kamara and that Brima was not in Port Loko at the time.

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[591] **Trial Chamber's Judgement**, paras 1617-1620.
[592] **Trial Chamber's Judgement**, para. 1619.
[593] **Trial Chamber's Judgement**, para. 1621.
[594] **Trial Chamber's Judgement**, para. 1626.
[595] Compare **Trial Chamber's Judgement**, para. 1954.
[596] **Trial Chamber's Judgement**, paras 1631-1632.
[597] **Trial Chamber's Judgement**, para. 1630.
[598] *Ibid.*

345. The Prosecution submits that on the findings of the Trial Chamber, and/or the evidence accepted by the Trial Chamber in making those findings, no reasonable trier of fact could conclude that there was insufficient evidence linking the attacks on civilians in Port Loko District by forces under the command of Kamara with the orders given by Kamara. As elaborated in paragraphs 276 above, Kamara gave numerous orders specifically calling for killings and acts of violence against civilians in Port Loko District, and congratulated his troops on a job well done when the attacks against civilians were reported back to him. For the reasons given above, the only reasonable conclusion that could be reached by any reasonable trier of fact is that the orders given by Kamara ordered or instigated, or at least aided and abetted, the commission of these crimes.

346. The Prosecution further submits that on the findings of the Trial Chamber, and/or the evidence accepted by the Trial Chamber in making those findings, no reasonable trier of fact could conclude that spreading terror may not have been a primary purpose of the attacks against civilians ordered by Kamara. The attacks against civilians in Port Loko District by troops under the command of Kamara were part of the widespread and systematic attack against the civilian population of Sierra Leone (see paragraph 270 above), and for the reasons given in paragraph 270 above, were committed in a planned and systematic way. They followed a *modus operandi* similar to the attacks against civilians during the Bombali-Freetown Campaign, in which Kamara and the troops under his command had previously participated. For instance, in Manaarma, the opening of the stomach of a pregnant woman[599] who was killed was reminiscent of the same atrocity that was committed during the Bombali-Freetown Campaign.[600] As in the case of the attacks against civilians during the Bombali-Freetown Campaign, no military purpose was served by these attacks against civilians. The evidence before the Trial Chamber, which the Trial Chamber accepted, was that the express purpose of the attack against civilians in Mamamah was to make the area "fearful".[601]

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[599] **Trial Chamber's Judgement**, para. 1628 (referring to the evidence of TF1-253, which from the context the Trial Chamber clearly accepted).
[600] **Trial Chamber's Judgement**, paras 1555, 1570.
[601] **Trial Chamber's Judgement**, paras 1618, 1620.

347. The Prosecution further submits that on the findings of the Trial Chamber, and/or the evidence accepted by the Trial Chamber in making those findings, no reasonable trier of fact could conclude that inflicting collective punishments may not have been a primary purpose of the attacks against civilians ordered by Kamara. Again, these attacks followed a *modus operandi* similar to the attacks against civilians during the Bombali-Freetown Campaign, in which Kamara and the troops under his command had previously participated, and a primary purpose of which was found by the Trial Chamber to be to collectively punish protected persons for allegedly supporting the Kabbah government, ECOMOG, or other factions aligned to the Kabbah government, or for failing to support the AFRC/RUF.[602] Furthermore, Kamara was actually found to have given in particular, an order that those areas where Ecomog was based should be attacked, burnt down and that any civilian captured should be executed.[603] The only reasonable inference that can be drawn from all of the findings of the Trial Chamber and/or the evidence that it accepted is that the attacks against civilians in Port Loko by troops under the command of Kamara were committed for the same purpose.

I Conclusion

348. For the reasons given above, the Prosecution requests the Trial Chamber to reverse the Trial Chamber's finding in paragraph 1955a of the Trial Chamber's Judgement, and to revise the Trial Chamber's Judgement by adding a finding that Kamara is individually responsible, under both Article 6(1) and Article 6(3) of the Statute, for all of the crimes committed by AFRC troops under his command in Port Loko District, namely:

(i) the attack on Manaarma, in respect of which Kamara was found individually responsible under Article 6(3) of the Statute only;

(ii) sexual slavery in Port Loko District;

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[602] **Trial Chamber's Judgement**, paras 1573, 1611-1612.
[603] **Trial Chamber's Judgement**, para. 1662

(iii) all of the crimes committed in Port Loko District by AFRC troops under the command of Kamara that are encompassed within the Prosecution's other Grounds of Appeal, to the extent that the other Grounds of Appeal are upheld; and

(vi) based on (i) to (iii) above, acts of terror (Count 1) and collective punishments (Count 2) in Port Loko District.

349. The Prosecution also requests the Appeals Chamber to make any resulting amendments to the Disposition of the Trial Chamber's Judgement, and to increase the sentence imposed on Kamara to reflect the additional criminal liability.

V. Prosecution's Fourth Ground of Appeal: The Trial Chamber's decision not to consider joint criminal enterprise liability

A. Introduction

350. The Indictment in this case alleged that the crimes charged, *inter alia*, "were within a joint criminal enterprise in which each Accused participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which each Accused participated".[604] The entire proceedings in this case were conducted on the basis that joint criminal enterprise liability was one of the modes of liability on which it was alleged that each of the Accused was individually responsible under Article 6(1) of the Statute for all of the crimes charged in the Indictment.[605]

351. Joint criminal enterprise liability is a form of liability which existed in customary international law at all times material to the Indictment, and is a form of "commission" under Article 6(1) of the Statute of the Special Court.[606] The case law of international criminal tribunals recognises three forms of joint criminal enterprise liability.[607]

352. In its Rule 98 Decision, the Trial Chamber held that it was satisfied that a reasonable tribunal of fact could, on the basis of the evidence before it, if believed, find beyond reasonable doubt that each of the three Accused and other persons identified in the Indictment participated in a joint criminal enterprise to commit the crimes charged in the Indictment,[608] and that the evidence, if believed, was capable of establishing all three categories of joint criminal enterprise.[609]

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[604] **Indictment**, para. 35.
[605] See paragraphs 409 below.
[606] See **Rule 98 Decision**, para. 308, referring to ***Tadić* Appeal Judgement**, para. 188 and 226; ***Vasiljević* Appeal Judgement**, paras 95-99; and ***Ojdanić* JCE Appeal Decision**, para. 20.
[607] ***Tadić* Appeal Judgement**, paras 196-204; ***Kvočka* Appeal Judgement**, para. 83; ***Vasiljević* Appeal Judgement**, paras 96-99, ***Stakić* Appeal Judgement**, para. 64; **Rule 98 Decision**, paras 322-323; **Trial Chamber's Judgement**, paras 61-63.
[608] **Rule 98 Decision**, para. 325.
[609] **Rule 98 Decision**, para. 326.

353. However, ultimately, in its final Judgement in the case (at paragraph 85 of the Trial Chamber's Judgement), the Trial Chamber found that the Indictment had been defectively pleaded with respect to joint criminal enterprise as a mode of liability, and the Trial Chamber determined that it would therefore not consider joint criminal enterprise liability as a mode of criminal responsibility in this case.[610]

354. As a result of this decision, in respect of all of the crimes for which the Trial Chamber found each Accused not to be individually responsible under Article 6(1) of the Statute, the Trial Chamber so found without giving any consideration to the criminal responsibility of the Accused by virtue of joint criminal enterprise liability.

355. In this Fourth Ground of Appeal, the Prosecution contends that the Trial Chamber erred in deciding that joint criminal enterprise liability was defectively pleaded in the Indictment, and erred in deciding not to consider joint criminal enterprise liability in its Judgement. The errors are specified in paragraph 12 of the Prosecution's Notice of Appeal, and are dealt with in order below.

B. First error of the Trial Chamber: reconsidering earlier interlocutory decisions in the case, without first reopening the hearings

356. The Trial Chamber found (correctly it is submitted) that "Preliminary motions pursuant to Rule 72(B)(ii) are the primary instrument through which alleged defects in an indictment should be raised, and the Defence should be limited in raising such objections at a later stage for tactical advantage".[611]

357. In this case, two of the Accused, Kamara and Kanu brought preliminary motions alleging defects in the form of the Indictment, which were rejected by Trial Chamber I, save for one or two defects that were subsequently cured.[612]

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[610] See also **Trial Chamber's Judgement**, paras 1639 and 1668.
[611] **Trial Chamber's Judgement**, para. 24 (footnotes omitted).
[612] ***Kanu* Preliminary Motion Decision**; ***Kamara* Preliminary Motion Decision**.

358. Brima also filed a preliminary motion alleging defects in the form of the indictment, which was however rejected by the Trial Chamber on the ground that it had been filed out of time.[613] A renewed motion by Brima seeking an extension of time for filing such a preliminary motion was then also subsequently rejected by the Trial Chamber.[614] If the Brima motion on defects in the form of the Indictment was rejected at that stage for being out of time, it was certainly too late for such arguments to be entertained at the stage of final trial arguments.[615]

359. The preliminary motions filed by all three Accused (including the preliminary motion filed by Brima which the Trial Chamber refused to consider) expressly argued that joint criminal enterprise liability was defectively pleaded.[616] In the Trial Chamber's decisions on the preliminary motions filed by Kamara and Kanu, the Trial Chamber expressly found that joint criminal enterprise liability had ***not*** been defectively pleaded.[617]

360. Thus, in respect of all three Accused, the issue of alleged defects in the way in which joint criminal enterprise had been pleaded had been settled by the Trial Chamber at the pre-trial stage. The Prosecution was therefore entitled to proceed on the basis that there was no longer any such issue in this case.

361. At the Rule 98 stage, the Defence submissions on joint criminal enterprise liability argued that the evidence presented by the Prosecution did not meet the Rule 98 standard in relation to joint criminal enterprise liability.[618] The Defence also made a general submission that the Indictment pleaded only the third category of joint criminal enterprise liability and not the first.[619] However, at the Rule 98 stage the Defence did not suggest that joint criminal enterprise in general had been defectively pleaded. In particular, the Defence did not state how it had been prejudiced by the manner of its pleading, and certainly did not apply to

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[613] ***Brima* Preliminary Motion Decision**.
[614] **Decision on Renewed Brima Preliminary Motion**, paras 5-9.
[615] Transcript, 7 December 2006, pp. 58-59.
[616] **Kanu Preliminary Motion, paras 4-9**; ***Kamara* Preliminary Motion paras 8-9**.
[617] ***Kamara* Preliminary Motion Decision**, paras 51-53; ***Kanu* Preliminary Motion Decision paras 7-16** .
[618] ***Brima* Rule 98 Motion**, paras 13 88, 89 and 91; ***Kamara* Rule 98 Motion**, para. 50; ***Kanu* Rule 98 Motion**, para. 7.3 (ii) 5; **Defence Joint Legal Rule 98 Submission**, paras 29-34.
[619] **Defence Joint Legal Rule 98 Submission**, paras 29, 31.

reopen the earlier interlocutory decisions of the Trial Chamber on the form of the Indictment.

362. In its Rule 98 Decision, the Trial Chamber held (correctly, it is submitted) that:

> ... whether the Indictment has been sufficiently pleaded or is defective in form is not a matter which falls within the scope of Rule 98. A challenge to the form of the Indictment should have been raised in a preliminary motion under Rule 72. We will not make any findings on the issue in the present decision. Regarding the Joint Defence submission that the Indictment does not make it clear which form of joint criminal enterprise is alleged, we can only observe that the procedure under Rule 72 is designed to enable an accused to obtain further information in order to fully understand the nature of the charges brought against him.[620]

363. The Trial Chamber thereby gave no notice to the Prosecution that it was minded to reconsider any issue in this case of alleged defective pleading of joint criminal enterprise liability.

364. In their final trial briefs, the Defence argued that joint criminal enterprise liability had not been proved on the evidence,[621] and also that joint criminal enterprise liability had been defectively pleaded in the Indictment.[622] In the oral closing submissions, the Defence for Brima and Kamara did not refer to alleged defects in the Indictment apart from referring to their final trial briefs, and the Defence for Kanu made some additional brief submissions on the issue.[623]

365. In the Trial Chamber's Judgement, the Trial Chamber held that "Preliminary motions pursuant to Rule 72(B)(ii) are the primary instrument through which alleged defects in an indictment should be raised, and the Defence should be limited in raising such objections at a later stage for tactical advantage".[624] However, the Trial Chamber went on to hold that it is not precluded from reviewing in a final trial judgement whether shortcomings in the form of the indictment have actually resulted in prejudice to the rights of the Accused, and

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[620] **Rule 98 Decision**, para. 323.

[621] ***Brima* Final Trial Brief**, paras 52-62; ***Kamara* Final Trial Brief**, paras 41-57; ***Kanu* Final Trial Brief**, paras 280-364.

[622] ***Brima* Final Trial Brief**, paras 126, 128, 129, 134, 140; ***Kamara* Final Trial Brief**, paras 37, 39, 40, 41, 45-49; ***Kanu* Final Trial Brief**, paras 285, 291, 295-297.

[623] Transcript, 8 December 2006, pp. 5-6, 30-31.

[624] **Trial Chamber's Judgement**, para. 24 (footnotes omitted).

that it can reconsider an earlier interlocutory decision on alleged defects in the form of the indictment if either (1) a clear error of reasoning has been demonstrated, or (2) it is necessary to do so to prevent an injustice.[625]

366. The Trial Chamber referred to a number of authorities in support of this proposition. One of these authorities expressly cited by the Trial Chamber[626] was the decision of the ICTR Appeals Chamber in the *Cyangugu* case.[627] However, what the ICTR Appeals Chamber said in the cited paragraph of that judgement was as follows.

> It is apparent from the foregoing that the Trial Chamber reconsidered in the Trial Judgement some of the findings it had made in certain pre-trial decisions on the form of the Indictments. This does not in itself constitute an error, as it is within the discretion of a Trial Chamber to reconsider a decision it has previously made if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. *However, the Appeals Chamber emphasises that "where such a decision is changed, there will be a need in every case for the Trial Chamber to consider with great care and to deal with the consequences of the change upon the proceedings which have in the meantime been conducted in accordance with the original decision". In the present case, the Appeals Chamber considers that, once the Trial Chamber decided to reconsider its pre-trial decisions relating to the specificity of the Indictments at the stage of deliberations, it should have interrupted the deliberation process and reopened the hearings.* At such an advanced stage of the proceedings, after all the evidence had been heard and the parties had made their final submissions, the Prosecution could not move to amend the Indictment. On the other hand, reopening the hearings would have allowed the Prosecution to try to convince the Trial Chamber of the correctness of its initial pre-trial decisions on the form of the Indictment, or to argue that any defects had since been remedied. The Appeals Chamber finds that the Trial Chamber erred in remaining silent on its decision to find the abovementioned parts of the Indictments defective until the rendering of the Trial Judgement.[628]

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[625] **Trial Chamber's Judgement**, para. 24.
[626] **Trial Chamber's Judgement**, para. 24 (footnote 41).
[627] ***Cyangugu* Appeal Judgement**, para. 55.
[628] *Ibid.* (emphasis added).

367. In the present case, as in the *Cyangugu* case, the Trial Chamber's decision *to reopen the earlier interlocutory decisions* on defects in the form of the Indictment was taken only after the final trial arguments and after the close of the case. It is true that the Defence did raise alleged defects in the Indictment in their final trial submissions. However, the Defence never formally applied for leave to reopen the earlier interlocutory decisions on defects in the form of the Indictment, and no such leave was ever granted by the Trial Chamber.

368. The Prosecution submits that if in exceptional circumstances there are good reasons for the Defence to raise an issue of defects in the form of the Indictment after trial commences (for instance, if during the course of the trial itself, a defect became apparent that was not apparent before), there is an obligation on the Defence to raise that issue at the earliest opportunity, to allow the defect to be remedied as efficiently as possible if a defect is found to exist. The Prosecution submits that it is not tenable to allow a trial to proceed to the very end on an indictment, and for the Defence then to be permitted at the stage of final trial arguments to raise an allegation of defects in the form of the indictment.[629] If it thought that there was justification for doing so, the Defence should have applied for leave to reopen the earlier interlocutory decisions at the earliest opportunity. In this case, the Defence did not do so at any time during the course of the Prosecution case, or even at any time during the course of the Defence case, after the Trial Chamber had reaffirmed in the Rule 98 Decision that it was not entertaining arguments as to defects in the form of the Indictment.[630]

369. Even at the final trial stage, the Defence did not apply for leave to reopen the earlier interlocutory decisions, and was not granted such leave by the Trial Chamber. It simply presented arguments that the Indictment had been defectively pleaded in its final trial submissions. It is submitted that the Prosecution was not

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[629] See ***Brđanin* Trial Judgement**, para. 48; and Prosecution's closing submissions, Transcript, 7 December 2006, pp. 57-58. See also **Dissenting Opinion of Justice Doherty**, para. 10: "Whilst I do have no doubt of the fundamental nature of the accused's right to be informed of the nature and cause of the charge against him, the defence is under a corresponding duty to raise the issue prior to the commencement of trial or at the earliest opportunity thereafter. I do not consider it to be in the interests of justice to allow the accused to invoke this right to quash an indictment after the case has closed, without showing that he was materially prejudiced."

[630] See paragraph 362 above.

required, merely because the Defence raised such an issue in its final trial arguments, to assume that the earlier interlocutory decisions on defects in the form of the Indictment were now reopened, and had to be reargued by the Prosecution substantively on the merits. At no time prior to the close of trial did the Trial Chamber give any indication that it was prepared to consider the merits of the Defence claim that joint criminal enterprise was defectively pleaded. Accordingly, the Prosecution was entitled to assume that the Trial Chamber had not reopened the earlier interlocutory decisions on defects in the form of the Indictment, and therefore dealt only in a cursory fashion with this Defence argument in its oral closing arguments.[631] The first time that the Prosecution became aware that the Trial Chamber was indeed reopening the earlier interlocutory decisions was when the Trial Chamber's Judgement was given.

370. The Prosecution submits that if the Trial Chamber was minded to reopen the earlier interlocutory decisions, it was required to give clear notice to that effect to the Prosecution, and to allow the Prosecution adequate opportunity to deal fully with substance of the Defence arguments on defects in the Indictment. In this case, the Prosecution was given no such notice, nor was it given adequate opportunity to put its arguments on this issue fully.[632] At the stage of final oral submissions, the only question posed by the Trial Chamber to the Prosecution relating to joint criminal enterprise liability was by way of clarification of whether the Prosecution relied on the second category of joint criminal enterprise, as well as the first and third (and the Prosecution confirmed that it did).[633] The Prosecution submits that the Trial Chamber therefore acted contrary to the requirements set out by the ICTR Appeals Chamber in the *Cyangugu* case quoted

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[631] Transcript, 7 December 2006, p. 60

[632] The Prosecution was unable to respond in writing to the arguments in the Defence final trial briefs on this issue, since by then the Prosecution had already filed its own final trial brief. The Prosecution could only address these arguments in its oral closing submissions. The Prosecution's closing oral submissions were less than one hour and thirty minutes long, and in this time the Prosecution was required to address all arguments in the Defence final trial briefs, which totalled some 444 pages. The Prosecution dealt with the Defence argument on alleged defective pleading of joint criminal enterprise in about one minute: see Transcript 7 December 2006, p. 60 In the circumstances, the Prosecution submits that it was an error of law or a procedural error for the Trial Chamber to decide that "the Trial Chamber does not believe that a reopening of the case is necessary, as the Prosecution did make submissions in response on this objection in their Final Trial Brief and closing arguments" (**Trial Chamber's Judgement**, para.84).

[633] Transcript, 7 December 2006, pp. 83-84.

above. The Prosecution also submits that the Trial Chamber acted contrary to the holding of the ICTY Appeals Chamber in the *Jelisić* case, to the effect that where the Trial Chamber decides an issue *proprio motu*, whether or not invited to do so by a party, the Trial Chamber remains always under the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made.[634]

371. For this reason alone, the Prosecution submits that the decision of the Trial Chamber not to consider joint criminal enterprise liability should be reversed.

C. Second error of the Trial Chamber: The finding that joint criminal enterprise liability was defectively pleaded

(i). The pleading of the categories of joint criminal enterprise relied upon

372. The case law of international criminal tribunals indicates that for the Prosecution to rely on joint criminal enterprise liability, it must be specifically pleaded in the Indictment (unless that omission has subsequently been cured by timely, clear and consistent information by the Prosecution).[635] In this case, joint criminal enterprise liability was clearly expressly pleaded.[636]

373. The case law of international criminal tribunals further indicates that for the Prosecution to rely on the third category of joint criminal enterprise liability (that is, the "extended" form), this must also be specifically pleaded in the Indictment (again unless that omission has subsequently been cured by timely, clear and consistent information by the Prosecution).[637] However, where the first and second categories of joint criminal enterprise liability are relied upon, it is sufficient for the Indictment to plead in general terms that joint criminal

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[634] ***Jelisić* Appeal Judgement**, para. 27.
[635] See, for instance, ***Gacumbitsi* Appeal Judgement**, para. 163; ***Kvočka* Appeal Judgement**.
[636] **Indictment**, paras 33-34.
[637] ***Mrkšić* Indictment Decision**, para. 34, citing ***Krnojelac* Appeal Judgement**, paras 132-138, ***Kupreškić* Appeal Judgement**, para. 114.

enterprise liability is alleged. The first and second categories are both variants of what is referred to as the "basic" form of joint criminal enterprise liability.[638] The first and second categories do not need to be referred to specifically, since both are encompassed within a pleading of a "basic" form of joint criminal enterprise liability.[639]

374. In the present case, the Indictment clearly pleaded both the "basic" and the "extended" forms of joint criminal enterprise liability. Paragraph 34 of the Indictment stated that "The crimes alleged in this Indictment ... were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise". In both the Rule 98 Decision,[640] and in the Trial Chamber's Judgement, [641] the Trial Chamber acknowledged that the Indictment alleged both the basic and the extended forms of joint criminal enterprise liability.

375. However, the Trial Chamber found this pleading defective on the ground that:

> The Prosecution has alleged those two forms disjunctively, thereby impeding the Defence ability to know the material facts of the JCE against them, as it appears that the two forms as pleaded logically exclude themselves. If the charged crimes are allegedly within the common purpose, they can logically no longer be a reasonably foreseeable consequence of the same purpose and *vice versa*.[642]

376. The Prosecution submits that the Trial Chamber erred in so holding. The case law of international criminal tribunals establishes that it is permissible for an indictment to plead both the basic and extended forms of joint criminal enterprise in the alternative, based on the same facts.[643]

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[638] See Prosecution final oral arguments, Transcript, 7 December 2006, pp. 73-74; ***Ntakirutimana* Appeal Judgement**, para. 464-465; ***Vasiljević* Appeal Judgement**, para. 98, and ***Krnojelac* Appeal Judgement**, para. 89.

[639] ***Krnojelac* Appeal Judgement**, para. 89.

[640] **Rule 98 Decision**, paras 321-322.

[641] **Trial Chamber's Judgement**, para. 71.

[642] **Trial Chamber's Judgement**, para. 71.

[643] ***Krnojelac* Appeal Judgement**, para. 138; ***Mrkšić* Indictment Decision** para. 56; ***Brđjanin and Talić* Further Form of Indictment Decision**, para. 40.

(ii). The pleading of the necessary supporting facts

(a) Introduction

377. At paragraphs 60 to 65 of the Trial Chamber's Judgement, the Trial Chamber set out its findings of law on the pleading requirements for joint criminal enterprise liability. Relying on a decision of an ICTY Trial Chamber, the Trial Chamber found that four categories of supporting facts must be present in an indictment charging an accused with joint criminal enterprise liability, namely (1) the nature or purpose of the joint criminal enterprise, (2) the time at which or the period over which the enterprise is said to have existed, (3) the identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category as a group, and (4) the nature of the participation by the accused in that enterprise.[644] While there is case law to this effect,[645] there is other case law, including at the appellate level, indicating that it is only the first, third and fourth of these categories of facts that need to be pleaded.[646]

378. Provided that the required matters are pleaded in the Indictment, it is immaterial what language is used to plead them. "The question is not whether particular words have been used, but whether an accused has been meaningfully 'informed of the nature of the charges' so as to be able to prepare an effective Defence."[647]

379. Furthermore, in determining whether the allegations of joint criminal enterprise liability have been adequately pleaded, it is necessary to consider the wording of

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[644] **Trial Chamber's Judgement**, para. 64, referring to ***Krnojelac* Trial Judgement**, para. 77.

[645] ***Krnojelac* Second Indictment Decision**, para. 16; ***Meakić – Predrag* Decision**; ***Cermak and Markac* Form of Indictment Decision**, para. 9; ***Brđanin and Talić* Form Decision**, para. 21.

[646] ***Kvočka* Appeal Judgement**, para. 28; ***Gacumbitsi* Appeal Judgement**, paras 162-163 (indicating that "The Appeals Chamber adopts the holding and rationale of the ICTY Appeals Chamber in *Kvočka* "); ***Krajisnik and Plavšic Indictment* Decision**, para. 13; ***Stanisić and Simatović* Decision**, para. 16; ***Meakić -Zeljko* Decision**, para. 7; ***Meakić –Dusko* Decision**, para. 24; ***Martić* Preliminary Motion Decision**, para. 9.

[647] ***Gacumbitsi* Appeal Judgement**, para. 165, ***Ntakirutimana* Appeal Judgement**, para. 470; ***Blaškić* Appeal Judgement** para 209, ***Kupreškić* Appeal Judgement**, para. 88; ***Furundžija* Appeal Judgement**, para. 147; ***Krnojelac Preliminary Motion* Decision**, paras 7, 12; ***Krnojelac* Form of Amended Indictment Decision** 11 February 2000, paras 17, 18; ***Brđanin and Talić* Form of Indictment Decision**, para. 18. This view was subsequently adopted by the Appeals Chamber in the ***Krnojelac* Appeal Judgement**, para. 131.

the Indictment as a whole, rather than to consider whether the allegations have been adequately pleaded in one or more specific paragraphs.[648]

(b) The nature or purpose of the joint criminal enterprise

380. The Trial Chamber's fundamental concern with the way in which joint criminal enterprise liability had been pleaded related to this requirement.

381. The Trial Chamber found that "Even though the contribution to a joint criminal enterprise need not be criminal in nature, *the purpose has to be inherently criminal* and the perpetrators, including the accused, must have a common state of mind, namely the state of mind that the *statutory crime(s)* forming part of the objective should be carried out".[649] The Trial Chamber was not satisfied that the purpose of the joint criminal enterprise as pleaded in the Indictment was inherently criminal,[650] or that it involved the commission of crimes from its inception.[651] The Trial Chamber considered that the common purpose pleaded in the Indictment was "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone".[652] The Trial Chamber found that "Gaining and exercising political power is ... not inherently a criminal activity",[653] and that "There is no rule against rebellion in international law".[654] The Trial Chamber added that even if the commission of serious violations of international humanitarian law by certain members of armed forces or groups during an armed conflict are a foreseeable consequence of such an engagement in conflict, this does make the act of engagement of armed conflict in itself an international crime.[655]

382. The Trial Chamber contrasted the way in which joint criminal enterprise liability had been pleaded in the Indictment in this case with the way in which it was

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[648] ***Krnojelac* Preliminary Motion Decision**, para 7, ***Sesay* Preliminary Motion Decision**, paras 7(vi) and 16.
[649] **Trial Chamber's Judgement**, para. 73 (emphasis added, footnotes omitted).
[650] **Trial Chamber's Judgement**, paras 68-70, 72-73, 77.
[651] **Trial Chamber's Judgement**, paras 71, 74, 76.
[652] **Trial Chamber's Judgement**, para. 67 (quoting para. 33 of the Indictment), and para. 76.
[653] **Trial Chamber's Judgement**, para. 70.
[654] *Ibid.*
[655] **Trial Chamber's Judgement**, para. 73.

pleaded in certain indictments in cases before the ICTY.[656] Other examples of pleadings of joint criminal enterprise liability in indictments in cases before the ICTY include the following:

> The purpose of this joint criminal enterprise was the forcible removal of a majority of the Croat, Muslim and other non-Serb population from approximately one-third of the territory of the Republic of Croatia ("Croatia"), and large parts of the Republic of Bosnia and Herzegovina ("Bosnia and Herzegovina"), in order to make them part of a new Serb-dominated state through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal [=Articles 2 and 3 of the Special Court Statute].[657] (This wording is referred to below as the "***Martić* Indictment**".)

> The common criminal purpose of the JCE was to consolidate the total control of the KLA [Kosovo Liberation Army] over the Dukagjin operational zone by the unlawful removal and mistreatment of Serb civilians and by the mistreatment of Kosovar Albanian and Kosovar Roma/Egyptian civilians, who were, or were perceived to have been, collaborators with the Serbian Forces or otherwise not supporting the KLA. The common criminal purpose involved the commission of crimes against humanity under Article 5 [= Article 2 of the Special Court Statute] and violations of the laws or customs of war under Article 3 [= Article 2 of the Special Court Statute], including murder, persecution, inhumane acts, cruel treatment, unlawful detention, and torture.[658] (This wording is referred to below as the "***Haradinaj* Indictment**".)

383. Challenges to the form of the indictment in both the *Martić* and *Haradinaj* cases were rejected by the Trial Chamber.[659]

384. The indictments in both of these ICTY cases indicated the ***ultimate objective*** of the joint criminal enterprise. In the *Martić* Indictment, the ultimate objective was "to make [parts of Croatia and Bosnia and Herzegovina] part of a new Serb-

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[656] **Trial Chamber's Judgement**, para. 68.

[657] ***Martić* Second Amended Indictment**, para. 4. See also for instance, ***Seselj* Modified Indictment**, para. 6, which is similarly worded.

[658] ***Haradinaj* Second Amended Indictment**, para. 26.

[659] In the *Martić* case, the Trial Chamber expressly held that joint criminal enterprise liability had been validly pleaded: see ***Martić* Preliminary Motion Decision**, para. 9. In the *Haradinaj* case, it does not appear that the Defence expressly challenged the way in which joint criminal enterprise had been pleaded, but to the extent that the defence did challenge the form of the indictment, the challenge was rejected: see ***Haradinaj* Indictment Decision.**

dominated state". In the *Haradinaj* Indictment, the ultimate objective was "to consolidate the total control of the KLA [Kosovo Liberation Army] over the Dukagjin operational zone". In neither of these cases was the ultimate objective of itself a crime within the Statute of the ICTY, or a serious violation of international humanitarian law under any other provision of customary international law.

385. However, the indictments in these two cases also indicated the ***means*** by which this ultimate objective was to be achieved. In the *Martić* Indictment, the means to be employed to achieve the objective was "the forcible removal of a majority of the Croat, Muslim and other non-Serb population from ... [the regions in question] through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal [=Articles 2 and 3 of the Special Court Statute]". In the *Haradinaj* Indictment, the means to be employed to achieve the objective was "the unlawful removal and mistreatment of Serb civilians and by the mistreatment of Kosovar Albanian and Kosovar Roma/Egyptian civilians, who were, or were perceived to have been, collaborators with the Serbian Forces or otherwise not supporting the KLA ... [involving] the commission of crimes against humanity under Article 5 [= Article 2 of the Special Court Statute] and violations of the laws or customs of war under Article 3 [= Article 2 of the Special Court Statute]".

386. In other words, the common purpose of the joint criminal enterprise pleaded in both cases was a common purpose to commit crimes within the Statute of the ICTY in order to achieve a particular objective. The Prosecution submits that it is clear that even where the ultimate aim or objective of a common enterprise is not in itself inherently criminal, it is nonetheless a joint criminal enterprise if the participants have a common purpose of committing particular types of crimes in order to achieve that objective.

387. The Prosecution submits that this is consistent with basic principles of criminal law, at both the national and international levels. It is also consistent with the general distinction that exists in the criminal law, at both the national and international levels, between *motive* and *intent*. Even if the motive of an accused in committing an act was to achieve a purpose that was not unlawful, the accused

will be guilty of a crime if the act satisfied the *actus reus* of a crime, and the accused had the *intent* to perform those acts.[660]

388. In the present case, the Indictment alleged that the ***ultimate objective*** of the joint criminal enterprise was "to gain and exercise political power and control over the territory of Sierra Leone".[661] As the Trial Chamber found, and as in the *Martić* and *Haradinaj* cases, that ultimate objective was not in itself inherently criminal under the Statute of the Special Court. However, the Trial Chamber erred in treating this statement of the *ultimate objective* of the joint criminal enterprise as the alleged common criminal purpose itself, and in finding that the Indictment therefore did not plead a joint criminal enterprise that was inherently criminal.

389. As in the *Martić* and *Haradinaj* cases, the Indictment in this case clearly alleged a joint criminal enterprise to commit crimes within the Statute of the Special Court, in order to achieve the stated objective. This is clear from the wording of the Indictment as a whole.[662]

390. Paragraph 33 of the Indictment alleged that the members of the joint criminal enterprise were the AFRC, including the three Accused in this case, and the RUF, including the three accused in the RUF case. It alleged further that they shared a common plan, purpose or design "to take any actions necessary" to achieve their ultimate objective. Paragraph 38 of the Indictment alleged that at all times material to the Indictment, members of the AFRC and RUF acting in concert with the Accused (in other words, the participants in the joint criminal enterprise) conducted armed attacks throughout the territory of the Republic of Sierra Leone, and that the targets of the armed attacks included civilians. Paragraph 39 of the Indictment alleged that:

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[660] ***Stakić*** **Appeal Judgement**, paras 44-45: "The Prosecution argues that the Trial Chamber improperly conflated the questions of motive and intent, concluding that because the Appellant's underlying motive (to establish a Serb municipality, which could be achieved by mere displacement of non-Serbs) was not necessarily genocidal, he must have lacked genocidal intent. ... The Prosecution is correct that the Tribunal's jurisprudence distinguishes between motive and intent; in genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt." See also *Jelisić* Appeal Judgement, paras 49, 71; *Kunarac* Appeal Judgement, para. 103; ***Kvočka*** **Appeal Judgement**, paras 105-106.

[661] **Indictment**, para. 33.

[662] Compare also ***Kvočka*** **Appeal Judgement**, para. 45. In this case, the Appeals Chamber found that the Defence had adequate notice of the alleged joint criminal enterprise, *even though it had not been pleaded in the indictment*, and said that according to the Prosecution, the common purpose of the accused was "to rid the Prijedor area of Muslims and Croats as part of an effort to create a unified Serbian State".

> These attacks were carried out primarily to terrorise the civilian population, but also were used to punish the population for failing to provide sufficient support to the AFRC/RUF, or for allegedly providing support to the Kabbah government or to pro-government forces. These attacks included unlawful killings, physical and sexual violence against civilian men, women and children, abductions and looting and destruction of civilian property.

Paragraph 40 of the Indictment referred expressly to the "campaign of terror and punishment" conducted by the AFRC/RUF. Paragraph 41 of the Indictment, which related to Counts 1 and 2 of the Indictment (terrorising the civilian population and collective punishments respectively) pleaded that all of the crimes alleged under the other Counts in the Indictment (Counts 3-14, alleging unlawful killings, sexual violence, physical violence, use of child soldiers, abductions and forced labour, and looting and burning) were committed by members of the AFRC/RUF "acting in concert with" the three Accused in this case "as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone" and "to punish the civilian population for allegedly supporting the elected government of President Ahmed Tejan Kabbah and factions aligned with that government, or for failing to provide sufficient support to the AFRC/RUF". Paragraph 34 of the Indictment alleged that the joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize their resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise.

391. The Prosecution submits that when the Indictment is read as a whole, it is clear that what it pleads is that the common plan, purpose or design was *to carry out a campaign of terrorising and collectively punishing the civilian population of Sierra Leone through the commission of crimes within the jurisdiction of the Special Court*, in order to achieve the ultimate objective of gaining and exercising political power and control over the territory of Sierra Leone. There is no basis for the suggestion, in paragraph 72 of the Trial Chamber's Judgement, that the Indictment in this case somehow "make[s] the act of engagement in armed

conflict in itself an international crime", or confuses *jus in bello* with *jus ad bellum*.

392. The Prosecution submits that the joint criminal enterprise as pleaded in the Indictment in this case is therefore analogous to the joint criminal enterprise as pleaded in the *Martić* and *Haradinaj* cases.

393. The Prosecution submits that the purpose of the joint criminal enterprise as pleaded was therefore inherently criminal. The joint criminal enterprise was pleaded with at least as much particularity as in the *Martić* and *Haradinaj* cases, and in the indictments in the other ICTY cases referred to in paragraph 68 of the Trial Chamber's Judgement. The fact that the wording of the pleading in the Indictment in this case was not identical to the wording in certain indictments in cases before the ICTY is immaterial.[663]

394. The Prosecution therefore submits that there is no defect in the way in which the nature or purpose of the joint criminal enterprise was pleaded.

395. At paragraph 75 of the Trial Chamber's Judgement, the Trial Chamber considered some of the evidence in the case. It concluded that there was little evidence of the motives of the AFRC and RUF in forming a coalition after the AFRC had staged the May 1997 coup against the Kabbah Government, and that both factions had officially declared at the time that they were joining forces to bring peace and stability to Sierra Leone. The Prosecution submits that the Trial Chamber erred in considering the evidence in the case when determining whether the nature or purpose of the joint criminal enterprise had been properly pleaded. The question whether an indictment is properly pleaded, and the question whether the allegations in the indictment are proved beyond a reasonable doubt, are two separate questions. The former question, which in almost all cases is decided at the pre-trial stage before any evidence has been presented, must be determined from the wording of the indictment alone. The latter question is determined by an evaluation of the evidence in the case. While defects in an indictment may in some cases be cured by subsequent clear, timely and consistent information from the Prosecution, the question of whether an indictment has been defectively

[663] See paragraph 382 above.

pleaded in the first place cannot be determined by a consideration of the evidence in the case. [664]

396. The Prosecution notes that in any event the Trial Chamber did find that from the time that the RUF joined the AFRC after the May 1997 coup, there was indeed a widespread and systematic attack against the civilian population[665] in which the AFRC/RUF "routinely directed attacks against civilians suspected of supporting Kamajors",[666] and that this systematic attack against the civilian population "was executed at the behest of the State, as AFRC/RUF government officials were routinely responsible for the commission of the crimes".[667] Therefore, although the evidence is not material to the question whether or not the Indictment has been properly pleaded, it may be noted that, contrary to what the Trial Chamber suggested in paragraph 75 of the Trial Chamber's Judgement, the evidence did not contradict what the Prosecution had pleaded.

(c) The time at which or the period over which the enterprise is said to have existed

397. As submitted in paragraph 377 above, there is case law, including at the appellate level, indicating that this is not one of the material facts that needs to be pleaded in an indictment in respect of an alleged joint criminal enterprise.

398. The Trial Chamber found that "The indictment fails to provide a specific time period over which the JCE is supposed to have existed".[668] The Trial Chamber considered that the words "at all times relevant to the Indictment", which appear in paragraph 32 of the Indictment, do not relate to the alleged joint criminal enterprise which is referred to in paragraph 33 of the Indictment.[669]

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[664] See, for instance ***Martinović* Objection to Indictment Decision,** p. 3 (noting that previous ICTY decisions "have also stressed that a 'motion on the form of the indictment is not an appropriate way of challenging the evidence' and that proof of the facts alleged in the indictment is a matter for trial").
[665] **Trial Chamber's Judgement**, paras 227-232, especially paras 231-232.
[666] **Trial Chamber's Judgement**, para. 227.
[667] **Trial Chamber's Judgement**, para. 230.
[668] **Trial Chamber's Judgement**, para. 77.
[669] *Ibid.*, footnote 126.

399. The Prosecution submits that the relevant time period of the joint criminal enterprise is clear from a reading of the Indictment as a whole. All of the crimes charged in the Indictment were alleged to have been actions within the joint criminal enterprise or to have been a reasonably foreseeable consequence of the joint criminal enterprise.[670] The time period of the alleged joint criminal enterprise was thus the time period spanned by all of the alleged crimes.

400. The Indictment alleged that from March 1991, there was an armed conflict between the RUF and the Government of Sierra Leone.[671] The Indictment further alleged that the AFRC was formed by members of the armed forces of Sierra Leone, that soldiers of the Sierra Leone army comprised the majority of the membership of the AFRC, and that the AFRC seized power from the Kabbah Government in a coup on 25 May 1997.[672] The necessary implication of this is that until 25 May 1997, the AFRC founders and members were forces loyal to the Kabbah Government who were in opposition to the RUF.

401. The Indictment further alleged that shortly after the AFRC seized power from the Kabbah Government, at the invitation of the leader of the AFRC, and on the order of the leader of the RUF, the RUF joined the AFRC to form the Junta, and that the AFRC and RUF acted jointly thereafter.[673]

402. The earliest specified date for any of the crimes charged in the Indictment (all of which were encompassed within the allegation of joint criminal enterprise liability) was "about 1 June 1997".[674] The necessary implication is that the Accused and other members of the AFRC began participating in a joint criminal enterprise with members of the RUF some time between 25 May 1997 and about 1 June 1997; about a week after the May 1997 coup. Contrary to what paragraph 75 of the Trial Chamber's Judgement suggests it was not alleged in the Indictment that the RUF was invited to join the AFRC to form the Junta for the *purpose* of establishing the joint criminal enterprise. The Indictment alleged that members of

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[670] **Indictment**, para. 34.
[671] **Indictment**, paras 9-11.
[672] **Indictment**, para. 12.
[673] **Indictment**, para. 13.
[674] **Indictment**, paras 43 and 75.

the AFRC and members of the RUF were participants in a joint criminal enterprise from the same time as, or from very shortly after, the RUF joined the AFRC to form the Junta.

403. The Indictment further expressly alleged that the AFRC/RUF alliance continued after the AFRC/RUF Junta was ousted from power in March 1998.[675] The latest specified date for any of the crimes charged in the Indictment (all of which were encompassed within the allegation of joint criminal enterprise liability) was "about April 1999".[676] It is therefore clear that the Indictment alleged that the joint criminal enterprise continued to exist until at least about April 1999. Whether the joint criminal enterprise continued after that date was immaterial for the purposes of this case, and it is submitted that it is not necessary to plead in an indictment the time that a joint criminal enterprise ended, if it ended after the times material to the Indictment.

404. The Prosecution submits that even if it was necessary for the Indictment to plead the time period over which the joint criminal enterprise was said to exist, the Indictment in this case did so with at least as much particularity as the indictments in the *Martić* and *Haradinaj* cases, the indictments in the other ICTY cases referred to in paragraph 68 of the Trial Chamber's Judgement, and in other cases before international criminal tribunals. The Prosecution therefore submits that there is no defect in this respect in the way in which the time period of the joint criminal enterprise was pleaded.

(d) *The identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category as a group*

405. The Prosecution submits that the Trial Chamber's Judgement does not identify any defect in the way in which the Indictment pleaded the identity of those engaged in the joint criminal enterprise, and did not find that there was any.

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[675] **Indictment,** para. 15.
[676] **Indictment**, paras 50, 57, 64.

406. The identities of those engaged in the joint criminal enterprise were pleaded in paragraph 33 of the Indictment as being the three Accused in this case, as well as Issa Hassan Sesay, Morris Kallon, Augustine Gbao, and other unspecified persons who were referred to by their category as a group, namely other members of the AFRC and RUF. Other specified individuals are named in paragraphs 31 and 32 of the Indictment.

407. The Prosecution submits that the Indictment in this case pleaded this category of material facts with at least as much particularity as the indictments in the *Martić* and *Haradinaj* cases, the indictments in the other ICTY cases referred to in paragraph 68 of the Trial Chamber's Judgement, and in other cases before international criminal tribunals. The Prosecution therefore submits that there is no defect in this respect in the way in which the identities of those engaged in the joint criminal enterprise was pleaded.

(e) *The nature of the participation by the accused in that enterprise*

408. The Prosecution submits that the Trial Chamber's Judgement does not identify any defect in the way in which the Indictment pleaded the nature of the participation of the Accused in the joint criminal enterprise, and did not find that there was any.

409. All of the crimes charged in the Indictment were alleged to have been actions within the joint criminal enterprise or to have been a reasonably foreseeable consequence of the joint criminal enterprise.[677] The participation of the Accused was alleged to have formed, during the Junta period, while serving as members of the Junta governing body.[678] In the post-junta period, the nature of Brima's participation in the joint criminal enterprise is alleged in paragraph 24 of the Indictment, where it is stated that he was "in direct command of AFRC/RUF forces which conducted armed operations throughout the northeastern and central areas of the Republic of Sierra Leone, including but not limited to, attacks on

[677] **Indictment**, para. 34.
[678] **Indictment**, paras 23 (Brima), 26 (Kamara), 29 (Kanu).

civilians [during the Bombali-Freetown Campaign]". The nature of Kamara's participation in the post-Junta period is alleged in paragraph 27 of the Indictment, where it is stated that he was "a commander of AFRC/RUF forces which conducted armed operations throughout the north, eastern and central areas of the Republic of Sierra Leone, including but not limited to, attacks on civilians [in Koinadugu District, Bombali District and Freetown]". Kanu's participation in the joint criminal enterprise in the post-Junta period is alleged in similar terms in paragraph 30 of the Indictment. From the way that the Indictment as a whole is worded, it is evident that it is also alleged that each of the Accused participated in the joint criminal enterprise by planning, ordering, committing, instigating and/or aiding and abetting the specific crimes charged in the Indictment, and in failing to prevent subordinates from committing those crimes and/or failing to punish subordinates who had committed such crimes.[679]

410. The Prosecution therefore submits that there is no defect in this respect in the way in which the joint criminal enterprise was pleaded.

(iii). Conclusion

411. The Prosecution therefore submits that joint criminal enterprise liability was not defectively pleaded in the Indictment in this case.

412. The Prosecution notes, as an additional matter, that the way in which joint criminal enterprise was pleaded in the Indictment in this case is materially identical to the way in which it was pleaded in the Indictment in the CDF case.[680] In its Judgement in the CDF case, Trial Chamber I dismissed a Defence challenge to the way in which joint criminal enterprise liability had been pleaded in that case.[681]

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[679] See **Indictment**, paras 35, 36, 38 and 39.
[680] Compare paras 19-20 of the **CDF Indictment** with paragraphs 33-41 of the Indictment in this case.
[681] ***CDF* Trial Judgement**, paras 32-34, 39.

D. Third error of the Trial Chamber: The failure of the Trial Chamber to find that any defect had been cured

413. It is a well-established principle in international criminal tribunals that in some instances, a defect in an indictment can be deemed "cured" if the Prosecution provides the accused with timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her.[682] The question whether the Prosecution has cured a defect in the indictment has been said to be equivalent to the question whether the defect has caused any prejudice to the Defence or, whether the trial was "rendered unfair" by the defect.[683]

414. This principle was not only recognised by the Trial Chamber, but was applied by the Trial Chamber in the Trial Chamber's Judgement in a number of instances.[684] However, the Trial Chamber found that the defects in the way that joint criminal enterprise liability had been pleaded had not been cured in this way.[685] The ICTY Appeals Chamber in the *Kvočka* case expressly held that even where an indictment fails to allege joint criminal enterprise liability *at all*, joint criminal enterprise liability can still be considered by the Trial Chamber if timely, clear and consistent information from the Prosecution has cured the defect in the indictment of failing to mention joint criminal enterprise liability.[686]

415. The Indictment in the present case, unlike in the *Kvočka* case, expressly pleaded both the basic and the extended forms of joint criminal enterprise liability. From the moment that each of the Accused was transferred to the Special Court and the Indictment was served upon them, none of the Accused could have been under

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[682] ***Cyangugu* Appeal Judgement**, para 28. See also ***Ntakirutimana* Appeal Judgement**, para 27; ***Kvočka* Appeal Judgement**, para 33; ***Naletilić and Martinović* Appeal Judgement**, para 26; ***Mrkšić* Indictment Decision**, para. 24, ***Krnojelac* Second Indictment Decision**, paras 20-24.

[683] ***Ntakirutimana* Appeal Judgement**, para 26.

[684] **Trial Chamber's Judgement**, paras 47-56, 82-93, 1752-1767, 2051-2054.

[685] **Trial Chamber's Judgement**, para. 82.

[686] ***Kvočka* Appeal Judgement** paras 36-54.

any doubt that both forms of joint criminal enterprise liability were alleged against them.

416. In the Prosecution response to the Kanu preliminary motion alleging defects in the form of the Indictment,[687] which was filed before trial commenced, the Prosecution gave a number of affirmations or clarifications as to the pleading of the joint criminal enterprise liability, including (1) that the Indictment must be read as a whole, and that a reading of the full indictment clearly shows sufficient factual allegations that reflect the nature of the participation of the Accused in the common plan or joint criminal enterprise;[688] (2) that it was alleged that the Accused as an individual held a position of authority within the AFRC and the RUF/AFRC in his individual capacity, participated in a common plan with other individuals in the RUF and the AFRC and that by virtue of this position and participation, the Accused was liable for crimes resulting from the joint criminal enterprise;[689] and (3) that the Prosecution alleged both the basic and extended forms of joint criminal enterprise liability.[690]

417. In its decision on this Kanu preliminary motion,[691] Trial Chamber I found that the Indictment had not been defectively pleaded, and affirmed, *inter alia*, (1) that the Indictment alleged that the Accused participated in the joint criminal enterprise by reason of having served as a member of the Junta governing body and by reason of having been a commander of AFRC/RUF forces, and by reason of having planned, instigated, ordered or otherwise aided and abetted the crimes within the joint criminal enterprise;[692] (2) that it was clear how the Indictment alleged the responsibility of the Accused for crimes committed by the RUF, given that it alleged that there was an alliance between the two organized armed factions;[693] (3) that the Indictment alleged both the basic and extended forms of joint criminal

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[687] **Prosecution *Kanu* Preliminary Motion Response**, paras 4-8.
[688] *Ibid.*, para. 4.
[689] *Ibid.*, para. 5.
[690] *Ibid.*, paras 6-8.
[691] ***Kanu* Preliminary Motion Decision**, paras 8-15.
[692] *Ibid.*, para. 12.
[693] *Ibid.*, para. 13.

enterprise liability;[694] and (4) that all of the crimes charged were alleged to be within the joint criminal enterprise.[695]

418. In the Prosecution response to the Kamara Preliminary Motion alleging defects in the form of the indictment,[696] the Prosecution also gave a number of affirmations or clarifications as to the pleading of the joint criminal enterprise liability, including that (1) all crimes charged in the Indictment were alleged to be a result of the joint criminal enterprise;[697] (2) the nature and purpose of the joint criminal enterprise was set out throughout the Indictment, in particular in paragraphs 9, 10, 11 and 23-25 of the Indictment;[698] (3) the identity of those involved in the joint criminal enterprise was set out in paragraphs 8, 19, 21 and 22 of the Indictment;[699] (4) the Indictment "pegs the joint criminal enterprise to the crimes alleged in the Indictment and therefore to the dates of the alleged crimes";[700] (5) it was alleged that the Accused intended to perpetrate the crimes within the joint criminal enterprise, or alternatively, that the crimes charged were a reasonably foreseeable consequence of the joint criminal enterprise and that the Accused, in participating in the joint criminal enterprise, willingly took that risk;[701] (6) the unlawful means that were part of the joint criminal enterprise were defined in paragraphs 24 and 31-64 of the Indictment;[702] and (7) it was a matter for evidence at trial, rather than for pleading in the Indictment, whether the accused participated in the joint criminal enterprise voluntarily.[703]

419. In its decision on this Kamara Preliminary Motion,[704] Trial Chamber I found that the Indictment had not been defectively pleaded, and in effect affirmed the

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694 *Ibid.*, para. 14.
695 *Ibid.*, para. 15.
696 **Prosecution *Kamara* Preliminary Motion Response**, paras 19-27.
697 *Ibid.*, para. 19.
698 *Ibid.*, para. 20, the paragraph of the Indictment referred to correspond to paragraphs 21-42 of the final Indictment.
699 *Ibid.*, para. 20, the paragraph of the Indictment referred to correspond to paragraphs 17, 21-38 of the final Indictment.
700 *Ibid.*, para. 20.
701 *Ibid.*, para. 24.
702 *Ibid.*, para. 25, the paragraph of the Indictment referred to correspond to paragraphs 18-66 of the final Indictment.
703 *Ibid.*, paras 26-27.
704 ***Kamara* Preliminary Motion Decision**, paras 51-53.

submissions made by the Prosecution in the response referred to in the previous paragraph.

420. In the Prosecution's Pre-Trial Brief, the Prosecution added:

> It is the case for the prosecution that, in addition to the modes of liability expressly referred to in Article 6.1, each of the accused is criminally responsible because of their position and the form of their participation in the joint criminal enterprise. It should be noted that often a single act imputes liability both via an express mode under article 6.1 and also as a form of participation in the joint criminal enterprise. The modes of participation for each accused in the joint criminal enterprise include:
>
> a. The use of radio communications to coordinate troop and supply movements, and offer status reports;
>
> b. Attendance and participation in AFRC/RUF leadership meetings;
>
> c. The coordination or direction of various AFRC/RUF troop movements;
>
> d. The coordination or direction of various AFRC/RUF weapons and supply distribution;
>
> e. The organization of AFRC/RUF recruitment and training;
>
> f. The organization of financial and resource support from outside Sierra Leone;
>
> g. The organization of diamond mining; and
>
> h. Any action of an accused which furthered the joint criminal enterprise.
>
> Accordingly, the prosecution case is that each accused is criminally responsible for the acts and omissions of each of the other accused and of the accused alleged to be members of the RUF.[705]

421. As noted above, at the Rule 98 stage, the Defence again made a general submission that the Indictment pleaded only the first category of joint criminal enterprise liability and not the first.[706] For the reasons given in the immediately preceding paragraphs, before the trial in this case commenced, it had been made abundantly clear to the Defence by the Prosecution and the Trial Chamber that the Indictment alleged both the basic and the extended forms of joint criminal

[705] **Prosecution Supplemental Pre-Trial Brief**, paras 9-10.
[706] **Defence Joint Legal Rule 98 Submission**, paras 29, 31.

enterprise liability. At the Rule 98 stage, the Defence did not suggest that the pleading of joint criminal enterprise liability in the Indictment was otherwise defective, or that the Defence was otherwise in any way prejudiced in its ability to respond adequately to the Prosecution case with respect to this mode of liability. The Defence submissions were predominantly concerned with addressing the Prosecution's Rule 98 submissions on its merits, and with the Defence argument that the evidence presented by the Prosecution did not meet the Rule 98 standard in relation to joint criminal enterprise liability.[707] The Prosecution submits that this establishes that in all of the circumstances, the Defence was not prejudiced by the pleading of joint criminal enterprise liability in this case, and that the Defence was capable of understanding, and responding to, the Prosecution's case on this mode of liability.

422. In the Prosecution's response to the Defence Rule 98 submissions, the Prosecution set out in further detail, in the light of the evidence presented during the Prosecution case, the case of the Prosecution with respect to joint criminal enterprise liability.[708]

423. The proposition that the Defence was able to respond effectively to the Prosecution case is further underscored by the line of cross examination adopted by the Defence to Prosecution witnesses who were suggesting that the AFRC and the RUF were closely working together, and by the fact that the Defence led evidence to try to distance the AFRC's association with the RUF and even to suggest that after the ECOMOG intervention in February 1998, the RUF and the AFRC did not co-operate at all.[709]

424. As noted in paragraph 15 above, in their final trial briefs, the Defence responded in detail to the substance of the Prosecution case with respect to joint criminal enterprise liability.[710] The Defence also argued that joint criminal enterprise

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[707] ***Brima* Rule 98 Motion**, paras 13 88, 89 and 91; ***Kamara* Rule 98 Motion**, para. 50; ***Kanu* Rule 98 Motion**, para. 7.3 (ii) 5; **Defence Joint Legal Rule 98 Submission**, paras 29-34.

[708] **Prosecution Rule 98 Response**, paras 25-55.

[709] See ***Brima* Final Trial Brief**, paras 57-62; ***Kamara* Final Trial Brief**, paras 41-57; ***Kanu* Final Trial Brief**, paras 284-314.

[710] ***Brima* Final Trial Brief**, paras 52 to 62; ***Kamara* Final Trial Brief**, paras 41-57; ***Kanu* Final Trial Brief**, paras 280-364.

liability had been defectively pleaded in the Indictment.[711] However, the Defence argued only in a very general way that it had been "prejudiced" by the way in which joint criminal enterprise liability had been pleaded. It gave no specifics of what particular information was lacking, and precisely what difficulties this had allegedly caused the Defence.

425. The Prosecution submits that even if it were established that joint criminal enterprise liability was defectively pleaded in the Indictment (and for the reasons given in paragraphs 416-423 above, it was not), the information given in the Indictment, taken together with the information provided to the Defence in the Prosecution pre-trial filings and Rule 98 response, as well as the pre-trial decisions of the Trial Chamber, was such that the Defence suffered no prejudice as a result. Accordingly, any defects in the Indictment were subsequently cured. Reference is made again in this respect to paragraphs 41-54 of the *Kvočka* Appeal Judgement.

E. The requested remedy

426. For the reasons given in paragraphs 416-423 above, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's decision, in paragraph 85 of the Trial Chamber's Judgement, not to consider joint criminal enterprise liability as a mode of liability in this case.

427. If joint criminal enterprise liability is reinstated by the Appeals Chamber as one of the modes of liability with which the Accused are charged in this case, the question then arises whether joint criminal enterprise liability has been proved beyond a reasonable doubt in relation to each of the three Accused.

428. The elements that need to be proved to establish joint criminal enterprise liability are set out in paragraphs 309-311 of the Trial Chamber's Rule 98 Decision and paragraph 63 of the Trial Chamber's Judgement. In this respect, the Prosecution adopts its legal submissions set out in paragraphs 460-481 of the Prosecution

[711] ***Brima* Final Trial Brief**, paras 126, 128, 129, 134, 140; ***Kamara* Final Trial Brief**, paras 37, 39, 40, 41, 45-49; ***Kanu* Final Trial Brief**, paras 285, 291, 295-297.

Final Trial Brief. The Prosecution also adopts the legal submissions made in the Prosecution oral closing arguments.[712]

429. The Prosecution submits that on the basis of the findings contained in the Trial Chamber's Judgement, each of the Accused is individually responsible on the basis of joint criminal enterprise liability for all of the crimes found by the Trial Chamber to have been committed by AFRC and RUF forces in the armed conflict, and all crimes which may, following the determination of all of the Prosecution's other grounds of appeal, be found to have been committed by AFRC or RUF forces.

430. The most important findings in the Trial Chamber's Judgement that establish this are set out in Appendix C to this Appeal Brief.

431. The Prosecution submits that in determining whether joint criminal enterprise liability is established in relation to a particular Accused, it need not necessarily be established that the material facts established by the evidence coincide completely with the facts as pleaded in the Indictment. If at the end of a trial it is established beyond a reasonable doubt that an Accused is individually responsible for a crime within the jurisdiction of the Special Court, it is not necessarily possible for the Defence to avoid a conviction for that crime merely because some of the facts differ to what the Indictment pleaded.

432. For instance, where it is found that an Accused is responsible for a crime pleaded in the Indictment, but that the date on which the crime is found to have been committed differs from the date pleaded in the Indictment, this does not mean that the Accused must be acquitted of that crime. The common law rule concerning dates specified in an indictment, which was said in *Dossi* to be a rule that has existed "since time immemorial",[713] is expressed in *Archbold* as follows:

> ... a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. ...

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[712] Transcript, 7 December 2006, pp. 70-76, 83-84.

[713] ***R .v. Dossi*, 13 CR.App.R. 158 (CCA)**: at pp. 159-160 "From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.... Thus, though the date of the offence should be alleged in the indictment it has never been necessary that it should be laid according to truth unless time is of the essence of the offence."

> The prosecution should not be allowed to depart from an allegation that an offence was committed on a particular day in reliance on the principle in *Dossi* if there is a risk that the defendant has been misled as to the allegation he has to answer or that he would be prejudiced in having to answer a less specific allegation....[714]

433. The rule in *Dossi* has been applied by the Appeals Chamber of the ICTR[715] and the Appeals Chamber of the ICTY.[716] *Dossi* has been further cited with approval by Trial Chambers of the ICTY and ICTR.[717] The principle is applied in the national courts of a variety of jurisdictions, including for instance England and Wales,[718] Australia,[719] Canada,[720] Trinidad and Tobago[721] and Papua New Guinea.[722,723]

434. Thus, it is submitted that if it were ultimately established in this case that a joint criminal enterprise did exist as alleged, but that it did not exist for the whole of the period alleged in the Indictment (for instance, if it were found to have existed during the Junta period, but not during the post-Junta period, or vice versa), this would not prevent the Accused from being convicted on the basis of joint criminal enterprise liability for crimes committed within the joint criminal enterprise during the period that it did exist.

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[714] ***Archbold Criminal Pleading, Evidence and Practice***, 2002 Edition, paras 1-127 to 128, emphasis added.

[715] ***Rutaganda* Appeal Judgement**, paras 296-306, especially para. 306 (affirmed in ***Rutaganda* Trial Judgement**, para 201).

[716] ***Kunarac* Appeal Judgement**, para. 217.

[717] ***Tadić* Trial Judgement**, para. 534; ***Kayishema* Trial Judgement**, paras 81-86.

[718] ***R. v. Lowe* [1998] EWCA Crim 1204; *R. v. JW* [1999] EWCA Crim 1088.**

[719] ***R. v. Kenny*, Matter No. CCA 60111/97**, where the indictment alleged offences in 1986 and the court convicted on evidence indicating that the offence happened in the last week of 1985; ***R. v. Liddy* [2002] SASC 19 (31 January 2002) (SA CCA)**, esp. paras 256ff; ***R. v. Frederick* [2004] SASC 404 (7 December 2004) (SA CCA)**, esp. paras 38-41.

[720] ***R. v. Hughes* [1988] BCJ No. 2496**; ***R. v. B(G)* (1990), 56 CCC (3d) 200**; ***A.B. and C.S. v. R.*, [1990] 2 SCR 30 (SCC).**

[721] ***Bowen v. State*, Cr. App. No. 26 of 2004, Trinidad and Tobago Court of Appeal, 12 January 2005.**

[722] ***State v. Fineko* [1978] PNGLR 262 (25th July, 1978).**

[723] The rule is not applicable where the defence has provided an alibi defence or where the age of the complainant is an essential element of the offence: See ***R. v. Radcliffe* [1990] Crim LR 524 (CA).** The Prosecution submits that this "alibi" exception to the *Dossi* principle does not appy in a case such as the present, where the Accused were not alleged to personally have committed all the crimes, or event to have necessarily been present at all the crimes scenes, but where liability is based on alleged participation in a joint criminal enterprise that existed over an extended period of time. In any event, there can be no prejudice to the Defence if the evidence establishes that the joint criminal enterprise existed for a *shorter* period than that alleged.

435. Similarly, if it were found that a joint criminal enterprise did exist during the whole of the period alleged, but that a particular Accused was a participant in it for only a part of that period (for instance, during the Junta period or post-Junta period only), this would not prevent the Accused from being convicted on the basis of joint criminal enterprise liability for crimes committed during the period that the Accused was a participant in it.

436. Again, in the same way, if it is found that the joint criminal enterprise did exits as alleged, and that an Accused was a participant in it, the Accused could be convicted on the basis of joint criminal enterprise liability, even if the evidence does not establish the participation of all of the other persons alleged in the Indictment to have been participants in it. As the Prosecution said in its final oral submissions:

> ... it's often not possible for the Trial Chamber to determine on the evidence every single person who was part of the joint criminal enterprise. We submit that it's equally true that some persons who are named in the indictment, as being within the joint criminal enterprise may, at the end of the day, be found not to have been a part of it. That doesn't prevent a conviction of these others who were found to be part of it.
>
> To give a simple hypothetical example, suppose that an indictment charges A, B and C with joint criminal enterprise liability as participants in a major illegal drug-dealing business, for instance. And suppose that the indictment alleges that also D and E, who are not charged in the indictment, and various other unknown or unnamed persons, were also part of this joint criminal enterprise. Now, suppose at the end of the day the Trial Chamber is satisfied beyond a reasonable doubt that A, B and C, the three accused, were, in fact, part of the joint criminal enterprise but that it's not satisfied that D or E were; does that prevent a conviction of A, B and C? We submit clearly not. And that A, B and C can be convicted of any crime that was shown to be a part of the joint criminal enterprise in which they were participating.

437. The Prosecution submits that the issue in all of the above circumstances is whether the Accused has "been misled as to the allegation he has to answer" or

has been prejudiced by the particular discrepancy between the details of the facts as found and the details of the facts as pleaded in the Indictment.[724]

438. The Prosecution therefore submits that the Appeals Chamber can, based on the findings in the Trial Chamber's Judgement, and without the need to remit the case to the Trial Chamber for any further findings of fact in this respect, revise the Trial Chamber's Judgement by adding a corresponding conviction for all three Accused on the basis of joint criminal enterprise liability in respect of all crimes found by the Trial Chamber to have been committed, and all crimes that may be found to have been committed following the determination of the Prosecution's other grounds of appeal.

439. This entails a finding of significant additional criminal responsibility on the part of each of the Accused in this case. For instance, if this Ground of Appeal is upheld, each of the Accused would be additionally individually responsible for the crimes found by the Trial Chamber to have been committed by AFRC and RUF forces in Bo District,[725] Kenema District,[726] Kono District,[727] Kailahun

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[724] See the quote in paragraph 432 above.

[725] The Trial Chamber found that in Bo District in June 1997, crimes were committed by AFRC/RUF forces (para. 1641) including the unlawful killing of an unknown number of civilians, as charged under Counts 3 to 5 (**Trial Chamber's Judgement**, para. 826) and the terrorisation and collective punishment of civilians, as charged under Counts 1 and 2 (**Trial Chamber's Judgement**, para. 1497).

[726] Trial Chamber found that in Kenema District between 25 May 1997 and 14 February 1998, AFRC/RUF forces committed a number of crimes (**Trial Chamber's Judgement**, para. 1642) including the unlawful killing of a number of civilians, as charged under Counts 4 and 5 (**Trial Chamber's Judgement**, para. 840), the infliction of physical violence on an unknown number of civilians as charged under Count 10 (**Trial Chamber's Judgement**, para. 1197), the recruitment and use children under the age of 15 years for military purposes, as charged under Count 12 (**Trial Chamber's Judgement**, para. 1277), the abduction of an unknown number of civilians who were used as forced labour at Cyborg Pit in Tongo Field, as charged under Count 13 (**Trial Chamber's Judgement**, para. 1309), and the terrorisation and collective punishment of civilians, as charged under Counts 1 and 2 (**Trial Chamber's Judgement**, paras 1475-1477).

[727] The Trial Chamber found that in Kono District, in the period from mid-February to June 1998, AFRC/RUF troops unlawfully killed civilians (**Trial Chamber's Judgement**, para. 857), committed sexual slavery and physical violence against civilian population (**Trial Chamber's Judgement**, paras 1109, 1213) abducted civilians and used them as forced labour (**Trial Chamber's Judgement**, paras 1333), and illegally recruited and used children under the age of 15 years for military purposes, as charged under the Indictment (**Trial Chamber's Judgement**, paras 1277-1278). The Trial Chamber also found that AFRC/RUF troops engaged in widespread looting (**Trial Chamber's Judgement**, para. 1415) and committed various crimes against the civilian population as collective punishments (**Trial Chamber's Judgement**, paras 1525-1527).

District,[728] and Koinadugu District,[729] in respect of which the Trial Chamber found Brima and Kanu not to have been individually responsible at all,[730] and in respect of which Kamara was found to be individually responsible under Article 6(3) only for a limited number of crimes in Kono District and Port Loko District.[731] In respect of the crimes found by the Trial Chamber to have been committed in Bombali District and Freetown and the Western Area, each of the Accused would be responsible for all crimes under Article 6(1) on the basis of joint criminal enterprise liability, irrespective of the outcome of the Prosecution's First Ground of Appeal.

440. Alternatively, if the Appeals Chamber is not satisfied that the elements of joint criminal enterprise liability have been established in relation to each of the Accused on the findings of the Trial Chamber and the evidence that it accepted, it becomes necessary for an evaluation of the evidence to be undertaken for this purpose.

441. The evidence in respect of the joint criminal enterprise liability of the Accused that was before the Trial Chamber is detailed in paragraphs 727-245 of the Prosecution's Final Trial Brief. The most important evidence of joint criminal enterprise liability which was not considered in the Trial Chamber's Judgement is set out in Appendix D to this Appeal Brief. The Prosecution submits that it is open to the Appeals Chamber itself to consider that evidence, and to enter its own verdict on joint criminal enterprise liability, if it finds that on the basis of the findings in the Trial Chamber's Judgement, together with the other evidence

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[728] The Trial Chamber found that in Kailahun District during the Junta period, RUF troops abducted civilians and used them as forced labour, as charged under Count 13 (**Trial Chamber's Judgement**, paras 1374, 1643).

[729] The Trial Chamber found that in Koinadugu District, AFRC/RUF forces unlawfully killed or inflicted sexual or physical violence on an unknown number of civilians in the period February to September 1998, as charged under Counts 3 to 5, 6 to 9, and 10 respectively (**Trial Chamber's Judgement**, para. 897). In addition, the Trial Chamber found that AFRC/RUF forces abducted an unknown number of civilians and used them as forced labour in that District, as charged under Count 13 (**Trial Chamber's Judgement**, para. 1333). In addition, the Trial Chamber found that AFRC/RUF forces illegally recruited children under the age of 15 years and used them for military purposes in that District, as charged under Count 12 (**Trial Chamber's Judgement**, para. 1277). The Trial Chamber also found that AFRC/RUF forces engaged in widespread looting of civilian homes, as charged in Count 14 (**Trial Chamber's Judgement**, para. 1409).

[730] **Trial Chamber's Judgement**, paras 1646, 1668, 1690 (Brima) and 1987, 2000, 2018 (Kanu).

[731] **Trial Chamber's Jud**gement, paras 1873-1877, 1893 (Kono District), 1958-1969 (Port Loko District).

before the Trial Chamber, the only conclusion open to any reasonable trier of fact is that joint criminal enterprise liability is established beyond a reasonable doubt. In such circumstances, there is no purpose in remitting the case back to the Trial Chamber for further findings of fact, since any conclusion of the Trial Chamber to the contrary would be reversed again on appeal on the ground that the conclusion reached was one that was not open to any reasonable trier of fact.

442. If either of these courses adopted, the Prosecution requests the Appeals Chamber also to make any resulting amendments to the Disposition of the Trial Chamber's Judgement, and to increase the sentences imposed on the Accused to reflect the additional criminal liability

443. Alternatively, if the Appeals Chamber considers it inappropriate for the evidence to be considered by the Appeals Chamber at first instance, or if it cannot conclude that there is only one finding that is open to any reasonable trier of fact, the Prosecution requests the Appeals Chamber to remit the proceedings to the Trial Chamber for further findings of fact on joint criminal enterprise liability.

G. Conclusion

444. In the event that the Appeals Chamber decides that it cannot determine this matter without remitting the matter to the Trial Chamber for further findings of fact, but rejects the Prosecution request to remit the matter to the Trial Chamber, the Prosecution requests as an alternative remedy that the Appeals Chamber make a finding of law that the Trial Chamber erred in failing to consider joint criminal enterprise liability in this case.[732]

[732] The Appeals Chamber of the ICTY has indicated that where it is in the interests of justice to do so, it can find that the Trial Chamber erred in acquitting the accused on the ground that it did, but without either substituting a conviction or ordering a new trial: See ***Aleksovski* Appeal Judgement**, paras 153–154; ***Jelisic* Appeal Judgement**, paras 73–77.

VI. Prosecution's Fifth Ground of Appeal: The Trial Chamber's failure to find all three Accused individually responsible on Counts 1 and 2 of the Indictment in respect of the three enslavement crimes

A. Introduction

445. The Indictment charged all three Accused under Count 1 with acts of terrorism,[733] and under Count 2 with collective punishment.[734] The evidentiary basis for those crimes comprised the facts pleaded in paragraphs 42 to 79 of the Indictment, in support of Counts 3 to 14 of the Indictment.[735] The crimes pleaded under Counts 3 to 14 were unlawful killings (Counts 3-5), sexual violence (Counts 6-9), physical violence (Counts 10-11), use of child soldiers (Count 12), abductions and forced labour (Count 13), and looting and burning (Count 14).

446. The Trial Chamber held, in relation to the crimes for which it found the Accused to be individually responsible, that unlawful killings (Counts 3-5), rapes (Count 6), acts of physical violence (Counts 10-11), and burnings[736] (Count 14) constituted acts of terrorism and collective punishment.[737] However, the Trial Chamber found that the instances in this case of the commission of the three enslavement crimes (sexual slavery, forced labour, and child soldiers)[738] did ***not*** satisfy the elements of acts of terrorism or collective punishment.[739]

447. In this Fifth Ground of Appeal, the Prosecution contends that the Trial Chamber erred in law and fact in making this finding in relation to the three enslavement crimes. The Prosecution requests the Appeals Chamber to reverse this finding, and to revise the Trial Chamber's Judgement by substituting findings that the

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[733] A crime punishable under Article 3(d) of the Statute.
[734] A crime punishable under Article 3(b) of the Statute.
[735] Indictment, para. 41; **Prosecution Supplemental Pre-Trial Brief**, para 13; **Prosecution Final Trial Brief,** paras 543, 560, 1288, 1373, 1488, 1517 and 1641; **Trial Chamber's Judgement**, para. 1435.
[736] **Trial Chamber's Judgement**, para. 1438.
[737] **Trial Chamber's Judgement**, paras 1430-1634.
[738] See paragraph 11 above.
[739] **Trial Chamber's Judgement**, paras 1447-1459.

convictions of the three Accused on Counts 1 and 2 of the Indictment includes the individual responsibility of the Accused for acts of terrorism and collective punishments based on their responsibility for the three enslavement crimes.

B. The Trial Chamber's reasoning

448. The Trial Chamber found that the elements of the crime of terrorism are, in addition to the chapeau requirements of Article 3 of the Statute:

> 1. Acts or threats of violence directed against persons or their property;
>
> 2. The perpetrator wilfully made persons or their property the object of those acts and threats of violence; and
>
> 3. The acts or threats of violence were committed with the primary purpose of spreading terror among those persons.[740]

449. The Prosecution take no issue with the Trial Chamber's articulation of these elements.

450. As the Trial Chamber found, the first and second of these elements (*i.e.* the *actus reus*), need not involve an act that is otherwise criminal. For instance, the mere *threat* of attacks on civilians' property or means of survival may satisfy these elements.[741] However, as the Trial Chamber also found in this case, the acts of a perpetrator that satisfy these elements may also simultaneously satisfy the elements of another crime under the Statute of the Special Court.

451. The Trial Chamber found that the third of these elements (*i.e.* the *mens rea*)[742] was not established in the present case for the enslavement crimes, as it was not established that the enslavement crimes were committed with the primary purpose to terrorise the civilian population.[743] The Trial Chamber acknowledged that the three enslavement crimes may have been committed simultaneously with other

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[740] **Trial Chamber's Judgement**, para. 667. See also Rule 98 Decision, para. 49.
[741] **Trial Chamber's Judgement**, para. 1436 (last sentence).
[742] **Trial Chamber's Judgement**, para. 667.
[743] **Trial Chamber's Judgement**, paras 1446-1459.

acts of violence accepted by the Chamber as acts of terrorism.[744] However, the Trial Chamber found that the purpose of "the conscription and use of child soldiers by the AFRC during the conflict in Sierra Leone was primarily military in nature".[745] Similarly, the Trial Chamber held that "the primary purpose behind commission of *(sic)* abductions and forced labour was not to spread terror among the civilian population, but rather was primarily utilitarian or military in nature."[746] As to the crime of sexual slavery, the Trial Chamber considered that it was the urge to "take advantage of the spoils of war, by treating women as property and using them to satisfy [the soldiers'] sexual desires and to fulfil other conjugal needs" that had moved the perpetrators of these crimes.[747]

452. The Trial Chamber said that it did not "discount that abduction and detention of persons from their homes and their subjection to forced labour under conditions of violence [did] spread terror among the civilian population". However, it considered that these were "side-effects" of terror, which were, in its opinion, insufficient to establish "the specific intent element of the crime" of terror.[748]

453. As to the crime of collective punishment, the Trial Chamber found that the elements of this crime are, in addition to the chapeau requirements of Article 3 of the Statute:

> 1. A punishment imposed indiscriminately and collectively upon persons for acts that they have not committed; and
>
> 2. The intent on the part of the perpetrator to indiscriminately and collectively punish the persons for acts which form the subject of the punishment.[749]

454. Again, the Prosecution take no issue with the Trial Chamber's articulation of these elements.

455. The Trial Chamber's Judgement contains no explanation as to why the enslavement crimes were not considered to satisfy these elements.

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[744] **Trial Chamber's Judgement**, para 1450, 1454 and 1459.
[745] **Trial Chamber's Judgement**, para.1450.
[746] **Trial Chamber's Judgement**, para. 1454.
[747] **Trial Chamber's Judgement**, para. 1459.
[748] **Trial Chamber's Judgement**, para. 1453.
[749] **Trial Chamber's Judgement**, para. 676. See also **Rule 98 Decision**, para. 62.

456. For the reasons given below, the Prosecution submits that, based on the findings of the Trial Chamber, or alternatively, the findings of the Trial Chamber and the evidence accepted by the Trial Chamber in making those findings, the instances in this case of the commission of the three enslavement crimes satisfied the elements of both acts of terrorism and collective punishment.

457. Both acts of terrorism and collective punishment are war crimes under Article 3 of the Statute. The Trial Chamber found that the general requirements (or chapeau elements) of Article 3 of the Statute were satisfied in respect of all three Accused, for of all crimes charged in the Indictment for which they would be found individually responsible.[750] The remaining question is whether the specific elements of these crimes set out in paragraphs 448 and 453 above were satisfied.

C. Acts of terrorism

(i). Introduction

458. The first two elements set out in paragraph 448 above were established by the findings of the Trial Chamber in this case. The Trial Chamber's Judgement contains numerous findings that the victims of the three enslavement crimes were held against their will,[751] that they were threatened with death if they tried to escape,[752] that victims who did try to escape were killed, beaten or otherwise mistreated,[753] that victims feared what would happen to them if they tried to escape,[754] and indeed, that express orders were given that civilians who tried to escape should be killed.[755]

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[750] **Trial Chamber's Judgement**, paras 240-254.

[751] See, for instance, **Trial Chamber's Judgement**, paras 712, 1095. See also at paras 1162, 1380 ("the civilians that were abducted were "well-secured" meaning that they could not escape"), 1317 ("the 'rebels' shot around them and there was no way for them to escape"), 1831 ("abducting commanders were formally responsible for ensuring that civilians did not escape").

[752] **Trial Chamber's Judgement**, paras 1184, 1869, 1909; **Dissenting Opinion of Justice Doherty**, para. 44.

[753] **Trial Chamber's Judgement**, paras 1094, 1103, 1105, 1203, 1313, 1725

[754] **Trial Chamber's Judgement**, paras 1154, 1159, 1181, 1183.

[755] **Trial Chamber's Judgement**, paras 1314.

459. In relation to the crime of acts of terrorism charged in Count 1 of the Indictment, the only remaining issue is whether the third element set out in paragraph 448 above (the *mens rea* requirement) was satisfied in relation to the three enslavement crimes that were found to have been committed in this case.

(ii). The *mens rea* for acts of terror

460. As is indicated by the title of Article 3 of the Special Court's Statute, acts of terrorism are punishable as a crime under Article 3(d) of that provision as "Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II".

461. Acts of terrorism are not included in the list of prohibited acts in Article 3 common to the Geneva Conventions. "Acts of terrorism" are however expressly prohibited under Article 4(2)(d) of Additional Protocol II "at any time and in any place whatsoever".[756] They are also prohibited under Article 13 of Additional Protocol II, which provides that:

> **Art 13. Protection of the civilian population**
>
> 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
>
> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
>
> 3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.

462. This provision is in terms which are materially identical to Article 51(2) of Additional Protocol I. In relation to this latter provision, the ICTY Appeals Chamber held in the *Galić* case that:

> "... a plain reading of Article 51(2) suggests that the purpose of the unlawful acts or threats to commit such unlawful acts need not be the only purpose of the acts or threats of violence. The fact that

[756] See the chapeau to Article 4(2) of **Additional Protocol II**.

> *other purposes may have coexisted simultaneously with the purpose of spreading terror* among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was *principal among the aims*. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration." [757]

463. The Trial Chamber expressly quoted and approved of this passage from the *Galić* Appeal Judgement.[758] The quoted passage makes clear that the spreading of terror among the civilian population need not be the *only* aim of the acts in question. The Prosecution submits that the quoted passage further indicates that the spreading of terror also need not be the only *principal* aim: the *Galić* Appeal Judgement states that the spreading of terror among the civilian population must be "*principal* among the aims", in other words, that it must be *one* of the principal purposes.

464. The Trial Chamber in this case held that:

> The Trial Chamber therefore finds as a preliminary observation, that the possibility that another purpose to acts of violence may have existed does not in and of itself disprove that the primary purpose was to spread terror among the civilian population. Whether such a purpose was the *primary* purpose is a question to be determined in relation to the events outlined below.[759]

465. The Trial Chamber thereby acknowledged that the spreading of terror need not be the *only* aim of the conduct in question. However, this passage from the Judgement indicates that the Trial Chamber took the view that, where the conduct may have had more than one purpose, it is necessary to identify one single purpose as *the* primary purpose, and that the *mens rea* requirement of acts of terrorism will only be satisfied where terrorisation of the civilian population can be established to have been that *single* primary purpose.

466. Thus, the Trial Chamber found, in relation to the recruitment and use of child soldiers, that because child soldiers were forced to fight in the conflict, were forced into labour which supported and maintained the troops, and were used as

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[757] ***Galić* Appeal Judgement** , para. 104 (emphasis added).
[758] **Trial Chamber's Judgement**, para. 1442.
[759] **Trial Chamber's Judgement**, para. 1443.

human shields[760] and to act as guards, "the primary purpose of the conscription and use of child soldiers by the AFRC during the conflict in Sierra Leone, was not to spread terror among the civilian population, but rather was primarily military in nature".[761]

467. Similarly, the Trial Chamber found that because abducted civilians were forced into labour or forced to fight as soldiers for the AFRC,[762] "the primary purpose behind commission of abductions and forced labour was not to spread terror among the civilian population, but rather was primarily utilitarian or military in nature".[763]

468. Again, in relation to sexual slavery, the Trial Chamber found that "the primary purpose behind commission of sexual slavery was not to spread terror among the civilian population, but rather was committed by the AFRC troops to take advantage of the spoils of war, by treating women as property and using them to satisfy their sexual desires and to fulfil other conjugal needs".[764]

469. The Prosecution submits that the Trial Chamber thereby erred in law. The effect of the Trial Chamber's articulation of the *mens rea* of this crime is that it would not be a violation of Article 3(d) of the Statute to commit acts that are *specifically intended* to terrorise the civilian population, provided that the spreading of terror was not the only purpose of the conduct in question and that another purpose was the more important purpose.

470. The effect of the position taken by the Trial Chamber can be illustrated by the following example. The conduct prohibited by Article 3(d) includes the issuing of *threats* which spread terror among the civilian population. As the ICRC commentary states:

> This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage. It is interesting to note that threats of such acts are also prohibited. *This calls to mind*

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[760] See **Trial Chamber's Judgement**, para. 1447.
[761] **Trial Chamber's Judgement**, para. 1450.
[762] **Trial Chamber's Judgement**, paras 1451-1452.
[763] **Trial Chamber's Judgement**, para. 1454.
[764] **Trial Chamber's Judgement**, para. 1459.

some of the proclamations made in the past threatening the annihilation of civilian populations."[765]

471. Suppose, therefore, that the forces of one party to an armed conflict issued a threat to annihilate the entire population of a particular region of the country that was loyal to the opposing party, but was within military striking distance of the party issuing the threat. Suppose that this threat was specifically intended to spread terror among the civilian population in that part of the country. Suppose, however, that the more important purpose of the party issuing this threat was to induce the opposing party to divert some of its armed forces away from a battlefront in another part of the country where combat is in progress in order to defend the threatened civilians, thereby giving the party issuing the threat a military advantage in the battle.

472. On the approach adopted by the Trial Chamber, this conduct would not be a war crime under Article 3(d), on the basis that although the party issuing the threat specifically intended to spread terror among the civilian population, the one purpose that could be considered "primary" was to gain a military advantage on the battlefront.

473. In other words, in the example given above, the effect of the Trial Chamber's approach would be to legitimise the use of conduct *specifically intended* to spread terror among the civilian population as a means of warfare.

474. The Prosecution submits that such a result would be contrary to the most fundamental principles and purposes of international humanitarian law. The International Court of Justice has affirmed that the fundamental rules of international humanitarian law are "intransgressible principles of international customary law".[766] The International Court of Justice has added that one of these "cardinal principles" is "aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-

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

[766] **Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996**, p. 226, para. 79.

combatants".[767] The first paragraph of Common Article 3 to the Geneva Convention states that "persons taking no active part in the hostilities ... shall in all circumstances be treated humanely". Article 4(1) of Additional Protocol II provides that "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities ... are entitled to respect for their person, honour and convictions and religious practices ... [and] shall in all circumstances be treated humanely".

475. The International Court of Justice further affirmed[768] that one of the cardinal principles of international humanitarian law is the "Martens Clause", first used in an international convention in 1899, and a modern form of which can be found in Article 1(2) of Additional Protocol I to the Geneva Conventions, which states that:

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

476. The fundamental aim of international humanitarian law is to protect the human being, to safeguard his or her dignity, and to limit suffering in the extreme situation of war.[769]

477. The Prosecution submits that it would contradict and undermine these fundamental principles to legitimise, as a means of warfare, conduct *specifically intended* to spread terror among the civilian population, merely because some more important military purpose is served by doing so.

478. *A fortiori*, it would contradict and undermine these fundamental principles to legitimise in armed conflict, conduct specifically intended to spread terror among

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[767] *Ibid.*, para. 78.
[768] *Ibid.*
[769] ***Hadžihasanović Dissenting Opinion of Judge David Hunt, Interlocutory Appeal Decision***, para. 22; ***Tadić* Appeal Judgement**, paras 166, 190-191, 282-285; ***Aleksovski* Appeal Judgement**, paras 98, 152; ***Celibici* Appeal Judgement**, paras 67-70, 81; ***Milosević* Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder**, para. 16; ***Furundžija* Trial Judgement**, para. 254.

the civilian population, merely because some more important "utilitarian" aim[770] is served by it. It must be untenable to suggest that it is legitimate to engage in conduct that is specifically intended to spread terror among the civilian population by subjecting members of the population to sexual slavery, provided that in so doing, the aim of taking advantage of the spoils of war and of using women to satisfy the forces' sexual desires[771] was considered more important than the aim of spreading terror.

479. This is not to say that any conduct committed by armed forces in an armed conflict will be a crime under Article 3(d) of the Statute, if it has the effect of terrorising the civilian population. As has been observed:

> "... the prohibition covers acts ***intended*** to spread terror; there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here."[772]

480. In cases where armed forces conduct hostilities in accordance with international humanitarian law, there will be no violation of Article 3(d) of the Statute even if that conduct has the incidental effect of spreading terror. For this reason, Article 13(2) of Additional Protocol II does not prohibit acts that "spread terror", but only acts "*the primary purpose of which* is to spread terror". Where there is no *intent* to spread terror, there is no violation of international humanitarian law. Where there is an express *purpose* to spread terror among the civilian population, the aims and objectives of international humanitarian law are violated, whether or not the purpose of spreading terror was the only purpose, or whether or not another purpose was more important to those committing the conduct in question.

481. It is further submitted that where conduct is committed for the purpose of spreading terror among the civilian population, and simultaneously another

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[770] Compare **Trial Chamber's Judgement**, para. 1454, referred to in paragraph 451 above.
[771] Compare **Trial Chamber's Judgement**, para. 1459, referred to in paragraph 451 above.
[772] **Y. Sandoz, C. Swinarski and B. Zimmerman (eds),** Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, Martinus Nijhoff, Geneva 1987. (emphasis added).

purpose, it is artificial and unworkable to seek to identify one of those purposes as being the single "principal" purpose.

482. By way of analogy, one can refer to the case of a serial killer who kills victims for sexual gratification. Even if the aim of seeking sexual gratification is more important to the perpetrator than seeking the death of the victim, it must still be said that the particular acts of the perpetrator that caused the death of the victim had the primary purpose of killing the victim.

483. Thus, in the *Galić* case, it was found that the campaign of terror had an "ultimate purpose" of putting the local authorities under pressure.[773] This ultimate purpose of the perpetrators was presumably more important to them than the terrorisation of the civilian population *per se*. However, this did not prevent the accused in that case from being convicted of acts of terrorism. In the *Blagogević* case, the Trial Chamber found that "the aim of the shellings was to cause fear and panic among the civilian population *and* force the people to flee the Srebrenica enclave".[774] The Trial Chamber in that case saw no need to determine which of the two purposes was more important to the perpetrators before concluding that the acts in question were "carried out with the primary purpose to create an atmosphere of extreme fear among the population".[775] In the present case itself, the Indictment alleged that the campaign of terror by the AFRC had the ultimate aim "to gain and exercise political power and control over the territory of Sierra Leone".[776] Notwithstanding this, the Trial Chamber in this case rejected an argument by Kanu that the crimes in question did not satisfy the elements of Article 3(d) of the Statute because "all the crimes allegedly committed during this time were in furtherance of the overall goal of SAJ Musa to reinstate the army in Freetown".[777] The Trial Chamber thereby acknowledged contrary to its own finding, that the spreading of terror need not be the single predominant or ultimate purpose of conduct.

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[773] ***Galić* Trial Judgement**, paras 576-577, 674.
[774] ***Blagogević* Trial Judgement**, para. 611 (emphasis added).
[775] *Ibid.*, para. 614.
[776] **Indictment,** para. 33.
[777] **Trial Chamber's Judgement**, para. 1444.

484. Similarly, it is notorious that in numerous armed conflicts, mass rape is used as an instrument of terrorising the civilian population.[778] It is submitted that it would be contrary to the objectives and purposes of international humanitarian law to suggest that such instances of mass rape only satisfy the elements of the crime of acts of terror if it can be established that the objective of terrorising the civilian population was actually more important to the perpetrators than their aim of "satisfying their sexual desires".[779] Indeed in this case, the Trial Chamber expressly found that instances of rape committed by AFRC Forces satisfied the elements of acts of terror.[780]

485. Article 13(2) of Additional Protocol II must be interpreted in accordance with the principles in Article 31(1) of the Vienna Convention on the Law of Treaties, which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".

486. The plain meaning of the word "principal" does not necessarily mean "first" or "dominant"; it also means "cardinal", "essential", "fundamental", "main", "major", "paramount", "prominent", "salient".[781]

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[778] Report of the Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, E/CN.4/Sub.2/1998/13, para. 15 ("... it is the internationally accepted view that regardless of whether sexual violence committed in armed conflict occurs on an apparently sporadic basis by marauding soldiers or as part of a comprehensive plan to systematically attack and terrorize a targeted population, all acts of sexual violence, including rape, must be recognized, condemned and prosecuted. Sexual violence and slavery have been used pervasively and consistently in times of war because they are clearly an effective means of demoralizing the opposition); United Nations Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Report of the High Commissioner for Human Rights on "Contemporary Forms of Slavery", E/CN.4/Sub.2/2000/20, 27 June 2000, paras 9, 51 ("[t]he most recent conflicts have been the scene of brutal attacks against civil populations, especially women and children. All kinds of sexual violence, including assault, rape, abuse and torture of women and children, have been used in a more or less systematic manner to terrorize civilians and destroy the social structure, family structure and pride of the enemy"... "Violence against women appeared to be extremists' instrument of choice as a means of terrorizing whole communities through, *inter alia*, attacks on women's dignity and on the "honour" of the entire community"); Amnesty International, http://www.amnestyusa.org/women/rapeinwartime.html ("[r]ape and other forms of sexual violence, including rape camps where women and girls are subject to systematic sexual slavery, are used as weapons for spreading terror"); Madeline Morris, "By force of arms: rape, war, and military culture", Duke Law Journal, vol. 45, 1996; ***Nikolić* Trial Judgement**, para. 67; ***Krajišnik* Trial Judgement**, para. 1105;

[779] Compare **Trial Chamber's Judgement**, para. 1459, referred to in paragraph 451 above.

[780] **Trial Chamber's Judgement,** paras 1567-1571

[781] **The Oxford Thesaurus**, pp. 351, 882.

487. For the reasons given above, the objects and purposes of international humanitarian law and of Article 13(2) of Additional Protocol II would be defeated by the interpretation given by the Trial Chamber in this case.

488. Pursuant to Article 32 of the Vienna Convention on the Law of Treaties, in interpreting Additional Protocol II, recourse may also be had to the preparatory work of the treaty. The preparatory work (*travaux préparatoires*) of Additional Protocol II was considered by the Trial Chamber in the *Galić* case. The Trial Chamber said that:

> The Additional Protocols were debated and finalized at the 1974-1977 Diplomatic Conference under the auspices of the ICRC. A summary record of the proceedings has been preserved. ... States' concerns were for the most part limited to whether the object of the prohibition against terror should be the actor's intent or the capacity of the methods employed to spread violence. ... The language of 'intended to' also gave rise to some controversy. Some delegations suggested that the substantive element of intent would be too difficult to determine and that methods that in fact spread terror should be prohibited. Other delegations emphasized the problem of imposing responsibility for acts that might cause terror without terror having been intended." ... In the report on its second session, the committee stated: "The prohibition of 'acts or threats of violence which have the primary object of spreading terror' is directed to ***intentional conduct specifically directed toward the spreading of terror and excludes terror which was not intended by a belligerent and terror that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful.***" What little disagreement there was about the draft provision was thus put to rest.[782]

489. There is no suggestion in the records of the Diplomatic Conference that it was ever intended that "conduct specifically directed toward the spreading of terror" would be excluded from the prohibition if the conduct was ***not*** "in all other respects lawful", merely because the conduct had another unlawful object that was more important to the perpetrator than the spreading of terror *per se*.

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[782] ***Galić* Trial Judgement**, paras 99-101 (footnotes omitted, emphasis added), referring to the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 17 vols. (Geneva: ICRC, 1974-77).

490. The Prosecution submits that the interpretation given by the Trial Chamber to this provision, according to which the prohibition only applies where the purpose of spreading terror was more important to the perpetrator than any other purpose, is not a "good faith" interpretation for the purposes of Article 31(1) of the Vienna Convention on the Law of Treaties. The Prosecution submits, in accordance with the *Galić* Appeal Judgement, that it is only necessary to establish that the aim of spreading terror was "principal among the aims of the perpetrators", that is, one of the principal purposes. Furthermore, where conduct is specifically intended to spread terror among the civilian population, the purpose of so doing will almost inevitably be one of the principal purposes of the actor.

(iii). The facts of this case

491. The ICTY Appeals Chamber held in the *Galić* case that the intent to spread terror among the civilian population:

> "... can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration." [783]

492. The Trial Chamber in this case was also of the view that in determining whether this intent existed, "the Trial Chamber may rely on evidence which demonstrates a pattern of similar attacks, the context of the act, or is otherwise indicative of the purpose relative to any acts of violence committed, regardless of the nature of that evidence", and that it would "therefore examine the whole of the evidentiary record in this regard".[784]

493. The Trial Chamber found that it was established beyond a reasonable doubt that a widespread *and* systematic attack by AFRC/RUF forces was directed against the civilian population of Sierra Leone at all times relevant to the Indictment.[785]

494. The Trial Chamber indicated in its Judgement that "unless stated otherwise in the Factual Findings, the Trial Chamber is satisfied that each incident described therein formed part of a widespread or systematic attack within the meaning of

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[783] ***Galić* Appeal Judgement** , para 104 (emphasis added).
[784] **Trial Chamber's Judgement**, para. 1439.
[785] **Trial Chamber's Judgement**, paras 224, 231, 232, 237, 238.

Article 2 of the Statute".[786] The Trial Chamber made *no* finding that the enslavement crimes of sexual slavery and of the recruitment and use of child soldiers were *not* part of that widespread and systematic attack against the civilian population. It follows that the Trial Chamber found that they were. In respect of the enslavement crime of abductions and forced labour, the Accused were convicted on Count 13 of enslavement as a crime against humanity under Article 2(c) of the Statute, which necessarily involved a finding that these crimes were part of the widespread and systematic attack against the civilian population.[787]

495. The Trial Chamber said, for instance, that:

> Documentary evidence authored by the United Nations and Human Rights Watch reports that attacks in villages across Sierra Leone continued regularly throughout the year. Such attacks "exhibited a characteristic *modus operandi*: amputation of limbs, mutilation, actual or attempted decapitation, rape, burning alive of men, women and children, destruction of homes, ***abduction*** and looting". Numerous instances appear in the oral evidence of pregnant women being killed, beaten or raped in these attacks. Civilians suffered amputations including arms, hands, feet, breasts, lips and ears. ***The abducted civilians, numbered in their thousands, were forced to serve the AFRC/RUF as "porters, potential recruits or sex slaves"***. Women were actively targeted through sexual violence. ***The phenomenon of the 'bush wives' witnessed thousands of women forcibly married to rebels***.[788]

496. It is evident from the findings of the Trial Chamber as a whole, and the evidence that it accepted, that the three enslavement crimes were not something that just coincidentally happened at the same time as the attack against the civilian population. Together with all of the other crimes that were committed, they were an ***integral part*** of that attack against the civilian population.

497. The Prosecution submits that on the basis of these findings, and the evidence accepted by the Trial Chamber in making these findings, the only conclusion open to any reasonable trier of fact is that all of the facts pleaded in paragraphs 42 to 79

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[786] *Ibid.*

[787] Indeed, the Trial Chamber made an explicit finding that forced labour was part of the widespread and systematic attack: see **Trial Chamber's Judgement**, para. 231.

[788] **Trial Chamber's Judgement**, para. 233 (footnotes omitted; **emphasis added**).

of the Indictment in relation to Counts 3 to 14 formed, to the extent that they were proved, as alleged in the Indictment, a single campaign of terror.[789]

498. The Prosecution submits that all of these facts, to the extent that they were proved, should therefore have been found to be included within the individual responsibility of the Accused for acts of terror under Count 1. The primary purpose of the campaign of terror was to terrorise the civilian population. All of the crimes committed during that campaign of terror, as part of that campaign, therefore had the purpose of spreading terror.

499. However, rather than considering the purpose of each of the individual crimes in the context that they were all part of a single campaign of terror, the Trial Chamber looked at each crime individually, in order to determine whether, viewed in isolation, it could be seen to have the primary purpose of spreading terror.[790] Thus, the Trial Chamber found that the amputations committed in Kabala Town in mid-May 1998 had the primary purpose of terrorising the civilian population,[791] but that the other acts of violence committed in Kabala Town (unlawful killings, rape and pillage[792]) did not have this purpose.[793] The Prosecution submits that the Trial Chamber erred in looking at each of the acts in question in isolation in this way, when the only reasonable inference was that they were all parts of a single campaign of terror.

500. In particular, the Trial Chamber erred in considering the enslavement crimes in isolation this way, and in finding, in effect, that they were taken outside the campaign of terror because they also served additional purposes for the AFRC. A campaign or terror, viewed as a whole,[794] is necessarily composed of individual atrocities,[795] and each individual atrocity that was committed as part of a campaign of terror has the purpose of contributing to it. It is artificial to assess the purpose of the enslavement crimes, without considering them *together with*

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[789] **Indictment**, paras 40, 41.
[790] **Trial Chamber's Judgement** , paras 1465-1633.
[791] **Trial Chamber's Judgement**, para. 1538.
[792] **Trial Chamber's Judgement**, para. 1531.
[793] **Trial Chamber's Judgement**, para. 1538.
[794] See the definition of "campaign" provided in ***Galić* Trial Judgement**, para. 181.
[795] See, for example, ***Blagogević* Trial Judgement**, paras 611-614, 620.

the killings, rapes, acts of physical violence,[796] and burnings,[797] which were part of the same campaign of terror, and which the Chamber recognised as acts of having the purpose of spreading terror.

501. Furthermore, even if each of the three enslavement crimes were to be considered in isolation, it is submitted that the only reasonable conclusion on the findings of the Trial Chamber, and the evidence accepted by the Trial Chamber in making these findings, is that the primary purpose of the enslavement crimes was also to spread terror among the civilian population.

502. The Trial Chamber said that it did not discount that the enslavement crimes did in fact spread terror among the civilian population.[798] That must be the only reasonable conclusion. It cannot reasonably be suggested that the civilian population was terrorised by the prospect of being killed, amputated or raped by the AFRC forces who were moving through the country and committing these crimes on a widespread scale, but that they felt no fear at the prospect of being *enslaved* by the AFRC.

503. Even if it were necessary to prove that the spreading of terror was the single principal or predominant purpose of these crimes (which for the reasons given above, it is not), it is submitted that it was. The Trial Chamber found that the AFRC troops were acting under orders given by Brima that they were to kill, maim or amputate any civilian with whom they came into contact, and that towns and villages were to be burned and women and girls were free to satisfy the soldier's sexual desires.[799] The only conclusion open to any reasonable trier of fact from this finding is that if the AFRC had not had military, utilitarian or "sexual or conjugal" needs for the victims of enslavement, it would have killed or mutilated them. The ability of the AFRC to meet other needs was thus a side effect of the purpose to spread terror, rather than the converse.

504. Furthermore, the conclusion that the acts of enslavement were intended to spread terror among the civilian population is underscored by the fact that the victims of

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[796] **Trial Chamber's Judgement**, paras 1462, 1475, 1493, 1495.
[797] **Trial Chamber's Judgement**, paras 1438, 1482, 1485, 1495, 1496, 1510, 1571.
[798] **Trial Chamber's Judgement**, paras 1453.
[799] See paragraphs 28, 39, 65, 82, 114, 148 above.

the enslavement were routinely mistreated. The Trial Chamber expressly found that the enslavement of civilians by the AFRC troops was of a "large scale, continuous and organised nature",[800] and that it involved a "system of exploitation and cruelty".[801] It noted for instance that:

> As was the pattern with all operations overseen by the Accused Brima, AFRC fighters exhibited a depraved indifference towards human life in abducting and enslaving civilians. Children watched their abductors executing family members. Throughout the conflict women and young girls were treated as war bounty, abducted from their homes and repeatedly raped. Child soldiers were terrorised, drugged and forced to commit crimes against other civilians.[802]

505. If the three enslavement crimes did not have the primary purpose of spreading terror among the civilian population, the persistent element of cruelty towards the victims of enslavement would not have been necessary.

506. Further confirmation that the three enslavement crimes had the purpose of spreading terror is provided by the orders that Brima gave for abductions to be committed. When launching the attack on Karina in Bombali District, Brima gave orders "to attack and burn Karina, amputate the citizens, and ***capture strong men***, as a demonstration 'to shock the whole country.'"[803] This confirms that the abduction of civilians, like the amputations and burnings committed by the AFRC, were intended to spread terror. Again, during the withdrawal from Freetown in January 1999, Brima held a meeting attended by Kamara and Kanu, at which Brima ordered the troops to begin abducting civilians, saying that "this would attract the attention of the international community."[804] This order was immediately carried out.[805]

507. The conclusion that the three enslavement crimes had the purpose of spreading terror is again affirmed by the fact that these crimes continued even after they had ceased to serve any "utilitarian" or "military" purpose for the AFRC, apart from

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[800] **Trial Chamber's Judgement**, para. 1826.
[801] **Trial Chamber's Judgement**, para. 1828.
[802] **Trial Chamber's Judgement**, para. 1832 (footnotes omitted). See also paras 1256, 1257, 1275.
[803] **Trial Chamber's Judgement**, paras 1553, 1710, 2038 (emphasis added).
[804] **Trial Chamber's Judgement**, paras 614, 1059, 1272, 1380, 1449, 1452, 1607, 1774, 1783, 1831.
[805] *Ibid.*

spreading terror. The Trial Chamber referred to the evidence of the expert witness Colonel Iron in its assessment of the crime of terrorism in relation to the enslavement crimes. Colonel Iron, whose evidence was accepted by the Trial Chamber, gave evidence that:

> There can be little military justification for what happened during the retreat from Freetown [...] The abductions seem particularly self-defeating: at a time when there was benefit in reducing the size of the force to make it faster moving during the escape, the abductees swelled the size of the column, slowed it down, and made it a bigger target. One reason given for the abductions was to make the fighting strength seem larger than it was; *but I suspect that the truth is more simply that abductions were now common practice for the AFRC.*[806]

508. The Trial Chamber also found that a purpose of abducting civilians was to give the impression to the local population that the troop enjoyed greater support than they actually did,[807] which also contributed to the terror spread among the civilian population.

509. Furthermore, the intent to spread terror among the civilian population:

> "... can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration."[808]

510. As to the duration of the enslavement crimes, the Trial Chamber found that the three enslavement crimes were committed continuously throughout Sierra Leone during the whole of the period of the Indictment.[809]

511. As to the timing of the enslavement crimes, the Trial Chamber found that these crimes were, at least partly, committed simultaneously with other acts of violence, during attacks launched against civilians.[810] The Trial Chamber found that "the occurrence of the crimes was widespread and involved a typical *modus operandi*

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[806] **Trial Chamber's Judgement**, para. 1825.
[807] **Trial Chamber's Judgement**, paras 1821, 1825.
[808] ***Galić* Appeal Judgement**, para 104; see also ***Blagojević and Jokić* Trial Judgement**, para. 591; **Trial Chamber's Judgement**, para. 1439.
[809] **Trial Chamber's Judgement**, paras 39, 1280, 1820, 1826.
[810] **Trial Chamber's Judgement**, paras 1450, 1454, 1459.

of attacks against civilians".[811] The *modus operandi* included the enslavement of civilians as well as other crimes in a way that was inextricably linked. The evidence accepted by the Chamber establishes that girls and women were brutally raped during and after their abduction, even *before* being used to perform chores or to be "bush wives".[812] During these abductions, women were often raped under the threat of a weapon, gang-raped, sometimes in the presence of other people, or the legitimate husband.[813] In Karina, the abducted women were stripped naked *upon Brima's specific order.*[814] As submitted above, after their abduction, victims of enslavement were subjected to other mistreatment and violence.

512. As to the scale of the enslavement crimes, as found by the Trial Chamber, "the abducted civilians numbered in their thousands"[815] and "[t]he phenomenon of the 'bush wives' witnessed thousands of women forcibly married to rebels".[816] It is evident from the findings of the Trial Chamber that the enslavement crimes were not only committed over a protracted period of time, but on a large scale.[817]

513. Other evidence that was accepted by the Trial Chamber also indicated that the enslavement crimes were intrinsically part of a pattern that included killings, physical violence, abduction, rape and enslavement, and that this overall pattern

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[811] **Trial Chamber's Judgement**, para. 1731.

[812] See in particular TF1-133, Transcript 7 July 2005, p. 99; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 996, 999, 1006, 1009.

[813] TF1-094, Transcript 14 July 2005 pp. 28-29: Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 1336-1337, 1349-1350; TF1-209, Transcript 7 July 2005, pp. 33-34; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 996, 999, 1006, 1009; TF1-133, Transcript 7 July 2005, pp. 85-86, 95, 97, 99; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, para. 1126; DAB-156, Transcript 29 September 2006, pp. 39-43; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 1084-1086, 1131; TF1-153, Transcript 22 September 2005, p. 10.; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 1343, 1350.

[814] TF1-033, Transcript 11 July 2005, p. 19; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, para. 1139; TF1-334, Transcript 23 May 2005, p. 72; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement** paras 1357-1358.

[815] **Trial Chamber's Judgement**, para. 233.

[816] *Ibid.*

[817] See, for instance, **Trial Chamber's Judgement**, paras 1271 (referring to the "hundreds" abducted between Mansofinia and Camp Rosos), 1272 (referring to 300 abducted civilians taken from Freetown to Benguema), 1361 (referring to the "approximately 520 civilians, including both adults and children" who were trained in Rosos), 1389 (referring to the "members of the AFRC [who] abducted large numbers of civilians from locations including Freetown, Kissy, Calaba Town and Kola Tree and used these civilians as forced labour in locations including Benguema and Newton in the Western Area"), and 1824 (setting out "[t]he magnitude of commission of the three enslavement crimes by AFRC troops indicates their systemic nature". See also **Trial Chamber's Judgement**, paras 1082 and 1114 (referring to the "many civilians at Rosos including hundreds of women).

of crimes was designed to terrorise the victims,[818] in order to break any resistance on the part of the civilian population, and to allow the perpetrators to reach their ultimate objectives.[819]

514. There was also other evidence accepted by the Trial Chamber that enslaved civilians were terrorised during their abduction and enslavement,[820] that those who refused work were either killed or beaten,[821] and that some had the letters RUF/AFRC carved on their bodies.[822]

515. The inevitable effect of the acts of enslavement was to make the inhabitants of the affected areas feel that *nobody* was safe, that nobody was protected from the terrible lingering threat of being abducted, ill-treated, and/or enslaved, and that *anyone* could be abducted at any place or time.[823] These objectives were specifically civilian ones,[824] as it cannot be reasonably argued that the

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[818] See in particular TF1-209, Transcript 7 July 2005, p. 36; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 996, 999, 1006, 1009; **Trial Chamber's Judgement**, para. 1710.

[819] TF1-199, Transcript 6 October 2005, pp. 79-80, 89-91; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 871, 891, 988, 1025, 1217, 1218; TF1-094, Transcript 14 July 2007 pp. 28-29; TF1-209, Transcript 7 July 2005, pp. 31-38; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 996, 999, 1006, 1009; George Jonhson, Transcript 15 September 2005, p. 58; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement** para. 1359; TF1-094, Transcript 14 July 2007 pp. 27, 28; TF1-209, Transcript 7 July 2005, pp. 31; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 996, 999, 1006, 1009; DAB-135, Transcript 11 September 2006, pp. 43, 49; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, para. 1374.

[820] TF1-094, Trial Transcript 14 July 2005 pp. 29, 32, 40, 41, 37, 38; TF1-085, Transcript 7 April 2005, pp. 8, 19, 28, 37, 44, 69, 70-71, 100, and 121; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 1090-1991; **Trial Chamber's Judgement**, paras 1340-1342, 1348, 1349, 1350, 1361; George Jonhson, 15 September 2005, p. 64; **Trial Chamber's Judgement**, paras 1103, 1105, 1106, 1176, 1183, 1185, 1293, 1297, 1314, 1315, 1456; 1822.

[821] TF1-094, Trial Transcript 14 July 2005 p. 32; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 1336-1337, 1349-1350.

[822] TF1-085, Transcript 7 April 2005, pp. 43-44, 121; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 1095, 1099.

[823] See ***Galić* Trial Judgement**, paras 571, 573, 593. See also ***Galić* Trial Judgement**, para. 115:"The *Motomura* court-martial convicted 13 of the 15 accused of "systematic terrorism practiced against civilians" for acts including unlawful mass arrests. The court found that those arrests had the effect of terrorizing the population, "for nobody, even the most innocent, was any longer certain of his liberty, and a person once arrested, even if absolutely innocent, could no longer be sure of health and life." The associated torture and ill-treatment of interned civilians was also found to be a form of systematic terror." See also para. 116. See further Bangura, Trial Transcript, 3 October 2005, p. 122: "Obviously the entire country had been taken systematically. So the terror and the anticipation of what would happen and the stories puts you in such a traumatic situation that when you are actually now captured you expect the worst."; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 149-151, 711; DAB-135, 11 September 2006, p. 37; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, para. 1374; **Trial Chamber's Judgement**, paras 1256-1257.

[824] See ***Galić* Trial Judgement**, para. 571.

enslavement of civilians can consist of a military objective. The evidence before the Trial Chamber was that civilians were terrorized by the previous attacks on nearby villages or towns and that everywhere, at the rebels' approach, people were running and hiding into the bush.[825]

516. For other acts perpetrated by the AFRC, the Trial Chamber found that the acts of violence committed in the Bombali District could "only reasonably be inferred to have been carried out with the primary purpose to spread terror among the civilian population"[826] on the basis of "the particularly brutal nature of a number of the acts of violence committed against civilians during the attacks."[827] The Prosecution submits that on the basis of the findings of the Trial Chamber and the evidence that it accepted, the only conclusion open to any reasonable trier of fact is that the same was true in respect of the three enslavement crimes in this case.

D. Collective punishment

517. The elements of collective punishment are set out in paragraph 453 above.

518. As noted previously, the Trial Chamber's Judgement contains no explanation as to why the enslavement crimes were not considered to satisfy these elements.

519. As to the first of the elements, the Trial Chamber found (correctly, it is submitted) that "this crime covers an extensive range of possible 'punishments'",[828] and noted that the ICRC Commentary of Article 75(2)(d) of Additional Protocol I "advocates an extensive interpretation of the crime of collective punishments", to include "not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) ... based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation".[829]

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[825] TF1-094, Trial Transcript 14 July 2005, p. 26; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, paras 1336-1337, 1349-1350. TF1-133, Trial Transcript 7 July 2005, p. 82; Evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, para. 1126.

[826] **Trial Chamber's Judgement**, para. 1571; see also paras 1525; 1609-1610.

[827] **Trial Chamber's Judgement**, para. 1570.

[828] **Trial Chamber's Judgement**, para. 681.

[829] *Ibid.*, quoting ICRC Commentary of the Additional Protocols, para. 4556

520. The Prosecution submits that for this purpose, the enslavement of an individual is a form of "punishment".

521. Furthermore, from the facts as found by the Trial Chamber, it is clear that the enslavement of members of the civilian population by the AFRC was "indiscriminate" and "collective", in the same way as the unlawful killings, physical violence, sexual violence and burnings that were found by the Trial Chamber to satisfy the elements of collective punishments.[830]

522. In relation to these other crimes, the Trial Chamber found that:

> The Trial Chamber is further satisfied that the crimes committed also served as a punishment against protected persons. No evidence has been adduced to indicate whether the protected persons targeted in these attacks did or did not in fact support the elected government of President Ahmed Tejan Kabbah or factions aligned with that government. The Trial Chamber has held that the material element in the *actus reus* of the crime of collective punishment is not whether the acts were actually committed or not by the victims, but whether the perpetrator indiscriminately and collectively punished these individuals for acts that they might or might not have committed.
>
> The Trial Chamber is satisfied, on the basis of the evidence specified above, that protected persons were collectively punished for allegedly supporting the President Ahmed Tejan Kabbah by members of the AFRC/RUF.[831]

523. The victims of the enslavement crimes were the *same civilian population* that were subjected to the other crimes that were held to be collective punishments. The Prosecution submits that the only reasonable inference that any reasonable trier of fact could reach based on the findings of the Trial Chamber is that this civilian population was subjected to crimes of enslavement for the same purpose as they were subjected to the other crimes, that is, by way of collective punishment.

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[830] **Trial Chamber's Judgement**, paras 1476, 1496, 1572, 1612, 1634, 1641-1643, 1665, 1700, 1745, 1842-1844, 1856, 1860, 1911, 1929, 1982-1983, 1997, 2002, 2025, 2045, and 2102.

[831] **Trial Chamber's Judgement**, paras 1572-1573, (footnote omitted). See also paras 221, 227, 672, 1470, 1476, 1497, 1563, 1595, 1612, and 1782.

524. The arguments in paragraphs 493-497 above apply *mutatis mutandis*. In determining whether the crimes committed during the widespread and systematic attack against the civilian population satisfied the elements of collective punishment, it is submitted that the Trial Chamber erred in looking at each of the crimes in question in isolation in this way, when the only reasonable inference was that they were all parts of a single campaign of collective punishment.

525. Furthermore, even if each of the three enslavement crimes were to be considered in isolation, it is submitted that the only reasonable conclusion on the findings of the Trial Chamber, and the evidence accepted by the Trial Chamber in making these findings, is that the enslavement crimes did serve as collective punishments. This is evident, for instance, from the order given by Brima to strip naked 35 abductees in Karina,[832] the response of Brima to a request to release abducted priests and nuns that "they are all involved. They are making us suffer",[833] the fact that a child soldier was continually flogged because he "was a madingo and belongs to Tejan Kabba people,"[834] and the fact that some enslaved civilians were amputated as "a message to President Kabbah".[835]

E. Conclusion

526. For the reasons given above, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's findings that the three enslavement crimes were not acts in furtherance of a primary purpose to terrorise protected persons, and were not collective punishments, to revise the Trial Chamber's Judgement by substituting findings that the three Accused are also guilty on Counts 1 and 2 of the Indictment, to the extent of their criminal liability, for the three enslavement crimes, and to increase the sentences imposed on the Accused to reflect the additional criminal liability.

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[832] TF1-033, Trial Transcript 24 May 2005, pp. 18-19; evidence accepted by the Trial Chamber, **Trial Chamber's Judgement**, para. 1139.
[833] **Trial Chamber's Judgement**, para. 1057.
[834] **Trial Chamber's Judgement**, paras 1252-1254.
[835] **Trial Chamber's Judgement**, para. 1316.

VII. Prosecution's Sixth Ground of Appeal: The Trial Chamber's dismissal of Count 7 on grounds of duplicity

A. Introduction

527. In paragraphs 92-95 of the Trial Chamber's Judgement, the Majority of the Trial Chamber held (Judge Doherty dissenting) that Count 7 of the Indictment was bad for duplicity, and accordingly the Majority dismissed that Count.

528. Count 7 of the Indictment charged the Accused with "Sexual slavery and any other form of sexual violence, a CRIME AGAINST HUMANITY, punishable by Article 2.g of the Statute" of the Special Court.

529. The reason why this Count was said to be bad for duplicity is that the Trial Chamber found that it charged two crimes in a single count, namely (1) "sexual slavery", and (2) "any other form of sexual violence".

530. In addition to being charged under Count 7, the crimes of sexual slavery were charged concurrently in the Indictment under Count 9 as "Outrages upon personal dignity, A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II, punishable under Article 3.e of the Statute" of the Special Court. As a result of the dismissal of Count 7 on grounds of duplicity, in respect of each of the instances of sexual slavery for which each of the Accused was found to be individually responsible, the Accused was convicted only of a war crime under Count 9, but not of a crime against humanity under Count 7.

531. Multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible if each statutory provision involved has a materially distinct element not contained in the other.[836] As the Trial Chamber found (correctly, it is submitted), crimes against humanity and war crimes each have distinct chapeau elements, and cumulative convictions under

[836] ***Čelebići* Appeal Judgement**, paras 412-413 (see also para. 421). See also the Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna, paras 13-23.

Article 2 of the Statute and under Article 3 of the Statute are therefore permissible in respect of the same conduct.[837]

532. Cumulative convictions for more than one crime in respect of the same conduct "serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct."[838] As a result of the Trial Chamber's dismissal of Count 7, the convictions entered against each of the Accused in respect of the acts of sexual slavery for which they were found to be individually responsible failed to reflect the full culpability of each of the Accused. In particular, the convictions entered failed to reflect the fact that the acts of sexual slavery occurred as part of a widespread and systematic attack against the civilian population, and were not merely war crimes, but also crimes against humanity.

533. In this Sixth Ground of Appeal, the Prosecution contends that the Trial Chamber erred in dismissing Count 7 for duplicity. The errors are specified in paragraph 18 of the Prosecution's Notice of Appeal, and are dealt with in order below.

534. The Prosecution requests the Appeals Chamber to reverse the Trial Chamber's decision to dismiss Count 7 for duplicity, and to revise the Trial Chamber's Judgement, by adding a corresponding conviction for all three Accused on Count 7 in respect of the acts of sexual slavery for which they were convicted under Count 9, in addition to the convictions under Count 9.[839]

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[837] **Trial Chamber's Judgement**, para. 2107. See also ***Vasiljević* Appeal Judgement**, para 145; ***Kordić* Appeal Judgement**, para. 1038; ***Brđanin* Trial Judgement**, para. 1086; ***Blagojević and Jokić* Trial Judgement**, para. 800, ***Kunarac* Appeal Judgement**, paras 176-178, ***Kupreškić* Appeal Judgement**, para. 388, ***Jelisić* Appeal Judgement**, para. 82.

[838] ***Kunarac* Appeal Judgement**, para. 169 (footnote omitted).

[839] The Trial Chamber found that crimes of sexual slavery were committed in Kono District (**Trial Chamber's Judgement**, paras 1102-1109), Koinadugu District (**Trial Chamber's Judgement**, paras 1112-1133); Bombali District (**Trial Chamber's Judgement**, paras 1136-1145), Freetown and Western Area (**Trial Chamber's Judgement**, paras 1152-1170) and Port Loko District (**Trial Chamber's Judgement**, paras 1173-1187). As regards the individual responsibility of **Brima**, the Trial Chamber found that Brima was responsible under Article 6(1) for *planning* outrages on personal dignity in Bombali District and Freetown and the Western Area (**Trial Chamber's Judgement**, para. 1835). As regards the individual responsibility of **Kamara**, the Trial Chamber found that Kamara was liable under Article 6(3) for acts of sexual slavery in Kono District (**Trial Chamber's Judgement**, para. 1976). As regards the individual responsibility of **Kanu**, the Trial Chamber found that Kanu was responsible under Article 6(1) for *planning* sexual slavery in Bombali District and the Western Area (**Trial Chamber's Judgement**, para. 2096). The criminal responsibility of all Accused for these crimes will be affected by certain of the Prosecution's other grounds of appeal.

535. The Prosecution further submits that if, following the decision of the Appeals Chamber on the Prosecution's other Grounds of Appeal, it is found that any of the Accused is individually responsible for any other acts of sexual slavery of which they were not convicted by the Trial Chamber, or is found to be individually responsible for acts of sexual slavery on modes of liability in addition to those on which they were found liable by the Trial Chamber, the Appeals Chamber should find that that additional criminal liability is reflected in convictions under Count 7, as well as under Count 9.

B. First error of the Trial Chamber: Reconsidering earlier interlocutory decisions in the case, without first reopening the hearings

536. The Trial Chamber found (correctly it is submitted) that "Preliminary motions pursuant to Rule 72(B)(ii) are the primary instrument through which alleged defects in an indictment should be raised, and the Defence should be limited in raising such objections at a later stage for tactical advantage".[840]

537. In this case, two of the Accused, Kamara and Kanu brought preliminary motions alleging defects in the form of the Indictment, which were rejected by Trial Chamber I, save for one or two defects that were subsequently cured.[841]

538. Brima also filed a preliminary motion alleging defects in the form of the indictment, which was rejected by the Trial Chamber on the ground that it had been filed out of time.[842] A renewed motion by Brima seeking an extension of time for filing such a preliminary motion was then also subsequently rejected by the Trial Chamber.[843] As the Prosecution submitted in its closing arguments, if the Brima motion on defects in the form of the Indictment was rejected at that

[840] **Trial Chamber's Judgement**, para. 24 (footnotes omitted).
[841] **Preliminary Motion Decision**; ***Kanu* Preliminary Motion Decision**.
[842] ***Brima* Preliminary Motion Decision**.
[843] **Renewed *Brima* Preliminary Motion**.

stage for being out of time, it was certainly too late for such arguments to be entertained at the stage of final trial arguments.[844]

539. Thus, in respect of all three Accused, the issue of defects in the form of the Indictment had been settled by the Trial Chamber in interlocutory decisions. In none of these preliminary motions was any issue raised by the Defence for any of the Accused that Count 7 had been defectively pleaded. The Prosecution was therefore entitled to proceed on the basis that there was no such issue in this case.[845]

540. However, the Trial Chamber held in its final trial Judgement that it is not precluded from reviewing in a final trial Judgement whether shortcomings in the form of the Indictment have actually resulted in prejudice to the rights of the Accused, and that it can reconsider an earlier interlocutory decision on alleged defects in the form of the indictment if either (1) a clear error of reasoning has been demonstrated, or (2) it is necessary to do so to prevent an injustice.[846]

541. The Trial Chamber referred to a number of authorities in support of this proposition. One of these authorities expressly cited by the Trial Chamber[847] was the decision of the ICTR Appeals Chamber in the *Cyangugu* case.[848] However, what the ICTR Appeals Chamber said in the cited paragraph of that judgement was as follows:

> It is apparent from the foregoing that the Trial Chamber reconsidered in the Trial Judgement some of the findings it had made in certain pre-trial decisions on the form of the Indictments. This does not in itself constitute an error, as it is within the discretion of a Trial Chamber to reconsider a decision it has previously made if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. *However, the Appeals Chamber emphasises that "where such a decision is changed, there will be a need in every case for the Trial Chamber to consider with great care and to deal with the consequences of the change upon the proceedings which have in the meantime been conducted in accordance with the original*

[844] Transcript, 7 December 2006, pp. 58-59.
[845] See also **Rule 98 Decision**, para. 323, in which the Trial Chamber acknowledged that "a challenge to the form of the Indictment should have been raised in a preliminary motion under Rule 72".
[846] **Trial Chamber's Judgement**, para. 24.
[847] *Ibid.*, footnote 41.
[848] ***Cyangugu* Appeal Judgement**, para. 55.

> *decision". In the present case, the Appeals Chamber considers that, once the Trial Chamber decided to reconsider its pre-trial decisions relating to the specificity of the Indictments at the stage of deliberations, it should have interrupted the deliberation process and reopened the hearings.* At such an advanced stage of the proceedings, after all the evidence had been heard and the parties had made their final submissions, the Prosecution could not move to amend the Indictment. On the other hand, reopening the hearings would have allowed the Prosecution to try to convince the Trial Chamber of the correctness of its initial pre-trial decisions on the form of the Indictment, or to argue that any defects had since been remedied. The Appeals Chamber finds that the Trial Chamber erred in remaining silent on its decision to find the abovementioned parts of the Indictments defective until the rendering of the Trial Judgement.[849]

542. In the present case, as in the *Cyangugu* case, the Trial Chamber's decision *to reopen the earlier interlocutory decisions* on defects in the form of the Indictment was taken only after the final trial arguments and after the close of the case. It is true that Judge Sebutinde did express the view, in a few short paragraphs in her separate concurring opinion at the Rule 98 stage, that Count 7 was bad for duplicity.[850] (Nevertheless, she suggested that even at that stage (that is, after the Prosecution case had closed, and after the Rule 98 Decision had been given), this defect could still be cured by an amendment to the Indictment.[851]) However, the issue was not mentioned at all anywhere in the main Rule 98 Decision, and there was no indication that either of the other members of the Trial Chamber shared her view on the issue.[852] There can be no suggestion that the Rule 98 Decision placed any onus on the Prosecution to take any action; rather the onus was on the Defence to raise any objection that it may have had to the pleading of Count 7.[853]

543. The Prosecution submits that if in exceptional circumstances there are good reasons for the Defence to raise an issue of defects in the form of the Indictment after trial commences (for instance, if during the course of the trial itself, a defect

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[849] *Ibid.* (emphasis added).
[850] **Rule 98 Decision, Justice Sebutinde Concurrence**, paras 3-9.
[851] *Ibid.*, para. 9.
[852] A point underscored by the fact that Judge Doherty dissented on this point in the Final Trial Judgement.
[853] The Trial Chamber's comment in para. 93 of the **Trial Chamber's Judgement** that "the Prosecution has not availed itself of Justice Sebutinde's suggested remedy" might be taken to suggest that the Trial Chamber thought otherwise. If it did, it is submitted that the Trial Chamber erred in this respect.

became apparent that was not apparent before), there is an obligation on the Defence to raise that issue at the earliest opportunity, to allow the defect to be remedied as efficiently as possible if a defect is found to exist. The Prosecution submits that it is not tenable to allow a trial to proceed to the very end on an indictment, and for the Defence then to be permitted at the stage of final trial arguments to raise an allegation of defects in the form of the Indictment.[854]

544. At the time that Judge Sebutinde gave her Separate Opinion in the Rule 98 Decision, the Defence had never previously suggested that Count 7 was bad for duplicity. Even after the Rule 98 Decision, the Defence did not raise any issue that Count 7 was defectively pleaded, until they raised this issue for the first time in their final trial briefs.[855] The Prosecution submits that it was not required, merely because the Defence raised such an issue for the first time at such an extremely late stage,[856] to assume that the earlier interlocutory decisions on defects in the form of the Indictment were now reopened, and had to be reargued by the Prosecution substantively on the merits. At no time prior to the close of trial did the Trial Chamber give any indication that it was prepared to consider the merits of the Defence claim, raised at such an impermissibly late stage, that Count 7 was defectively pleaded. Accordingly, the Prosecution was entitled to assume that the Trial Chamber had not reopened the earlier interlocutory decisions on defects in the form of the Indictment, and therefore dealt only in a cursory fashion with this Defence argument in its oral closing arguments.[857] The first time that the Prosecution became aware that the Trial Chamber was indeed reopening the earlier interlocutory decisions was when the Trial Chamber's Judgement was given.

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[854] See ***Brđanin* Trial Judgement**, para. 48; and Prosecution's closing submissions, Transcript, 7 December 2006, pp. 57-58.

[855] ***Brima* Final Trial Brief**, paras 146-149; ***Kamara* Final Trial Brief**, paras 94-96.

[856] The Trial Chamber expressed the view, in paragraph 93 of the **Trial Chamber's Judgement**, that "the Defence did not raise the objections at such a late stage for tactical advantages, but merely followed the opinion of Justice Sebutinde in her 'Separate and Concurring Opinion' to the Rule 98 Decision". However, the Trial Chamber did not explain how the Defence was justified in waiting until final trial arguments to raise this objection, rather than raising it immediately after the **Rule 98 Decision**. Furthermore, the Trial Chamber does not explain why the Defence was unable to raise this objection at the pre-trial stage, and why the Defence required an opinion of one member of the Trial Chamber at the Rule 98 stage before doing so.

[857] Transcript, 7 December 2006, pp. 61-62.

545. The Prosecution submits that if the Trial Chamber was minded to reopen the earlier interlocutory decisions, it was required to give clear notice to that effect to the Prosecution, and to allow the Prosecution adequate opportunity to deal fully with substance of the Defence arguments on defects in the Indictment. In this case, the Prosecution was given no such notice, nor was it given adequate opportunity to put its arguments on this issue fully.[858] The Prosecution submits that the Trial Chamber therefore acted contrary to the requirements set out by the ICTR Appeals Chamber in the *Cyangugu* case quoted above. The Prosecution also submits that the Trial Chamber acted contrary to the holding of the ICTY Appeals Chamber in the *Jelisić* case, to the effect that where the Trial Chamber decides an issue *proprio motu* whether or not invited to do so by a party, it remains always under the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made.[859]

546. For this reason alone, the Prosecution submits that the decision of the Trial Chamber to dismiss Count 7 for duplicity should be reversed, unless any of the Accused in this case establishes not only that Count 7 was impermissibly duplicitous, but also discharges the burden of establishing that his ability to prepare his defence was actually materially impaired by that defect.[860]

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[858] The Defence first argued that Count 7 was duplicitous in its final trial briefs. At that stage, the Prosecution had already filed its own final trial brief, and could only respond to this Defence argument in its oral closing submissions. The Prosecution's closing oral submissions were less than three hours long, and in this time the Prosecution was required to address all arguments in the Defence final trial briefs, which totalled some 450 pages.

[859] ***Jelisić* Appeal Judgement**, para. 27.

[860] See, by way of analogy ***Simić* Appeal Judgement**, paras 25, 56-74 (indicating that different standards apply (1) in cases where an appellant raises a defect in the indictment for the first time on appeal, and (2) in cases where an accused has previously raised the issue of lack of notice before the Trial Chamber and appeals against the Trial Chamber's decision on that objection: in the former case, the accused bears the burden of proving that his ability to prepare his defence was materially impaired, while in the latter case the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare a defence was not materially impaired). See also ***Bagosora* Appeal Decision**, para. 42. The Prosecution submits that the same principle should apply in a case where an accused raises an alleged defect in the indictment at an extremely late stage of the trial proceedings without justification for the delay in raising the issue: see CDF Judgement, para. 27. The Prosecution submits that this is consistent with the approach taken in national legal systems. See Partially Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 ('Forced Marriages'), para. 8, who, citing Blackstone's Criminal Practice, notes that an appellate court may dismiss an appeal on grounds of duplicity in the indictment if there has been no miscarriage of justice.

C. Second error of the Trial Chamber: The finding that Count 7 was defectively pleaded

547. The rule against duplicity, as it exists in national legal systems, does not, and cannot, apply in the same way in proceedings before international criminal courts.[861]

548. Furthermore, even in respect of the rule against duplicity as it exists in national legal systems, it has been said that:

> The rule developed during a period of extreme formality and technicality in the preferring of indictments and laying of informations. It grew from the humane desire of judges to alleviate the severity of the law in an age when many crimes were still classified as felonies, for which the punishment was death by the gallows. The slightest defect made an indictment a nullity. That age has passed. Parliament has made it abundantly clear in those sections of the Criminal Code having to do with the form of indictments and informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities.[862]

549. Other case law of international criminal tribunals also confirms that in international criminal proceedings, it is not absolutely necessary to observe all "petty formalities" of technical rules such as the rule against duplicity.[863]

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[861] ***Brđanin*** **Indictment Decision**, para. 61: "The old pleading rule was that a count which contained more than one offence was bad for duplicity, because it did not permit an accused to plead guilty to one or more offences and not guilty to the other or other offences included within the one count. Such a rule is completely impracticable in this Tribunal, given the massive scale of the offences which it has to deal with. But the rule against duplicity was nevertheless also one of elementary fairness, and the consideration of fairness involved was that the accused must know the nature of the case he has to meet". (Footnote omitted.)

[862] ***R v Sault Ste Marie (City)*** **(1978) 3 CR (3d) 30 [Supreme Court of Canada]**, para 14. See also ***Criminal Trial Handbook***, ch 2.1(c)(iv): "Duplicity arises where the count charges two or more offences in the alternative. This may arise because the enacting section, by its very language, creates two or more offences and both offences are contained in a single count of the indictment. The historical rationale underlying an objection to a duplicitous charge is that by charging an accused with having committed A or B, the accused does not know which charge to defend. Moreover, he or she cannot plead *autrefois* if charged again because the accused does not know if he or she was acquitted or convicted of A or B. *This rule developed during the period of the common law when criminal pleading was a technical art. Neither reason has any substance in law today. There is nothing to prevent an accused from defending either A or B or pleading* autrefois *to either A or B*". (Emphasis added.).

[863] ***Bizimungu*** **Interlocutory Appeal Decision**, para. 23 ("The rule against duplicity *generally* forbids the charging of two separate offences in a single count, although a single count may charge different means of committing the same offence"); ***Naletilić and Martinović*** **Indictment Decision**, ("... in order to

550. The general pleading requirement of indictments in international criminal tribunals is that each count in the indictment should indicate the precise legal qualification of the crime charged which should be based on the material facts alleged in the indictment.[864] The fundamental question is whether the indictment meets the consideration of fairness that the accused must know the nature of the case he has to meet.[865] In determining whether this requirement is met, the Indictment must be considered as a whole.[866] A pleading is not defective if, taken as a whole, the indictment makes clear to each accused (a) the nature of the responsibility alleged against him or her and (b) the material facts by which his or her particular responsibility will be established.[867]

551. The Indictment in this case followed a format that is not uncommon in international criminal tribunals,[868] and which has been followed in other cases before the Special Court.[869] That format has since been criticised by the Appeals Chamber of the Special Court with reference to the specific provisions of the Rules of Procedure and Evidence of the Special Court,[870] and the Prosecution's practice has since been amended in the light of the guidance given by the Appeals Chamber.[871] However, the format of the Indictment used in the present case, and in other cases before the Special Court does not have the effect of invalidating the Indictment.[872]

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ensure precision and certainty in the charges made against an accused person, each count of an indictment *should* deal with only one type of offence".

[864] ***Krnojelac* Appeal Judgement**, para. 138; ***Celebici* Appeal Judgement**, para. 350; ***Cyangugu* Trial Judgement**, para. 37; ***Semanza* Trial Judgement**, para. 59.

[865] ***Brđanin and Talić*, Indictment Decision**, para. 61: "But the rule against duplicity was nevertheless also one of elementary fairness, and the consideration of fairness involved was that the accused must know the nature of the case he has to meet".

[866] ***Kovačević* Decision**, p. 2; ***Kondewa* Preliminary motion Decision**, para. 10; ***CDF* Trial Judgement**, paras 40-41; ***Mrksic* Form Decision** paras 11-12; ***Cyangugu* Trial Judgement**, para. 30.

[867] ***Krnojelac* Preliminary Motion Decision**, para. 7; ***Martić* Decision**, para. 4; **Blaškić Appeal Judgement**, paras 208-212; ***Cyangugu* Trial Judgement**, para. 31.

[868] Compare, for instance, the following ICTY and ICTR indictments: ***Tadić* Second Amended Indictment**; ***Meakić* Amended Indictment**; ***Akayesu* Amended Indictment**, ***Bisengimana* Indictment**.

[869] **CDF Indictment**; **RUF Indictment**.

[870] ***CDF* Indictment Appeal Decision**, paras 52-54.

[871] Compare the format of the original indictment in the Charles Taylor case (SCSL-01-01, "Indictment", 6 March 2003) with the amended indictment in that case (SCSL-01-75, "Amended Indictment", 16 March 2006).

[872] ***CDF* Indictment Appeal Decision**, paras 53-54.

552. The material facts on which Count 7 of the Indictment was based are set out in paragraphs 51 to 57 of the Indictment. In respect of those material facts, the Accused were charged with four counts (that is, Counts 6, 8 and 9, in addition to Count 7). It is evident from the reading of the Indictment as a whole which material facts in these paragraphs relate to which Counts. It was never suggested by the Trial Chamber or the Defence that all of the Counts in this Indictment were defectively pleaded on the ground that it was not possible to discern which material facts related to which Count.

553. Article 2(g) of the Statute gives the Special Court jurisdiction over the crime of "Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence". Count 7 of the Indictment charged the Accused with "Sexual slavery and any other form of sexual violence ... punishable under Article 2.g of the Statute". The Prosecution submits that it is permissible, in a single Count, to charge all violations of a single provision of the Statute (in this case, Article 2(g)) that are established by the pleaded material facts.[873]

554. However, even if it were to be concluded, contrary to this submission, that "sexual slavery" and "any other form of sexual violence" are two separate crimes, the effect of Count 7 of the Indictment is perfectly clear. It charges both (1) sexual slavery punishable under Article 2(g) of the Statute, as well as (2) any form of sexual violence punishable under Article 2(g) of the Statute *other than* sexual slavery (which is expressly mentioned in the same Count) or rape (which is charged in Count 6). There was no ambiguity as to the legal characterisation of what the Accused were charged with, or the material facts underpinning those charges.

555. Judge Sebutinde, in her Separate Concurring Opinion in the Rule 98 Decision, and subsequently the Majority of the Trial Chamber, were of the view that the perceived defect of duplicity in Count 7 could have been cured simply by recasting Count 7 as two separate counts, one alleging "sexual slavery" and one

[873] See Prosecution's closing oral submissions, Transcript, 7 December 2006, pp. 61-62. Thus, although in this Indictment the crime of "rape" punishable under Article 2(g) was pleaded in a separate count (Count 6), it is submitted that it would have been permissible to include this also within Count 7, together with sexual slavery and any other form of sexual violence.

alleging "any other form of sexual violence".[874] However, this would have been no more than the purest of mere technical formalities. Judge Sebutinde in the Rule 98 Decision did not suggest that there was any ambiguity that needed to be clarified, or any further details or information that needed to be provided to the Defence in order for the Defence to be given notice of the case that they were required to meet. Nor did the Majority of the Trial Chamber in any way suggest this.[875] Judge Sebutinde expressly noted that the making of the proposed amendment would not prejudice the Accused since "it would not necessitate the introduction of any new evidence of which they are not already aware".[876] Thus, a formal amendment to the Indictment would have been of no practical or substantive consequence whatsoever.

556. In the circumstances, it is submitted that it is impossible to see how the Accused were in any way prejudiced by the way in which Count 7 was pleaded. Judge Sebutinde merely said in her Separate Concurring Opinion in the Rule 98 Decision, without any elaboration, that the way in which Count 7 was pleaded "could prejudice a fair trial of the accused persons if left uncorrected" as it did "not enable the accused persons to know precisely which of the two crimes (sexual slavery or sexual violence) they should be defending themselves against".[877] However, for the reasons given in the previous paragraph, that is not correct. The Majority of the Trial Chamber concluded that the way in which Count 7 was pleaded "prejudices the rights of the Accused",[878] but gave no reasons for this other than to refer to the reasons given by Judge Sebutinde in the Rule 98 Decision.

557. Nor did the Defence identify any prejudice that it had suffered as a result of the way that Count 7 was pleaded. None of the Defence teams referred to alleged

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[874] **Rule 98 Decision, Justice Sebutinde Concurrence**, para. 9; see also **Trial Chamber's Judgement**, para. 93.

[875] See **Trial Chamber's Judgement**, paras 93-94. Thus, Judge Doherty considered that the reasons given by the Majority of the Trial Chamber "are formalistic and disregard the fundamental issue, which is whether the right of the Accused to be informed promptly and in detail about the nature and the cause of the charges against them has been violated": Partially Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 ('Forced Marriages'), para. 2.

[876] **Rule 98 Decision, Justice Sebutinde Concurrence**, para. 9.

[877] **Rule 98 Decision, Justice Sebutinde Concurrence**, para. 8.

[878] **Trial Chamber's Judgement**, para. 94.

duplicity of Count 7 in their oral closing submissions. The issue was referred to only in the final trial briefs of Brima and Kamara. The Brima Brief[879] merely referred to the Separate Concurring Opinion of Judge Sebutinde in the Rule 98 Decision, and then stated, with no elaboration or explanation, that "Count 7 in its current state has made it difficult for the First Accused to 'fully understand the nature and the cause of the charges brought against him'".[880] The Kamara final trial brief[881] was worded in vitually identical terms, and asserted merely that "the present Count as charged is duplex, defective, difficult to understand and violates the rule against duplicity".[882]

558. However, for the reasons given in paragraphs 552-556 above, it is impossible to see how the Defence failed to understand the charges against the Accused. The fact that the Defence never complained about the wording of Count 7 until their final trial briefs, and that even then they only invoked cursorily the Separate Opinion of Judge Sebutinde in the Rule 98 Decision, confirms that the Defence was in fact not confused at all. The Defence Rule 98 submissions clearly demonstrate that the Defence understood that Count 7 charged both "sexual slavery" under Article 5(g) of the Statute, as well as "any other form of sexual violence" under the same Article.[883]

559. It is submitted that neither the Majority of the Trial Chamber nor the Defence have demonstrated, apart from mere assertion, how the Defence was in any way prejudiced by the way in which Count 7 was pleaded, or was unable to understand fully the nature of the charges in the Indictment. It is noted that Judge Doherty, in her Partially Dissenting Opinion, found that there had been no material prejudice to the Defence.[884]

560. The Prosecution therefore submits that Count 7 was not defectively pleaded.

561. Alternatively, if Count 7 was defectively pleaded, the Prosecution submits that the appropriate remedy should not have been to dismiss the Count in its entirety, but

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[879] ***Brima* Final Trial Brief**, paras 146-149.
[880] *Ibid.*, para. 149.
[881] ***Kamara* Final Trial Brief**, paras 94-96.
[882] *Ibid.*, para. 239.
[883] **Joint Legal Part Submission**, paras 69-70.
[884] **Dissenting Opinion of Justice Doherty**, para. 10; also paras 11-12.

rather, merely to dismiss it to the extent that it alleged "any other form of sexual violence" apart from sexual slavery. This is the solution that Judge Doherty considered was appropriate.[885] The Prosecution submits that the Defence can never have been under any doubt that the Accused were charged with sexual slavery under Article 2(g) of the Statute. This is clear from the wording of Count 7 itself. It is furthermore clear from the Defence Rule 98 submissions and Defence final trial briefs that the Defence fully understood that the Accused had been charged with sexual slavery under Article 2(g) of the Statute.[886]

562. Thus, if there was any ambiguity or doubt as to what, if any, additional criminal conduct beyond sexual slavery was encompassed within this Count, the appropriate remedy would have been to dismiss this Count only to the extent that it went beyond the scope of sexual slavery, as unequivocally pleaded.[887] As Judge Doherty found, it is submitted that "the efficient discharge of the Tribunal's functions in the interest of justice warrants the conclusion that any possible errors of the Prosecution should not stultify criminal proceedings whenever a case nevertheless appears to have been made by the Prosecution and its possible flaws in the formulation of the charge are not such as to impair or curtail the rights of the Defence".[888] The Prosecution notes that the Trial Chamber considered that the Indictment failed to provide sufficient particulars of the "other forms of sexual violence" charged in Count 7.[889] The Prosecution submits that this is however a moot point because the Prosecution did not in its final trial submissions seek convictions on Count 7 for any criminal conduct other than acts of sexual

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[885] *Ibid.*, para. 12.

[886] **Joint Legal Submission**, para. 69; ***Brima* Rule 98 Motion**, para. 60; ***Kamara* Rule 98 Motion**, para. 27; ***Kanu* Rule 98 Motion**, paras 52-56; ***Brima* Final Trial Brief**, para. 258; ***Kamara* Final Trial Brief**, para. 237. As Justice Doherty found, the Defence had in fact "proceeded to adduce evidence and defend themselves on the charge": **Dissenting Opinion of Justice Doherty**, para. 10.

[887] The limited practice in international criminal tribunals does not support the approach taken by the Majority in this case of dismissing completely a count that it considered by the duplicitous. For instance, in ***Ntakirutimana* Preliminary Motion Decision**, the Trial Chamber considered that a count was duplicitous because it alleged genocide by means of both (1) killing members of the group (ICTR Statute, Article 2(a)), and (2) causing serious bodily or mental harm to members of the group (ICTR Statute, Article 2(b)). Consequently, the Chamber invited the Prosecutor to specify whether the accused was alleged to have committed acts of genocide by killing or by causing serious bodily (or mental) harm or whether she was alleging that the accused committed acts of genocide by *both* means (*ibid.*, paras 20, 22 and 24, and the disposition on p. 8).

[888] **Dissenting Opinion of Justice Doherty**, para. 11, quoting ***Kupreškić* Trial Judgement**, para 741.

[889] **Trial Chamber's Judgement**, paras 720-721, **Dissenting Opinion of Justice Doherty**, para. 3.

slavery,[890] which again underscores that the way in which Count 7 was pleaded has caused no prejudice to the Defence.

D. Third error of the Trial Chamber: The failure of the Trial Chamber to find that any defect had been cured

563. It is a well-established principle in international criminal tribunals that in some instances, a defect in an indictment can be deemed "cured" if the Prosecution provides the accused with timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her.[891] The question whether the Prosecution has cured a defect in the indictment has been said to be equivalent to the question whether the defect has caused any prejudice to the Defence or, whether the trial was "rendered unfair" by the defect.[892]

564. This principle was not only recognised by the Trial Chamber, but was applied by the Trial Chamber in the Trial Chamber's Judgement in a number of instances.[893]

565. However, the Trial Chamber gave no consideration at all to the question of whether any defect in the way that Count 7 had been pleaded had subsequently been cured by timely, clear and consistent information by the Prosecution.

566. The Prosecution submits that in the present case, timely, consistent and clear information *was* provided to the Defence as to the scope of the charges against the Accused under Count 7.

567. First, it was clear from information provided by the Prosecution prior to the commencement of the case and throughout the Prosecution case that Count 7 of the Indictment encompassed both sexual slavery under Article 2(g) of the Statute

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[890] **Prosecution Final Trial Brief**, paras 999-1005.

[891] ***Cyangugu* Appeal Judgement**, para 28. See also ***Ntakirutimana* Appeal Judgement** para 27; *Kvočka* Appeal Judgement, para 33; ***Naletilić & Martinović* Appeal Judgement**, para 26; ***Kupreškić* Appeal Judgement**, para. 114; See also **Trial Chamber's Judgement** references in footnote 58.

[892] ***Ntakirutimana* Appeal Judgement**, para 27.

[893] **Trial Chamber's Judgement**, paras 47-50, 55, 1438, 1706-1708, 1752-1754, 1757-1759, 1762-1764, 1767-1769, 1815, 2051, 2054-2055.

as well as any other form of sexual violence under the same Article.[894] It was clear from the Defence Rule 98 submissions that the Defence understood this to be the case.[895] It is furthermore clear from the Trial Chamber's Rule 98 Decision that the Trial Chamber itself also understood this to be the case.[896]

568. Secondly, even if it were to be decided that the Defence was not given timely, consistent and clear notice of the "other forms of sexual violence" alleged against the Accused, for the reasons given in paragraph 562 above, it is submitted that the appropriate course would have been to dismiss this Count only to the extent that it went beyond the scope of sexual slavery, as unequivocally pleaded.

569. In this respect, it is noted that the Defence never specifically complained that the "other forms of sexual violence" encompassed within Count 7 had been insufficiently particularised.[897] Furthermore, the Trial Chamber expressly found at the Rule 98 stage that there was evidence upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of each of the Accused for the crime referred to as "any other form of sexual violence" pursuant to Art 2.g of the Statute.[898] However, for the reason given in paragraph 562 above, it is submitted that this is a moot point because the Prosecution did not rely in its final trial submissions seek convictions on Count 7 for any criminal conduct other than acts of sexual slavery.

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[894] See, for instance, **Prosecution's Pre-Trial Brief** Pursuant to Order for Filing Pre-Trial Briefs of 13 February 2004 – SCSL-16-029, paras 40, 147-151 (laying out the elements of both sexual slavery and other forms of sexual violence), **Prosecution Supplemental Pre-Trial Brief** (referencing the theory of the case in proving sexual slavery and/or other forms of sexual violence against each Accused, dealing with **Brima** at paras 83-85, 86, 88, 90, 92-94, 96, 98, 100, 106, 108, 110, 112, 114, 116, 118, 119, 120, 122, 124, 126, 128, 130, **Kamara** at paras 366-369, 371, 373, 375-377, 379, 380-381, 383, 385, 387, 389, 391, 393, 395-397, 399, 401-403, 407, 409, 411, and **Kanu** at paras 649-652, 654-655, 658-660, 662, 663, 666, 668, 670, 674, 676, 678, 680, 682, 684-686, 688, 690, 692, 694, 696).

[895] **Joint Legal Submission**, paras 69-70; ***Brima* Rule 98 Motion**, paras 60, 63-64, 67; ***Kamara* Rule 98 Motion**, paras 18, 30; ***Kanu* Rule 98 Motion**, paras 54-56.

[896] **Rule 98 Decision**, paras 109-111, and 161-164.

[897] **The Brima Preliminary Motion** did assert that there was a lack of "significant lack of particularisation" in Counts 6 to 9, but no reference to the alleged duplicitous nature of Count 7.

[898] **Rule 98 Decision**, para. 164.

E. The requested remedy

570. For the reasons given in paragraphs 536-546 above, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's decision, in paragraph 95 of the Trial Chamber's Judgement, to dismiss Count 7 in its entirety.

571. If Count 7 is reinstated by the Appeals Chamber, the question then arises whether the elements of sexual slavery under Article 2(g) of the Statute are proved beyond a reasonable doubt in relation to each of the three Accused.[899]

572. The Prosecution submits that on the basis of the findings contained in the Trial Chamber's Judgement, each of the Accused is individually responsible under Count 7 for the crime against humanity of sexual slavery to the same extent that each Accused is criminally responsible under Count 9 for the war crime of outrages upon personal dignity in respect of acts of sexual slavery.

573. The Trial Chamber found that the general requirements (or chapeau elements) of crimes against humanity (Article 2 of the Statute) were satisfied in respect of all three Accused in respect of all crimes charged in the Indictment for which they would be found individually responsible.[900]

574. In addition to these general requirements (or chapeau elements), the Trial Chamber set out the specific elements of the crime against humanity of sexual slavery in paragraphs 708-709 of the Trial Chamber's Judgement.[901] The Prosecution take no issue with the Trial Chamber's articulation of these elements. The elements are:

> 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

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[899] For the reasons given in paragraphs 536-546 above, the Prosecution is only seeking convictions under Count 7 in respect of sexual slavery, regardless of whether Count 7 is reinstated in full, or only to the extent of the charges of sexual slavery.

[900] **Trial Chamber's Judgement**, paras 210-239.

[901] See further **Rule 98 Decision**, para. 109.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature;

3. The perpetrator committed such conduct intending to engage in the act of sexual slavery or in the reasonable knowledge that it was likely to occur.[902]

575. As noted above, the Accused were charged with the alleged acts of sexual slavery under both Court 7 (as a crime against humanity) and under Count 9 (as a war crime). In considering the evidence of sexual slavery for the purposes of Count 9, the Trial Chamber also made findings on whether the specific elements of sexual slavery under Count 7 were satisfied.

576. Thus, in the case of sexual slavery in Bombali District, the Trial Chamber found that women captured by the AFRC/RUF were distributed to soldiers to be their "wives", that they were subject to physical and psychological violence as a form of punishment, that they were deprived of their liberty, and that the exercise of ownership over their persons taken together with acts of sexual violence committed against them, namely, rape at the hands of their rebel "husbands" or at the hands of other fighters, satisfied the *actus reus* and *mens rea* elements of the crime of sexual slavery.[903] The Trial Chamber also made similar findings in respect of the acts of sexual slavery committed in Freetown and the Western Area.[904]

577. The Prosecution therefore submits that the Appeals Chamber can, based on the findings in the Trial Chamber's Judgement, and without the need to remit the case to the Trial Chamber for any further findings of fact in this respect, revise the Trial Chamber's Judgement by adding a corresponding conviction for all three Accused on Count 7 in respect of the acts of sexual slavery for which they were convicted under Count 9, in addition to the convictions under Count 9.

578. To the extent that it becomes relevant following the determination of any of the Prosecution's other grounds of appeal, the Prosecution notes that the Trial

[902] **Trial Chamber's Judgement**, para. 708, referring to International Criminal Court Elements of Crimes, Article 7(1)(g)-2.
[903] **Trial Chamber's Judgement**, para. 1141.
[904] **Trial Chamber's Judgement**, para. 1165.

Chamber also found that the elements of sexual slavery were established in other locations relevant to the Indictment.[905]

579. As submitted in paragraph 531 above, cumulative convictions in respect of the same conduct under both Article 2(g) of the Statute and Article 3(e) of the Statute are permissible.

F. Conclusion

580. For the reasons given above, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's decision to dismiss Count 7 for duplicity, and:

(i) to revise the Trial Chamber's Judgement, by adding a corresponding conviction for all three Accused on Count 7 in respect of the acts of sexual slavery for which they were convicted under Count 9, in addition to the convictions under Count 9;

(ii) if, following the decision of the Appeals Chamber on the Prosecution's other Grounds of Appeal, it is found that any of the Accused is individually responsible for any other acts of sexual slavery of which they were not convicted by the Trial Chamber, or is found to be individually responsible for acts of sexual slavery on modes of liability in addition to those on which they were found liable by the Trial Chamber, to find that that additional criminal liability is reflected in convictions under Count 7, as well as under Count 9;

(iii) to make any resulting amendments to the Disposition of the Trial Chamber's Judgement; and

(iv) to increase the sentences imposed on Brima, Kamara and Kanu to reflect the additional criminal liability.

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[905] **Trial Chamber's Judgement**, paras 1069, 1109 (Kono District), 1133 (Koinadugu District), 1145 (Bombali District), 1149 (Kailahun District), 1170 (Freetown and Western Area), and 1187 (Port Loko District). The Chamber held that these amounted to proof of Outrages on Personal Dignity as charged in Count 9: *ibid:*, para. 1188. See also paras 1665 (Kono District), 1686 (Koinadugu District), 1745 (Freetown and Western Area), and 1811 (Port Loko District).

VIII. Prosecution's Seventh Ground of Appeal: The Trial Chamber's Dismissal of Count 8 for Redundancy

A. Introduction

581. Count 8 of the Indictment charged the Accused with an "Other inhumane act, a CRIME AGAINST HUMANITY, punishable under Article 2.i of the Statute" of the Special Court.

582. This Count was not originally contained in the Indictment. It was added with the leave of Trial Chamber I, granted in a decision of 6 May 2004.[906] In its motion which led to that decision, the Prosecution indicated that the purpose in adding this new Count was to encompass acts of forced marriages.[907] That motion stated in particular that "The Prosecution submits that forced marriage, which is an inhumane act of similar gravity to existing crimes within the Court's jurisdiction, constitutes a crime which falls within the jurisdiction of the Court, namely, Crimes Against Humanity – Other inhumane acts, in violation of Article 2.i of the Statute".[908]

583. After Trial Chamber I gave leave to add this Count to the Indictment, the proceedings were conducted on the basis that Count 8 of the Indictment related to acts of forced marriage. This was made clear by the Prosecution,[909] and was understood by the Defence[910] and the Trial Chamber.[911]

584. In the Trial Chamber's Judgement, the Trial Chamber found, by Majority (Judge Doherty dissenting): (1) that the crime against humanity of "other inhumane acts" exists as a residual category, and must therefore involve conduct not otherwise subsumed by other crimes against humanity under Article 2 of the Statute;[912] and (2) that the Trial Chamber was not satisfied that the evidence adduced by the

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[906] **Amended Brima Preliminary Motion Decision.**
[907] **Amended Indictment Motion**, paras 9-12.
[908] *Ibid.*, para. 11.
[909] **Prosecution Final Brief**, paras 1009-1012.
[910] ***Kanu* Final Trial Brief**, paras 48, 56.
[911] See **Trial Chamber's Judgement**, paras 701-707, **Rule 98 Decision,** para. 165.
[912] **Trial Chamber's Judgement**, para. 703.

Prosecution was capable of establishing the elements of a non-sexual crime of forced marriage independent of the crime of sexual slavery under Article 2(g) of the Statute.[913]

585. As a result of these findings, the Trial Chamber concluded, by Majority (Judge Doherty dissenting), that the evidence adduced by the Prosecution with respect to forced marriages was completely subsumed by the crime of sexual slavery and that there is no lacuna in the law which would necessitate a separate crime of forced marriage as an "other inhumane act".[914] Count 8 was considered by the Majority to be redundant and was therefore dismissed.[915]

586. Judge Doherty dissented on this point,[916] and concluded that forced marriage constitutes a crime against humanity separate from the crime against humanity of sexual slavery.[917]

587. The Prosecution submits that the Majority of the Trial Chamber erred in law and in fact in making the above findings, and that the Partially Dissenting Opinion of Judge Doherty on this point was correct. As a result of these errors, the Trial Chamber wrongly failed to convict each Accused of the crime of forced marriage as an "other inhumane act" as charged in Count 8, and erred in law and fact, and committed a procedural error at paragraph 722 of the Trial Chamber's Judgement, in dismissing Count 8 for redundancy.

B. "Other inhumane acts" are not required to be non-sexual

588. The decision of the Majority with respect to Count 8 of the Indictment was foreshadowed by the Dissenting Opinion of Judge Sebutinde in the Rule 98

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[913] **Trial Chamber's Judgement**, para. 704.
[914] **Trial Chamber's Judgement**, para. 713.
[915] **Trial Chamber's Judgement**, para. 714. Ultimately, the Trial Chamber did not convict any of the Accused in respect of the acts of forced marriage under Count 7, which alleged the crime against humanity of sexual slavery, on the ground that the pleading of Count 7 was duplicitous. The Trial Chamber decided instead to consider the acts of forced marriage under Count 9, which alleged the war crime of outrages upon personal dignity. This aspect of the Trial Chamber's Judgement is the subject of the Prosecution's Sixth Ground of Appeal above.
[916] **Dissenting Opinion of Justice Doherty**, paras 14-71.
[917] *Ibid.*, para. 71.

Decision.[918] There, Judge Sebutinde took the view that "it is impermissible to allege acts of sexual violence (other than rape, sexual slavery, enforced prostitution and forced pregnancy) under Article 2.i [of the Statute] since "other inhumane acts", even if residual, must logically be restrictively interpreted as covering only those acts of a non-sexual nature amounting to an affront to human dignity".[919] She further took the view that "any alleged acts or offences that are of a residual, non-sexual nature and that could arguably be contained under the general regime of 'other inhumane acts' do not belong under the part of the Indictment entitled "COUNTS 6-9: SEXUAL VIOLENCE".[920]

589. This view was subsequently adopted by the Majority of the Trial Chamber, which found that "In light of the exhaustive category of sexual crimes particularised in Article 2(g) of the Statute, the offence of 'other inhumane acts', even though residual, must logically be restrictively interpreted as applying only to acts of a non-sexual nature amounting to an affront to human dignity".[921]

590. The Prosecution submits that there is no basis in logic or in principle why the residual category of crimes against humanity of "other inhumane acts" in Article 2(i) of the Statute should be confined to acts of a non-sexual nature. Nor did the Trial Chamber cite any authority for this proposition.[922] Furthermore, the existing authorities contradict this proposition.

591. As the Prosecution argued in its closing trial submissions in this case:

> The argument, as we understand it, is because paragraph 2(g) of the Statute expressly includes a range of sexual crimes, that that must somehow be taken to cover the field of sexual crimes as far as crimes against humanity is concerned. We submit that cannot be the case. On that kind of logic, it would be said because Article 2 lists the crimes against humanity of murder, extermination and torture, that that somehow covers the field of crimes against the person so that other inhumane acts under Article 2(i) could not

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[918] **Rule 98 Decision, Justice Sebutinde Concurrence** paras 10-14.
[919] *Ibid.*, para. 13, quoting ***CDF* Evidence Decision**, para. 19(iii).
[920] **Rule 98 Decision, Justice Sebutinde Concurrence**, para. 14.
[921] **Trial Chamber's Judgement**, para. 697, referring again to the **CDF Indictment Appeal Decision**, para. 19(iii).
[922] Apart, that is, from the ***CDF* Indictment Appeal Decision** (see footnotes 914 and 916 above). The effect of the Prosecution submissions in relation to this ground of appeal is that the ***CDF* Indictment Appeal Decision** was also wrong on this point.

include any crimes of violence against the person. We submit there can be no basis for that proposition.

In that respect, I need only refer to paragraphs 173 to 174 of the Rule 98 decision citing other case law, which notes that forced prostitution can be another inhumane act under Article 2(i). In that respect, we refer also to paragraphs 1,006 to 1,012 of the Prosecution [final trial] brief.[923]

592. The Trial Chamber set out the specific elements of the crime against humanity of "other inhumane acts" in paragraph 174 of the Rule 98 Decision and paragraph 698 of the Trial Chamber's Judgement.[924] The Prosecution take no issue with the Trial Chamber's articulation of these elements. The elements are:

> 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
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> 2. The act was of a gravity similar to the acts referred to in Article 2 a. to h. of the Statute;
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> 3. The perpetrator was aware of the factual circumstances that established the character or gravity of the act.
>
> 4. The act was committed as part of a widespread or systematic attack directed against a civilian population.
>
> 5. The perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.

593. A similar definition is given, for instance, in the Elements of Crimes of the International Criminal Court,[925] and in the case law of other international criminal courts and tribunals.[926]

594. There is no suggestion in this statement of the elements of the crime of "other inhumane acts" that the crime must necessarily be of a non-sexual nature. Indeed, the Prosecution submits that it would be contrary to the very purpose of criminalising "other inhumane acts" as a crime against humanity to exclude

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[923] Transcript, 7 December 2006, pp. 62-63.
[924] See also **Dissenting Opinion of Justice Doherty**, para. 21.
[925] **ICC Elements of Crimes**, Article 7(1)(k).
[926] See also for instance ***Kordić* Appeal Judgement**, para 117; ***Stakić* Appeal Judgement**, para 366; ***Blagojević and Jokić* Trial Judgement**, para 628. See also ***Galić* Trial Judgement**, para 154; and ***Krnojelac* Trial Judgement**, para 132. See also **Dissenting Opinion of Justice Doherty**, para. 54.

sexual crimes from its ambit. The category of other inhumane acts was "deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition".[927] In other words, the categories of crimes against humanity are not closed.[928] The Trial Chamber expressly recognised that this was indeed the purpose of the crime against humanity of other "inhumane acts".[929] The Prosecution submits that there is no reason in principle or logic why it should be assumed that Article 2 of the Special Court's Statute has somehow managed to define exhaustively all crimes against humanity of a sexual nature, and that it was only non-sexual crimes that were incapable of exhaustive definition, leaving a need for this residual category.

595. The Prosecution is not aware of any suggestion in the literature or other authorities that in order to be a crime against humanity of "other inhumane acts", the crime must be of a non-sexual nature. Indeed, there are authorities in support of the proposition that the crime against humanity of "other inhumane acts" *does* include crimes of a sexual nature.[930]

596. The Prosecution therefore submits that the issue is not whether forced marriage is a sexual crime or a non-sexual crime, but simply whether forced marriage satisfies the elements of the crime against humanity of other inhumane acts. The characterisation of forced marriage as a "sexual" crime or as a "non-sexual" crime is simply immaterial.

597. However, even if forced marriage were categorised as a "non-sexual" crime, it is submitted that there was nothing inappropriate in its inclusion in the part of the

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[927] ***Kordić* Appeal Judgement**, para 117; ***Kupreškić* Trial Judgement**, para. 563.

[928] See ***Stakić* Appeal Judgement**, paras 315 and 316; ***Kordić* Trial Judgement**, para 117; ***Galić* Trial Judgement**; ***Naletilić and Martinović* Trial Judgement**, para 247; ***Vasiljević* Trial Judgement**, para 130; ***Kvočka* Trial Judgement**, para 206; ***Kordić* Trial Judgement**, para 269; ***Kupreškić* Trial Judgement**, para 563; ***Jelisić* Trial Judgement**, para 52; and ***Kayishema* Trial Judgement**, para 150.

[929] **Trial Chamber's Judgement**, footnote 1363 and accompanying text.

[930] ***Akayesu* Trial Judgement**, paras 688, 697 (holding that acts of forced undressing of women were in the circumstances "inhumane acts" under ICTR Statute, Article 3(i) [= Special Court Statute, Article 2(i)]); ***Kupreškić* Trial Judgement**, para. 566 (indicating that it can include enforced prostitution); ***Niyitegeka* Trial Judgement**, para. 463, 465 (holding that a sexual assault on the body of a dead woman is an "inhumane act") and ***Kajelijeli* Appeal Judgement**, paras 933-936, and para. 916 ("Other acts of sexual violence which may fall outside of this specific definition [of rape] may of course be prosecuted ... under other categories of crimes ... such as *other inhumane acts*").

Indictment (paragraphs 51-57) entitled "COUNTS 6-9: SEXUAL VIOLENCE".[931] The material facts on which the allegations of forced marriage were based were to a significant degree common to the material facts on which the allegations of sexual slavery were based, and for this reason it was appropriate for Count 8 to be placed in the section of the Indictment dealing with those material facts. From the way that the Indictment was pleaded, in relation to the allegations of forced marriage there was no ambiguity in the Indictment as to the legal characterisation of what the Accused were charged with, or the material facts underpinning those charges.[932] The Defence cannot establish that it suffered any prejudice from the way in which forced marriages were pleaded in the Indictment, and the Defence has never raised this as an issue.[933]

C. The issues in this appeal

598. For the reasons given above, the main issue in this appeal is whether forced marriages satisfy the elements of the crime against humanity of "other inhumane acts". These elements are set out in paragraph 595 above.

599. The fourth and fifth elements set out in paragraph 595 above are the general requirements (or chapeau elements) for crimes against humanity generally. The Trial Chamber found that the general requirements (or chapeau elements) of crimes against humanity (Article 2 of the Statute) were satisfied in respect of all three Accused in respect of all crimes charged in the Indictment for which they would be found individually responsible.[934] The remaining question is therefore whether the first three elements set out in paragraph 595 above are satisfied in relation to forced marriages. As to this question, see Section D below.

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[931] Compare **Rule 98 Decision, Justice Sebutinde Concurrence**, para. 14, referred to in paragraph 591 above.
[932] See paragraphs 557-558.
[933] See paragraphs 558-565.
[934] **Trial Chamber's Judgement**, paras 210-239.

600. If the answer to this question is in the affirmative, the next question is whether the elements of this crime, and the individual responsibility of the Accused for this crime, were established in this case. As to this question, see Section E below.

601. If the answer to the previous two questions is in the affirmative, the final question is whether the Accused can be convicted on Count 8 in respect of forced marriages, in addition to the other Counts on which they were charged in relation to this conduct. As to this question, see Section F below.

D. The crime against humanity of "Other inhumane acts" of forced marriage

602. Contrary to what was alleged by the Defence,[935] the Prosecution was not in this case seeking to establish a "new" crime of forced marriage. The crime against humanity of "other inhumane acts" was firmly established in customary international law at all times within the temporal jurisdiction of the Special Court. This is clear from the inclusion of this crime in the Statutes of other international criminal tribunals.[936] This has also been affirmed in the case law of international criminal tribunals.[937]

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[935] ***Kanu* Final Trial Brief,** para 56.

[936] The temporal jurisdiction of the Special Court commences from 30 November 1996 (see **Special Court Statute**, Article 1(1)). The crime against humanity of "other inhumane acts" was previously included in Article 5(i) of the **ICTY Statute** (which was adopted on 25 May 1993), and Article 3 (i) of the ICTR Statute, which was adopted on 8 November 1994. At the time of adoption of the ICTY Statute, the Secretary-General of the United Nations expressed the view that all of the crimes contained within the ICTY Statute are "beyond any doubt part of customary law" (Report of the Secretary-General Pursuant To Paragraph 2 of Security Council Resolution 808 (1993) (presented 3 May 1993), United Nations Document No. S/25704, para 34). At the time that the Agreement establishing the Special Court was concluded, the Secretary-General of the United Nations expressed the view that "In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated [in the Special Court Statute], are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime" (Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 12). See also *ibid.*, para. 14 ("The list of crimes against humanity [in the Special Court's Statute] follows the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on article 6 of the Nürnberg Charter"). The crime against humanity of "other inhumane acts" was included in Article 6(c) of the the Nürnberg Charter. The crime against humanity of "other inhumane acts" was also included in United Nations General Assembly resolution 95(1).

[937] ***Tadić* Jurisdiction Appeal Decison**, para. 141; ***Čelebići* Appeal Judgement**, para. 113; ***Blagojevic and Jokić* Trial Judgement,** para. 624.

603. As the ICTY Appeals Chamber has held, the notion of "other inhumane acts" cannot be regarded as a violation of the principle of *nullum crimen sine lege* as it forms part of customary international law, and the function of this provision as a residual category is clear, namely that it "was [d]eliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition".[938]

604. It is well established that "[T]he principle of *nullem crimen sine lege* does not prevent a court from interpreting and clarifying the elements of a particular crime.[939] The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. Where an accused must have recognised the criminal nature of the acts in question, there will be no violation of the principle of *nullum crimen sine lege*, even if the accused may not at the time have foreseen the creation of an international criminal tribunal to try that crime, or the precise legal characterisation of that crime under international criminal law.[940]

605. The Prosecution submits that no person could ever be under the belief that it is not unlawful, as part of a widespread or systematic attack against a civilian population, to inflict on a member of that civilian population great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act. In the case of the crime against humanity of "other inhumane acts", compliance with the principle of *nullum crimen sine lege* is, apart from anything else, addressed by the requirement that, in order for conduct to fall within the category of "other inhumane acts", conduct must be of similar seriousness to the

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[938] ***Stakić* Appeal Judgement**, paras 315-316, quoting and citing other ICTY and ICTR judgements at the Appeals Chamber and Trial Chamber levels.

[939] ***Čelebići* Appeal Judgement**, paras 173, 576; ***Aleksovski* Appeal Judgement**, para. 127.

[940] ***Čelebići* Appeal Judgement**, paras 179-180. See also Greenwood, "The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia" (1998) 2 *Max Planck Yearbook of United Nations Law* 97, 132-133 (observing that the principle of *nullum crimen* does not preclude all development of criminal law through the jurisprudence of courts and tribunals, so long as those developments do not criminalise conduct which, at the time it was committed, could reasonably have been regarded as legitimate, and that that principle is not infringed where the conduct in question would universally be acknowledged as wrongful and there was doubt only in respect of whether it constituted a crime under a particular system of law).

other acts enumerated in Article 2 of the Special Court Statute,[941] and the *mens rea* requirements that the perpetrator was aware of the factual circumstances that established the character or gravity of the act, and must have known or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.[942]

606. An example of a crime that has become recognized in the case law as a crime against humanity of "other inhumane acts", despite not having been previously expressly articulated as such, is the crime of forcible transfer of civilians (for instance, by way of an "ethnic cleansing" campaign).[943] Other examples include serious physical and mental injury,[944] mutilations, beatings and other acts of violence, inhumane and degrading treatment, forced prostitution, and forced disappearance.[945]

607. "The element of 'similar seriousness' is to be evaluated in light of all factual circumstances, such as the nature of the act or omission, the context within which it occurred, the individual circumstances of the victim(s) as well as the physical, mental and moral effects on the victim(s). There is no requirement that the effects on the victim(s) be long-lasting, however the fact that such were the effects will impact the determination of the seriousness of the act or omission".[946]

608. Forced marriages in armed conflict were not a phenomenon unique to the armed conflict in Sierra Leone. According to one report:

> Forced marriages of girls and young women by armed opposition groups have been documented in recent armed conflicts in Sierra Leone (1991-2001), Liberia (1990-2003), Uganda (1986-present), the Democratic Republic of Congo (1998-present), Algeria (1994-present), Kashmir (1990-present) and elsewhere. In Algeria and Kashmir, armed opposition groups have abducted girls and women with impunity and no cases to date have been brought to national or

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[941] Compare, for instance, ***Blagojević and Jokić* Trial Judgement**, para. 626; *See* ***Galić* Trial Judgement**, para. 152; ***Kayishema* Trial Judgement**, paras 150, 151.

[942] See paragraph 595 above [elements of other inhumane acts].

[943] ***Stakić* Appeal Judgement**, paras 313-317.

[944] ***Blaškić* Trial Judgement**, para. 239.

[945] ***Kvočka* Trial Judgement**, paras 206-208.

[946] ***Blagojević and Jokić* Trial Judgement**, para. 627. *See also* ***Galić* Trial Judgement**, para. 153; ***Vasiljević* Trial Judgement**, para. 235; ***Kayishema* Trial Judgement**, paras 150, 151, 154 (noting that the acts that rise to the level of inhumane acts should be determined on a case-by-case basis); ***Krnojelac* Trial Judgement**, para. 131; ***Čelebići* Trial Judgement**, para. 536.

> local courts. Forced marriages have also been committed by state armed forces. For example, from 1980-2000, Indonesian security forces in East Timor forcibly married Timorese girls and young women and forced others into prostitution. Prior to 2001, Taliban fighters in Afghanistan made death threats against families to hand over their girls and young women and forced the families to complete marriage contracts. Today in Afghanistan, armed opium dealers and *jihadi* commanders are forcibly marrying girls and young women.
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> The violations experienced by girls and young women subjected to forced marriages are often severe and long-lasting and encompass a number of psychological, emotional, physical, social, economic and cultural elements. Among these elements are forced pregnancy, child-bearing and the raising of children born of rape in societies where those children are often rejected and physically abused (including the withholding of food and medicines) by extended family members and community members. These young mothers report that because they are often cut out of family and social networks, they struggle to provide education, food and health care to their children born due to forced marriage. Many of these young mothers have lost many years of education and lack the skills needed to pursue productive livelihoods, which are exacerbated due to the stigma they face from their past experiences and their exclusion from social networks.[947]

609. As long ago as 1998, the United Nations Commission on Human Rights' Special Rapporteur on Violence Against Women expressed the view that forced marriages in armed conflict are a war crime, stating that:

> The Special Rapporteur, however, agrees with international human rights experts that non-State actors conducting war are likewise bound by common article 3. Thus, non-State actors contesting State power must respect international humanitarian law. Individual criminal responsibility and universal jurisdiction also apply to individuals waging war against the State. Since women are often the victims of violence perpetrated by non-State actors during armed conflict, for example forced marriages by non-State actors in

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[947] United Nations, Division for the Advancement of Women (DAW), in collaboration with UNICEF, Expert Group Meeting, Elimination of all Forms of Discrimination and Violence, Against the Girl Child, Florence, Italy, 25-28 September, report prepared by Dyan Mazurana and Khristopher Carlson, Document EGM/DVGC/2006/EP.12, paras 42-43. See also United Nations Economic and Social Council, Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission resolution 1997/44, UN Document E/CN.4/1998/54, 26 January 1998 (the "**Coomaraswamy Report**"), paras 17, 23, 27, 36.

> Algeria and in Kashmir, it is imperative that the international community evolve unequivocal standards which ensure human rights protection to victims who live in areas not under the control of formal State authorities.[948]

610. The Special Rapporteur in this quote contemplated that forced marriage in an armed conflict is a war crime under Common Article 3 to the Geneva Conventions. Since that report was produced, it is now well-established that violations of Common Article 3 give rise to individual criminal responsibility of the perpetrator and can be prosecuted and punished by international criminal courts and tribunals having jurisdiction over violations of Common Article 3.[949] If the general requirements (chapeau elements) for crimes against humanity are also satisfied in relation to such a crime, there is no reason in logic or principle why such a crime should not also constitute the crime against humanity of "other inhumane acts", since it has been held that the notions of "cruel treatment" within the meaning of Common Article 3 (Special Court Statute, Article 3(a)) on the one hand, and of "inhumane" treatment for the purposes of the crime against humanity of "other inhumane acts" have the same legal meaning.[950]

611. The phenomenon of forced marriages as a crime under international humanitarian law is distinguishable from the question whether or not customary practices of arranged marriage as they exist in some societies are contrary to international human rights law, or for that matter even criminal law.[951] The distinguishing feature of forced marriages in international humanitarian law is that they are perpetrated in an armed conflict and/or as part of a widespread or systematic attack against a civilian population. Furthermore, they are perpetrated by members of forces of one of the sides in an armed conflict against civilians who are associated with, or perceived to be associated with, the other side of the armed

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[948] **Coomaraswamy Report**, para. 17.

[949] See ***Tadic* Jurisdiction Appeal Decision**, para. 91. This is now trite law. The Special Court is specifically given jurisdiction over violations of Common Article 3: See **Special Court Statute**, Article 3.

[950] ***Jelisić* Trial Judgement**, para. 52.

[951] See, however, the submissions made in paragraphs 611-614 below. On the distinction between forced marriages on the one hand, and arranged marriages as practised in some societies, see for instance the **Dissenting Opinion of Justice Doherty**, para. 36.

conflict, or by participants in a widespread or systematic attack against a civilian population against members of the civilian population under attack.

612. At trial, the Prosecution submitted that forced marriage consists of words or other conduct intended to confer a status of marriage by force or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment, with the intention of conferring the status of marriage.[952] Judge Doherty, in her Partially Dissenting Opinion, found that "[t]he crucial element of 'forced marriage' is the imposition, by threat or physical force arising from the perpetrator's word or other conduct, of forced conjugal association by the perpetrator over the victim."[953] The Prosecution does not understand Judge Doherty's definition to differ in substance from that proposed by the Prosecution. However, to the extent that there is any difference, the Prosecution accepts that Judge Doherty's definition appropriately identifies the unique feature of forced marriage.

613. In practice, the acts of a perpetrator in respect of a victim may amount not only to forced marriage, but also to one or more other crimes under international law, such as the crime against humanity of sexual slavery, or even the crime against humanity of torture. For this reason, some authorities have expressed the view that the concept of sexual slavery includes the practice of forced marriages,[954] and some authorities have contemplated instances of forced marriages being prosecuted by international criminal courts as the crime against humanity of sexual slavery.[955] It has thus also been suggested for this reason that instances of

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[952] **Prosecution Final Trial Brief**, paras 1009-1012.

[953] **Dissenting Opinion of Justice Doherty**, para 53.

[954] United Nations Economic and Social Council, "Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict" (Final Report submitted by Ms Gay J McDougall, Special Rapporteur) E/CN.4/Sub.2/1998/13 of 22 June 2000, para 30; United Nations Economic and Social Council, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict* (Update to the Final Report submitted by Ms Gay J McDougall, Special Rapporteur) E/CN.4/Sub.2/2000/21 of 6 June 2000, para 13.

[955] ***Kvočka* Trial Judgement**, footnote 343 (stating that "Sexual violence would also include such crimes as sexual mutilation, *forced marriage*, and forced abortion as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization' and other similar forms of violence" (emphasis added); Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal*

forced marriage might be prosecuted as the crimes against humanity of torture or rape.[956] However, authorities have also acknowledged that forced marriages do not always in practice involve the victim being subjected to non-consensual sex[957] (although in practice this may usually be the case),[958] or being forced to undertake domestic duties or other labour[959] (although in practice this will often also be the case[960]), or being subjected to torture or other mistreatment.[961] Thus, not all authorities treat forced marriage as a form of slavery *per se*. Many authorities which discuss the issue of forced marriage together with the issue of sexual slavery refer to these and other crimes collectively as "slavery and ***slavery-like*** offences." It is submitted that this is an acknowledgement that forced marriage is not, *per se*, a sub-category of sexual slavery, or of slavery in general, but a distinct offence, which may be described as "slavery-like."[962]

Court – Observers Notes, Article by Article [The Hague: Kluwer, 1999], page 142: 'The word "sexual" in the current paragraph denotes the result of this particular crime of enslavement: limitations on one's autonomy, freedom of movement and power to decide matters relating to one's sexual activity ... *Sexual slavery thus also encompasses situations where women and girls are forced into "marriage"*, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by captors.' (emphasis added).

[956] See Kalra, "Forced Marriage: Rwanda's Secret Revealed", U.C. Davis Journal of International Law and Policy, pp. 214-216, contemplating that forced marriages that occurred in Rwanda should be a separate charge ideally but could be charged by the ICTR as the crimes against humanity of "other inhumane acts", "sexual slavery", "torture" or "rape".

[957] See, for instance, See, for instance, Report of the Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict E/CN.4/Sub.2/1998/13, paras 8 and 30. See also Sierra Leone Truth and Reconciliation Commission, *Witness To Truth* (Final Report of the Sierra Leone Truth and Reconciliation Commission) (2004) ("**Sierra Leone Truth and Reconciliation Commission Report**"), vol 3B, para 184 ("In Sierra Leone, as well as in many other conflicts, women and girls were given as "wives" to commanders and combatants. These sexual slaves are widely referred to as "bush wives". *When "forced marriage" involves forced sex or the inability to control sexual access or exercise sexual autonomy, which, by definition, forced marriage* ***almost always*** *does, it constitutes sexual slavery*, as recognised by the Special Rapporteur for Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict." (Emphasis added.)

[958] See, for instance, **Trial Chamber's Judgement**, para. 1165.

[959] See, for instance, **Trial Chamber's Judgement**, para. 1160.

[960] See, for instance, **Trial Chamber's Judgement**, para. 1165.

[961] See **Dissenting Opinion of Justice Doherty**, para 52: "the conduct contemplated as 'forced marriage' does not necessarily involve elements of physical violence such as abduction, enslavement or rape, although the presence of these elements may go to proof of the lack of consent of the victim".

[962] United Nations Economic and Social Council, *Integration of the Human Rights of Women and the Gender Perspective* (Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44), Doc No E/CN.4/2000/68 (2000), para. 13 ("Documentation and research shows that trafficking occurs for a myriad of exploitative purposes to which trafficked victims have not consented, including but not limited to forced and/or bonded labour, including within the sex trade, ***forced marriage and other slavery-like***

614. The distinguishing feature of forced marriage is the "forced *conjugal association* by the perpetrator over the victim."[963] It represents forcing a person into the appearance, the veneer of a conduct (i.e. marriage), by threat, physical assault or other coercion.[964]

615. The fact that victims of forced marriage need not necessarily be subject to non-consensual sex or to forced labour or mistreatment is demonstrated by the evidence in this case. Paragraphs 314-321 above deal with the evidence relating to TF1-023, who was held captive by "Colonel X" as his "wife", and was subsequently left "in the care" of "Captain Y" when Colonel X went to Makeni. While TF1-023 was held captive by Colonel X, she was frequently subjected to non-consensual sex.[965] While she was "in the care of" Captain Y, the latter "tried to look after her and to ensure that she did not come to any harm."[966] Nevertheless, while with Captain Y, TF1-023 was clearly still in forced captivity, until she was able to escape while in Magbeni.[967] The Prosecution submits that the only conclusion open to any reasonable trier of fact on the findings of the Trial Chamber and the evidence that it accepted is that while she remained in captivity with Captain Y, TF1-023 was still treated as the "wife" of Colonel X, who was being "looked after" by Captain Y until Colonel X's return. Thus, although she was not subjected to any form of sexual violence or forced labour while in captivity with Captain Y, she was during this period still a victim of forced marriage.

616. Thus, while acts of sexual slavery, or of forced labour or slavery, may usually be present in cases of forced marriage, this is not inevitably the case. Non-

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practices" (emphasis added)); United Nations Office of the High Commissioner for Human Rights, *Abolishing Slavery and its Contemporary Forms* [New York and Geneva: United Nations, 2002], Doc No HR/PUB/02/4, para. 30 (indicating that the section of the report in question is dealing with "the various forms of slavery and ***slavery-like practices***" (emphasis added)), and para. 112 (describing forced marriage as one of the "institutions or practices ***akin to slavery***" (emphasis added) and stating that "***It is not the payment which is an abuse but its occurrence in a forced or non-consensual marriage***" (emphasis added); Report of the Special Rapporteur on Systematic Rape, Sexual Slavery ***and Slavery-like Practices*** during Armed Conflict E/CN.4/Sub.2/1998/13 (emphasis added).

963 **Dissenting Opinion of Judge Doherty**, para. 53 (emphasis added).

964 **Status Conference, Transcript 8 March 2004**, p. 27, para. 203.

965 **Trial Chamber's Judgement**, para. 1154.

966 **Trial Chamber's Judgement**, para. 1157.

967 *Ibid.*

consensual sex, and forced labour, are not part of the definition of, and are not required in order to establish, that forced marriage has occurred. Rather, it is the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a *forced conjugal association* by the perpetrator over the victim that constitutes the definition of a forced marriage.[968]

617. The Prosecution submits that the imposition by a perpetrator of a forced conjugal association over a victim is an inhumane act causing great suffering to the victim of a gravity similar to the acts referred to in Article 2(a) to (i) of the Special Court's Statute, for the purposes of the first two elements of the crime against humanity of "other inhumane acts". It is certainly at the very least as grave as imprisonment (Article 2(e) of the Statute). The Prosecution submits that this is self-evident.

618. First, forced marriage, even outside the context of an armed conflict or outside the context of a widespread or systematic attack against the civilian population, constitutes a violation of the human rights of the victim. Many international treaties and conventions, such as the International Covenant of Civil and Political Rights, declare that forcing a person to marry another against his or her will is a violation of human rights.[969]

619. Forced marriage in this context does not require a formal or legal marriage; merely forcibly keeping a victim as a purported "wife" is enough to constitute a contravention of various human rights instruments.[970]

620. The Prosecution submits that the gravity of forced marriage is immeasurably enhanced where it is perpetrated as part of a widespread or systematic attack against a civilian population, against a member of the civilian population under

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[968] See paragraph 611 above.

[969] See Universal Declaration of Human Rights, Article 16(2); International Covenant on Civil and Political Rights, Article 23(2); Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Articles 5.1, 6(a) and 7; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, Article 1(1). See also Human Rights Watch, Reconciled to Violence: State Failure to Stop Domestic and Abduction in Kyrgyzstan, 1.

[970] Human Rights Watch, Reconciled to Violence: State Failure to Stop Domestic and Abduction in Kyrgyzstan, 2, 57; Karine Bélair, "Unearthing the Customary Law Foundations of 'Forced Marriages' During Sierra Leone's Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women's Rights in Post-Conflict Sierra Leone", 15 Colum. J. Gender & L. 552-558 (2006); Amnesty International, AFR 32/001/2002, Kenya: Rape: The Invisible Crime, 14-15.

attack. In this situation, the victim is held captive as the "wife" of one of the perpetrators of the attack against the civilian population of which she is a member.

621. The Prosecution submits that of its nature, being held captive as the "wife" of a perpetrator in such circumstances is a situation causing great suffering to the victim, regardless of whether the victim is forced to have non-consensual sex with her "husband", or is forced to perform labour, or is subjected to other mistreatment, during the forced marriage. The Prosecution submits that it is not necessary to establish that the victim suffered any form of physical or psychological harm beyond this in order to establish that the act of forced marriage was of sufficient gravity to meet the requirements of the first two elements of the crime against humanity of "other inhumane acts".

622. By way of analogy, in relation to the crime against humanity of imprisonment (Article 5(e) of the ICTY Statute, Article 2(e) of the Special Court Statute), it has been held that any form of arbitrary physical deprivation of liberty of an individual with no legal basis may constitute this crime.[971] According to the case law, there is no requirement, in order to establish that an act of imprisonment was of sufficient gravity to be a crime against humanity, that the victim suffered any form of physical or psychological harm beyond the harm caused by the deprivation of liberty itself. The mere fact of deprivation of liberty is of itself sufficient to make this conduct, when committed as part of a widespread or systematic attack against the civilian population, sufficiently grave to be a crime against humanity.

623. It would thus be no defence to the crime against humanity of imprisonment to argue that the victims were detained in humane conditions and well cared for, and that they therefore suffered no physical or mental harm of any gravity. It may be that if this was the case, it would be a factor relevant to sentencing; however, it would not be a defence to the crime itself. Other types of crime where the act itself is criminal irrespective of the additional harms associated with that conduct

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[971] ***Naletilic and Martinovic*** **Trial Judgement**, para. 642; ***Krnojelac*** **Appeal Judgement**, paras 109-114.

include the conscription or enlistment of child soldiers,[972] and deportation or forcible transfer of population.[973]

624. The Prosecution submits that in exactly the same way, the mere fact of forcibly requiring a member of the civilian population to remain in a conjugal association with one of the participants in a widespread or systematic attack against that civilian population is, without more, of sufficient gravity to make this conduct an other inhumane act.

625. In practice, of course, although it is not necessary to establish this in order to prove the crime, in many or most cases a victim of the crime against humanity of imprisonment will suffer physical or psychological harm above and beyond the mere fact of imprisonment. Similarly, although it is not necessary to establish this in order to prove the crime, in many or most cases a victim of the crime against humanity of forced marriage will suffer physical or psychological harm above and beyond the mere fact being forced to remain in a conjugal association with one of the attackers of the civilian population. While this need not be proved in order to establish the crime, the fact that this so frequently occurs is an added reason why international law criminalizes such conduct. The prohibition on conduct in international humanitarian law (as in any legal system) exists not only to prevent the inherent harm caused by the conduct in question itself, but also to prevent harm that is very commonly (although not necessarily always) associated with or caused by that conduct. The types of harm that are frequently associated with, or caused by, forced marriages include the following:

(i) Women and girls subjected to 'forced marriage' are often very young, and thus particularly vulnerable. Their vulnerability is heightened by their removal from their families and placement in a context of physical and sexual violence.[974]

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[972] "The term 'enlistment' could encompass both *voluntary* enlistment and *forced* enlistment into armed forces or groups, forced enlistment being the aggravated form of the crime": **CDF Trial Judgement**, para. 192.

[973] ***Krstić* Trial Judgement**, para. 532; ***Kupreškić* Trial Judgement**, para. 566; ***Milošević* Acquittal Motion Decision**, para. 52.

[974] **Dissenting Opinion of Judge Doherty**, para. 47.

(ii) Women and girls are forced to associate with and in some cases live together with men whom they may fear or despise.[975]

(iii) Women are frequently subject to abuse and torture, and possibly abandoned when their husbands grew tried of them or if they became ill and could no longer perform work.[976]

(iv) Women are frequently subjected to additional fear that if they are captured by an opposing armed group, they will immediately killed or otherwise punished for being the "wife" of their enemies.[977]

626. The types of harm that are frequently associated with, or caused by, forced marriages, and which continue even after the forced marriage has ended include the following:

(i) The label "wife" may stigmatise the victims and lead to their rejection by their families and community, negatively impacting on their ability to reintegrate into society and thereby prolonging their mental trauma.[978]

(ii) Victims may feel compelled (or even feel that they "want") to remain in a conjugal relationship with their forced "husbands" even after the event.[979]

(iii) Women who were captured and forced into marriages during the war often have to turn to commercial sex work or exchanging sex for food or

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[975] **Dissenting Opinion of Judge Doherty**, para. 48.

[976] Bélair, "Unearthing the Customary Law Foundations of 'Forced Marriages' During Sierra Leone's Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women's Rights in Post-Conflict Sierra Leone", 15 Colum. J. Gender & L. 552-558 (2006), 551, 555-556.

[977] Sierra Leone Truth and Reconciliation Commission Report, Volume 3B, para. 307.

[978] **Dissenting Opinion of Judge Doherty**, paras 48, 51; Sierra Leone Truth and Reconciliation Commission Report, Volume 3B, paras 307, 309.

[979] See, for instance, UNIFEM, "Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building", p 12: "In East Timor, Kirsty Gusmao, the wife of East Timor President Xanana Gusmao, told us the story of Juliana dos Santos, who had been kidnapped by an Indonesian army officer when she was about 14 years old. She was taken to a camp in West Timor controlled by militia groups and the Indonesian Army. Eventually she married an Indonesian in the camp and bore a child. Kirsty Gusmao campaigned vigorously to have dos Santos and her child returned to her home and her family and, in the process, the girl became a symbol in East Timor of the terrible price women had paid for their country's independence. Gusmao's efforts ultimately failed. Arrangements were made for dos Santos to be turned over to the East Timorese, but on the appointed day she arrived surrounded by a group of armed men and said she did not want to go home".

supplies as a way to support themselves after their escape or release from the "marriage".[980]

(iv) Some women became accustomed to life with the "husband", and particularly if they have young children fathered by the rebel, they may stay with their abductor as a sort of surrogate family to the one they lost in the war.[981]

627. The Prosecution submits, based on all of the arguments above, that there can be no doubt that forced marriage, when committed as part of a widespread or systematic attack against a civilian population, satisfies the elements of the crime against humanity of "other inhumane acts", punishable under Article 2(i) of the Special Court's Statute.

E. The findings and evidence in this case

628. Because the Trial Chamber, by Majority, dismissed Count 8, it gave no consideration to the question of whether the elements of the crime against humanity of forced marriage as an "other inhumane act", and the individual responsibility of the Accused for that crime, had been established beyond a reasonable doubt on the evidence before it. The evidence was however considered by Judge Doherty in her Partially Dissenting Opinion,[982] who was satisfied that the elements of the crime had been established.[983] She made no express finding as to the individual responsibility of the Accused for this crime,[984] although this may have been implicit in paragraph 51 of her Partially Dissenting Opinion.

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[980] Sierra Leone Truth and Reconciliation Commission Report, Volume 3B, paras 443-444; Human Rights Watch, Bhutan/Nepal: Trapped by Inequality: Bhutanese Refugees Women In Nepal, p. 36.

[981] Sierra Leone Truth and Reconciliation Commission Report, para. 218; Human Rights Watch, "We'll Kill You If You Cry": Sexual Violence in the Sierra Leone Conflict, 26, (2003).

[982] **Dissenting Opinion of Judge Doherty**, paras 22-57.

[983] **Dissenting Opinion of Judge Doherty**, para. 51.

[984] See the conclusions reached by Judge Doherty, paras 69-71. It may however be implicit in her Partially Dissenting Opinion that Judge Doherty was also satisfied, based on the other findings in the Trial Chamber's Judgement, that the Accused were individually responsible for this crime.

629. Although the Majority of the Trial Chamber undertook no evaluation of the evidence with respect to Count 8, the Prosecution submits that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence that it accepted in making those findings, the only conclusion open to any reasonable trier of fact is that the elements of the crime against humanity of forced marriage as an "other inhumane act", and the individual responsibility of the Accused for that crime, are established beyond a reasonable doubt.

630. The Trial Chamber made numerous findings as regards the "bush wife" or "rebel wife" phenomenon during the war. While the Trial Chamber dismissed the importance traditionally attached to the term "wife" and referred to the usage of the word merely as indicative of "the intent of the perpetrator to exercise ownership over the victim",[985] the Prosecution submits that the only conclusion that could be reached by any reasonable trier of fact on the basis of all of the findings of the Trial Chamber in paragraphs 1078-1188 of the Trial Chamber's Judgement, and the evidence that it accepted, was that the word "wife" in this case was intended to connote a conjugal association. For instance, the Trial Chamber made findings regarding the "wives" taken from Tombodu, Yamadu, and other villages near Koidu,[986] referred to the evidence of young girls being forced into marriages with soldiers without consent around Mortema,[987] and the testimony of DAB-101 that around Wordu Town young girls would be held and turned into wives.[988]

631. TF1-094 gave detailed evidence about her continuing relationship with "Andrew", including his asking her not to abort his baby rather than commanding it and his promise to take care of her, can also sufficiently establish a conclusion of a forced marriage.[989] TF1-085 gave evidence that she was married to "Colonel Z" in a ceremony, that money was given to the "father-in-law", and that Colonel Z took her to the doctor when she was bleeding and followed the doctor's advice

[985] **Trial Chamber's Judgement**, para. 711.
[986] **Trial Chamber's Judgement**, para. 1102-1103
[987] **Trial Chamber's Judgement**, para. 1106.
[988] **Trial Chamber's Judgement**, para. 1108.
[989] **Trial Chamber's Judgement**, paras 1080, 1113-1114.

not to have sex with her for one month until she healed.[990] When Colonel Z had to go to the battlefront, he left his "wife" in the care of a "Captain Y" to ensure her safety and to look after her.[991] Colonel Z's behaviour in this context establishes that this was a forced conjugal relationship, whether or not it was also a master/slave relationship.

632. Alternatively, if the Appeals Chamber is not satisfied that the elements of forced marriage as an "other inhumane act" and the individual responsibility of the Accused have been established on the findings of the Trial Chamber and the evidence that it accepted, it becomes necessary for an evaluation of the evidence to be undertaken for this purpose.

633. The evidence in respect of Count 8 that was before the Trial Chamber is detailed in paragraphs 1868-1918 of the Prosecution's Final Trial Brief. The Prosecution submits that it is open to the Appeals Chamber itself to consider that evidence, and to enter its own verdict on Count 8, if it finds that on the evidence before the Trial Chamber the only reasonable conclusion open to any reasonable trier of fact is that the elements of the crimes charged in Count 8, and the individual responsibility of the Accused for that crime, are established beyond a reasonable doubt. In such circumstances, there is no purpose in remitting the case back to the Trial Chamber for further findings of fact, since any conclusion of the Trial Chamber to the contrary would be reversed again on appeal on the ground that the conclusion reached was one that was not open to any reasonable trier of fact.

634. Alternatively, if the Appeals Chamber considers it inappropriate for the evidence to be considered by the Appeals Chamber at first instance, or if it cannot conclude that there is only one finding that is reasonably open to any reasonable trier of fact, the Prosecution requests the Appeals Chamber to remit the proceedings to the Trial Chamber for further findings of fact on Count 8.

635. In the event that the Appeals Chamber decides that it cannot determine this matter without remitting the matter to the Trial Chamber for further findings of fact, but rejects the Prosecution request to remit the matter to the Trial Chamber, the

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[990] **Trial Chamber's Judgement**, para. 1090-1092.
[991] **Trial Chamber's Judgement**, para. 1157.

Prosecution requests as an alternative remedy that the Appeals Chamber make a finding of law that the crime against humanity of other inhumane acts under Article 2(i) of the Statute includes the crime of forced marriage, and that the Trial Chamber erred in dismissing Count 8 for redundancy.[992]

F. Cumulative convictions

636. If, following the determination of this Ground of Appeal, it is found that the elements of the crime against humanity of forced marriage as an "other inhumane act" are established, as well as the individual responsibility of the Accused for that crime, the question remains whether the Accused can be convicted on Count 8 in respect of this conduct, in addition to the other Counts on which they were charged in relation to the acts pleaded in paragraphs 51-57 of the Indictment. As noted above, the material facts on which the allegations of forced marriage were based were to a significant degree common to the material facts on which the allegations of sexual slavery were based, in respect of which the Accused were also charged on Counts 7 and 9.

637. Count 9 charged the Accused in respect of acts of sexual slavery with outrages upon personal dignity, a violation of Common Article 3 and Additional Protocol II, punishable under Article 3(e) of the Statute of the Special Court. In respect of acts of sexual slavery, each of the Accused was convicted on Count 9.[993]

638. As cumulative convictions under Article 2 of the Statute and under Article 3 of the Statute are permissible in respect of the same conduct,[994] there is no impediment to the Accused being convicted on both Count 8 and Count 9 in respect of the same conduct, and no impediment to the Accused being convicted on both Count 7 and Count 9 in respect of the same conduct.

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[992] The Appeals Chamber of the ICTY has indicated that where it is in the interests of justice to do so, it can find that the Trial Chamber erred in acquitting the accused on the ground that it did, but without either substituting a conviction or ordering a new trial: See ***Aleksovski* Appeal Judgement**, paras 153–154; ***Jelisic* Appeal Judgement**, paras 73–77.

[993] **Trial Chamber's Judgement**, paras 2113 (Brima), 2117 (Kamara), 2121 (Kanu).

[994] See paragraphs 580-582 above.

639. The only remaining question, in the event that the Prosecution's Sixth Ground of Appeal is upheld, is whether the Accused can be convicted on both Count 7 and Count 8 in respect of the same conduct, both Counts involving charges of crimes against humanity under Article 2 of the Special Court's Statute.

640. Multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other, an element being materially distinct from another if it requires proof of a fact not required by the other.[995]

641. The Appeals Chamber of the ICTY has held that, provided that this test is satisfied, it is possible for an accused to be convicted cumulatively, in respect of the same conduct, of more than one crime against humanity under Article 5 of the ICTY Statute (= Article 2 of the Special Court Statute).[996] This test is satisfied in the case of the crimes charged in Count 7 and Count 8.

642. For sexual slavery (Statute, Article 2(g), charged in Count 7), it is necessary to prove that the perpetrator caused the victim or victims to engage in one or more acts of a sexual nature.[997] For the reasons given above, this element is not required to be proved for the crime against humanity of forced marriage as an other inhumane act.

643. For the crime against humanity of forced marriage as an other inhumane act (Statute, Article 2(i), charged in Count 8), it is necessary to prove the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victim. This element is not required to be proved for the crime against humanity of sexual slavery.

644. More generally, for the crime against humanity of an other inhumane act, it is necessary to prove an act "of a gravity similar to the acts referred to in Article 2 a. to h. of the Statute".[998] Count 7 charged the Accused with sexual slavery, which is an act referred to in Article 2(g) of the Statute. Thus, for the purposes of this

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[995] ***Čelebići* Appeal Judgement**, paras 412-413, 421.

[996] ***Kordić* Appeal Judgement**, para. 1039-40; ***Krnojelac* Appeal Judgement**, para. 188; ***Vasiljević* Appeal Judgement**, para. 146; ***Krstić* Appeal Judgement**, para. 231.

[997] See the second of the elements of sexual slavery, set out in paragraph 577 above.

[998] See the second of the elements set out in paragraph 595 above.

case, to satisfy the elements of an other inhumane act under Article 2(i) of the Statute as charged in Count 8, it is necessary to prove an act *other than* an act of sexual slavery, but of similar gravity. For the reasons given above, the act in question in this case is the imposition of a forced conjugal association over the victim. Thus, Article 2(g) and Article 2(i) each require proof of a fact not required by the other. Accordingly, cumulative convictions on both Count 7 and Count 8 are possible.

G. Conclusion

645. For the reasons given above, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's decision to dismiss Count 8 for redundancy, and:

(i) to revise the Trial Chamber's Judgement by adding findings that each of the Accused is individually responsible under Article 6(1) and Article 6(3) of the Statute for the crime against humanity of other inhumane acts (forced marriage) and to enter convictions for each Accused on Count 8, to the extent that the Appeals Chamber is able to determine, without further findings of fact by the Trial Chamber, that crimes of forced marriage were committed and that the Accused are individually responsible for these crimes, to make any resulting amendments to the Disposition of the Trial Chamber's Judgement, and to increase the sentences imposed on the Accused to reflect the additional criminal liability; and additionally or alternatively,

(ii) to the extent that the Appeals Chamber is unable to determine the matter without further findings of fact by the Trial Chamber, to remit the case to the Trial Chamber for further findings on whether these crimes were committed and whether each of the Accused is individually responsible for these crimes; or alternatively to (i) and (ii);

(iii) to make a finding of law that the crime against humanity of other inhumane acts under Article 2(i) of the Statute includes the crime of

forced marriage, and that the Trial Chamber erred in dismissing Count 8 for redundancy.

IX. Prosecution's Eighth Ground of Appeal: The Trial Chamber's treatment of Count 11

A. Introduction

646. Paragraphs 58-64 of the Indictment alleged that the Accused were individually responsible for various acts of physical violence committed during the armed conflict in Sierra Leone. In respect of these acts of physical violence, the Accused were charged with two counts, namely Count 10 ("violence to life, health and physical or mental well-being of persons, in particular mutilation, a VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II, punishable under Article 3.a of the Statute") and Count 11 ("Other inhumane acts, a CRIME AGAINST HUMANITY, punishable under Article 2.i of the Statute").

647. All of the acts of physical violence alleged in the material facts contained in paragraphs 58-64 of the Indictment, on which these two counts were based, involved acts of "mutilation", with the exception of paragraph 60 of the Indictment (relating to Kenema District), which alleged physical violence in the form of "beatings and ill-treatment of a number of civilians who were in custody". Of the other paragraphs alleging "mutilations", it was alleged in paragraphs 62 (dealing with Bombali District), 63 (dealing with Freetown and the Western Area) and 64 (dealing with Port Loko) that the mutilations included cutting off limbs; and in paragraphs 59 (dealing with Kono District) and 61 (dealing with Koinadugu District) that the mutilations included cutting off limbs and carving "AFRC" and "RUF" on the bodies of civilians.

648. In paragraph 726 of the Trial Chamber's Judgement, the Trial Chamber held that it would result in a duplicitous charge to consider both (i) "mutilations", and (ii) other acts of physical violence (such as beatings and ill treatment), under the same count. It therefore decided that it would consider mutilations under Count 10

only (as a war crime), and other acts of ill-treatment such as beatings under Count 11 only (as crimes against humanity).

649. The Trial Chamber ultimately found that each of the Accused was individually responsible for various acts of mutilations as charged, and each of the Accused was convicted in respect of these mutilations on Count 10 (as war crimes).[999]

650. In respect of physical violence other than mutilations, namely the beatings and ill-treatment in Kenema District alleged in paragraph 60 of the Indictment, the Trial Chamber was satisfied that AFRC/RUF troops carried out beatings and ill-treatment of civilians in their custody in Kenema District.[1000] However, the Trial Chamber ultimately found that none of the Accused was individually responsible for these beatings and ill-treatment in Kenema District.[1001] As a result of this finding, and as a result of the Trial Chamber's decision not to consider mutilations under Count 11, all three Accused were acquitted on Count 11.[1002]

651. The result of the Trial Chamber's treatment of Count 11 is that in respect of the mutilations for which each of the Accused was found to be criminally responsible, each Accused was convicted under Count 10 (a war crime), but not under Count 11 (a crime against humanity).

652. Cumulative convictions under Article 2 of the Statute (crimes against humanity) and under Article 3 of the Statute (war crimes) are permissible in respect of the same conduct.[1003] Such cumulative convictions "serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct".[1004] Because of the Trial Chamber's failure to consider the mutilations under Count 11 as well as under Count 10, the convictions entered against each of the Accused in respect of the acts of mutilation for which they were found to be individually responsible failed to reflect the full culpability of each of the

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[999] See **Trial Chamber's Judgement**, paras 2113 (Brima), 2117 (Kamara), 2121 (Kanu).
[1000] **Trial Chamber's Judgement**, para. 1197.
[1001] **Trial Chamber's Judgement**, paras 1646-1650, 1664 (Brima); 1847, 1855 (Kamara), 1987-1991, 1996 (Kanu).
[1002] See **Trial Chamber's Judgement**, paras 2115 (Brima) and 2119 (Kamara). The Disposition of the Trial Chamber's Judgement contains no express mention of Count 11 in relation to Kanu, but records no conviction on Count 11 for Kanu.
[1003] See paragraph 531 above.
[1004] See paragraph 532 above.

Accused. The amputations committed during the armed conflict in Sierra Leone were one of the most shocking and notorious features of the widespread and systematic attack against the civilian population during that conflict.[1005] The conviction of the Accused in respect of amputations as a war crime only failed to reflect the fact that the acts of mutilation occurred as part of a widespread and systematic attack against the civilian population, and were not merely war crimes, but also crimes against humanity.

653. In this Eighth Ground of Appeal, the Prosecution contends that the Trial Chamber erred in failing to consider the mutilations under Count 11 as well as under Count 10. It is contended by the Prosecution that the errors of the Trial Chamber in this respect are similar to those identified by the Prosecution in relation to its Sixth Ground of Appeal, and these are dealt with in the same order below. The detailed arguments set out in the Prosecution's Sixth Ground of Appeal are not repeated in detail in the present Ground of Appeal, but are incorporated by reference in the submissions below.

B. First error of the Trial Chamber: Reconsidering earlier interlocutory decisions in the case, without first reopening the hearings

654. It is submitted that it is clear from the structure and the wording of the Indictment that all of the acts of physical violence alleged in paragraphs 58-64 of the Indictment were relied upon to support the charge in Count 10, and that all of these acts of physical violence were simultaneously relied upon to support the charge in Count 11. Counts 10 and 11 were pleaded as being "in addition, or in the alternative" to each other.[1006] There is no suggestion in the Indictment that Count 10 of the Indictment related only to some of the acts alleged in paragraphs 58-64 of the Indictment, and Count 11 only to others.

[1005] **Sentencing Judgement**, paras 34-35, 46; **Trial Chamber's Judgement**, paras 227, 233, 1462.
[1006] See the words between Counts 10 and 11 on page 16 of the Indictment.

655. The finding of the Trial Chamber that it would result in a duplicitous charge to consider both (i) mutilations, and (ii) other acts of physical violence (such as beatings and ill treatment), under the same count effectively amounted to a finding that Counts 10 and 11 of the Indictment were defectively pleaded on grounds of duplicity. According to the logic of the Trial Chamber's finding, there would have been no such defect in the Indictment if Counts 10 and 11 of the Indictment had instead been cast as four counts instead of two, namely:

(i) Count 10: violence to life, health and physical or mental well-being of persons, *namely mutilations*, a war crime punishable under Article 3(a) of the Statute;

(ii) Count 10 *bis*: violence to life, health and physical or mental well-being of persons *other than mutilations*, a war crime punishable under Article 3(a) of the Statute;

(iii) Count 11: Other inhumane acts, *namely mutilations*, a crime against humanity punishable under Article 2(i) of the Statute;

(iv) Count 11 *bis*: Other inhumane acts *other than mutilations*, a crime against humanity punishable under Article 3(a) of the Statute.

656. At no stage before or during the trial in this case was it ever suggested by either the Defence or the Trial Chamber that Count 11 of the Indictment was defectively pleaded on grounds of duplicity, in that it alleged both mutilations, and acts of physical violence other than mutilations, in a single count. The first time that this was ever raised as an issue was in the Trial Chamber's Judgement.[1007]

657. The Prosecution refers to its submissions in Section B of the Prosecution's Sixth Ground of Appeal above. The Prosecution submits that consistently with the principles established by the ICTR and ICTY Appeals Chambers in the *Cyangugu* and *Jelisić* cases, the Trial Chamber erred in remaining silent on its decision to find this aspect of the Indictment defective until the rendering of the Trial Chamber's Judgement. The Trial Chamber should not have made this finding without first interrupting its deliberation process and reopening the hearings to

[1007] **Trial Chamber's Judgement**, at paras 22-23, summarizes the history of alleged defects in the Indictment, which does not include any complaints about the alleged duplicity of Count 11.

allow the parties to address this issue, and in particular, to allow the Prosecution to try to convince the Trial Chamber of the correctness of the form of the Indictment, or to argue that any defects had since been remedied.[1008]

658. For this reason alone, the Prosecution submits that the decision of the Trial Chamber to treat Counts 10 and 11 as duplicitous should be reversed, unless any of the Accused in this case establishes not only that Counts 10 and 11 were indeed impermissibly duplicitous, but also discharges the burden of establishing that his ability to prepare his defence was actually materially impaired by that defect.[1009]

C. Second error of the Trial Chamber: The finding that Counts 10 and 11 were effectively defectively pleaded

659. The Prosecution refers to its submissions in Section C of its Sixth Ground of Appeal above.

660. The rule against duplicity does not prevent the description in one count of different means of committing the same offence.[1010] It is submitted that it is clear that mutilations, and acts of physical violence other than mutilations, are not separate crimes, but are different ways of committing the war crime of violence to life, health and physical or mental well-being of persons (Article 3(a) of the Statute) as charged in Count 10, and different ways of committing the crime against humanity of other inhumane acts (Article 2(i) of the Statute) as charged in Count 11. The Prosecution submits that there is no impediment to both forms of physical violence being charged in each of Counts 10 and 11.

661. It is further submitted that even if mutilations, and acts of physical violence other than mutilations, were separate crimes rather than different means of committing the same crime (which they are not), there was no ambiguity in the Indictment as

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[1008] See, in particular, paragraph 541 above.
[1009] See paragraph 546 above.
[1010] ***Bizimungu* Interlocutory Appeal Decision**, para. 23; ***Ntakirutimana* Preliminary Motion Decision**, paras 12-14.

to the legal characterisation of what the Accused were charged with, or the material facts underpinning those charges. To suggest that Counts 10 and 11 should have been recast as four different counts along the lines of what is indicated in paragraph 655 above would have been no more than the purest of mere technical formalities. There was no ambiguity that needed to be clarified, and no further details or information that needed to be provided to the Defence in order for the Defence to be given notice of the case that they were required to meet. Such a formal amendment to the Indictment would have been of no practical or substantive consequence whatsoever.

662. In the circumstances, it is submitted that it is impossible to see how the Accused were in any way prejudiced by the way in which Counts 10 and 11 were pleaded, or how they would have been in any way prejudiced if all of the criminal conduct alleged in paragraphs 58-64 of the Indictment had been taken into account in relation to Count 11, as well as in relation to Count 10. The Defence certainly never suggested at any time before or during the trial that it was prejudiced in this respect in any way. The Defence Rule 98 submissions and final trial briefs never gave any indication that the Defence was proceeding on any basis other than that all of the acts of physical violence alleged in paragraphs 58-64 of the Indictment were relied upon to support both the charge in Count 10, as well as simultaneously to support the charge in Count 11.[1011] The Trial Chamber does not suggest in paragraph 726 of the Trial Chamber's Judgement that the Defence would be in any way prejudiced by considering mutilations, and ill-treatment other than mutilations, in a single count, and the Defence has never suggested in any way that this would be the case.

663. The Prosecution therefore submits that Counts 10 and 11 were not defectively pleaded, and that it would not result in a duplicitous charge to consider both mutilations and other forms of ill-treatment in a single count.

[1011] **Defence Joint Legal Rule 98 Submission**, paras 75-77; **Rule 98 Decision**, paras 171-190; ***Brima* Final Trial Brief**, paras 278-280; ***Kamara* Final Trial Brief**, paras 283-305; ***Kanu* Final Trial Brief**, paras 72-73.

D. Third error of the Trial Chamber: The failure of the Trial Chamber to find that any defect had been cured

664. The Prosecution refers to its submissions in Section D of its Sixth Ground of Appeal above.

665. In paragraph 726 of the Trial Chamber's Judgement, the Trial Chamber gave no consideration at all to the question of whether any perceived defect in the way that Counts 10 and 11 had been pleaded had been cured by subsequent timely, clear and consistent information by the Prosecution.

666. The Prosecution submits that it was clear from information provided by the Prosecution prior to the commencement of the case and throughout the Prosecution case that both Count 10 and Count 11 of the Indictment each encompassed all of the conduct alleged in paragraphs 58-64 of the Indictment.[1012] It was clear from the Defence Rule 98 submissions and final trial arguments that the Defence understood this to be the case.[1013]

667. It is true that the Trial Chamber's Rule 98 Decision considered the evidence of mutilations under the rubric of Count 10,[1014] and considered forms of physical violence other than mutilations under Count 11.[1015] However, in the Rule 98 Decision, the Trial Chamber expressly proceeded on the basis that:

> ... under Rule 98, [the Trial Chamber is] ... required to determine the evidence in relation to the counts of the Indictment, and to enter a judgement of acquittal, if appropriate, on a count – not on an item of particulars. We do not consider that we are empowered by Rule 98 to break a Count down to its particulars supplied in the Indictment and then to enter a judgement of acquittal in respect of any particular which has not been proved; nor would it be practical

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[1012] For instance, **Prosecution Supplemental Pre-Trial Brief**, pp. 49-65, 147-164, 245-261, in which all acts of physical violence are set out in a section which specifically relates to both Counts 10 and 11.

[1013] ***Brima* Final Trial Brief**, paras 126-132 (specifically referring to defects in the form of the indictment but making no mention of any confusion regarding Counts 10 and 11 of the Indictment), 278-287 (disputing, in relation to both Counts 10 and 11, the evidence led relating to paragraphs 58-64 of the Indictment); ***Kamara* Final Trial Brief**, paras 3, 89-91 (specifically referring to defects in the form of the Indicment but making no mention of any confusion regarding Counts 10 and 11 of the Indictment), 283-305 (in which the Defence relies on the same evidence and facts in relation to both Counts 10 and 11). See also ***Brima* Rule 98 Motion**, paras 69-75; ***Kamara* Rule 98 Motion**, paras 31-37; ***Kanu* Rule 98 Motion**, paras 62-75 (referring to the same evidence in relation to both Counts 10 and 11).

[1014] **Rule 98 Decision**, paras 172, 187-188.

[1015] **Rule 98 Decision**, paras 173, 189-190.

> to do so. We note the Prosecution concessions with regard to various locations for which no evidence was adduced and, in our view, that is sufficient to cover the situation.[1016]

668. On this logic, the Trial Chamber, having found that the evidence of mutilations satisfied the Rule 98 standard in relation to Count 10,[1017] and that the evidence of other forms of physical violence satisfied the Rule 98 standard in relation to Count 11,[1018] simply did not need to consider for Rule 98 purposes whether the converse was also true: in other words, it did not need to consider at the Rule 98 stage whether the evidence of mutilations satisfied the Rule 98 standard in relation to Count 11, or whether the evidence of other forms of physical violence satisfied the Rule 98 standard in relation to Count 10. The Trial Chamber in the Rule 98 Decision never gave any indication that it would amount to a "duplicitous charge" for the Trial Chamber to consider the evidence of all of these acts of physical violence in relation to both Counts 10 and 11, or that it would decline to do so in its final trial judgement. The Rule 98 Decision provided no basis for the parties to assume that mutilations would *only* be considered under Count 10, or that acts of physical violence other than mutilations would *only* be considered under Count 11.

E. The requested remedy

669. For the reasons given above, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's decision, in paragraph 726 of the Trial Chamber's Judgement, to consider mutilations under Count 10 only (as war crimes), and acts of physical violence other than mutilations under Count 11 only (as crimes against humanity).

[1016] **Rule 98 Decision**, para. 21.
[1017] **Rule 98 Decision**, paras 187-188.
[1018] **Rule 98 Decision**, paras 189-190.

670. If this decision of the Trial Chamber is reversed, the question then arises whether the evidence of mutilations before the Trial Chamber satisfies the elements of the crime against humanity of "other inhumane acts", punishable under Article 2(i) of the Statute, in relation to each of the three Accused, as alleged in Count 11.

671. The Prosecution submits that on the basis of the findings contained in the Trial Chamber's Judgement, each of the Accused is individually responsible, in respect of the mutilations which the Trial Chamber found to have been committed, under Count 11 for the crime against humanity of other inhumane acts to the same extent that each Accused is individually responsible under Count 10 for the war crime of violence to life, health and physical or mental well-being of persons.

672. The Trial Chamber found that the general requirements (or chapeau elements) of crimes against humanity (Article 2 of the Statute) were satisfied in respect of all three Accused in respect of all crimes charged in the Indictment for which they would be found individually responsible.[1019]

673. In addition to these general requirements (or chapeau elements), the Trial Chamber set out the specific elements of the crime against humanity of other inhumane acts in paragraph 174(a)-(c) of the Rule 98 Decision. The Prosecution take no issue with the Trial Chamber's articulation of these elements. The elements are:

> 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
>
> 2. The act was of a gravity similar to the acts referred to in Article 2 a. to h. of the Statute;
>
> 3. The perpetrator was aware of the factual circumstances that established the character or gravity of the act.

674. The Prosecution submits that it is clear from the findings of the Trial Chamber, and/or the evidence accepted by the Trial Chamber in making those findings, that these elements are satisfied in relation to all of the mutilations in respect of which the Trial Chamber convicted each of the Accused on Count 10. The Prosecution submits that this is particularly clear from the findings of the Trial Chamber in

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[1019] **Trial Chamber's Judgement**, paras 210-239.

paragraphs 1227 and 1460-1464 of the Trial Chamber's Judgement, and in paragraphs 34 (third last sentence), 46, 76, 97 and 107(ii) of the Sentencing Judgement.

675. The Prosecution therefore submits that the Appeals Chamber can, based on the findings in the Trial Chamber's Judgement, and without the need to remit the case to the Trial Chamber for any further findings of fact in this respect, revise the Trial Chamber's Judgement by entering corresponding convictions for all three Accused on Count 11 in respect of the mutilations for which they were convicted under Count 10, in addition to the convictions under Count 10.

676. The Prosecution further submits that if, following the decision of the Appeals Chamber on the Prosecution's other Grounds of Appeal, it is found that any of the Accused is individually responsible for any other acts of mutilations of which they were not convicted by the Trial Chamber, or is found to be individually responsible for acts of mutilations on modes of liability in addition to those on which they were found liable by the Trial Chamber, the Appeals Chamber should find that that additional criminal liability is reflected in convictions under Count 11, as well as under Count 10.

677. As submitted in Section F of the Prosecution's Seventh Ground of Appeal above, cumulative convictions in respect of the same conduct under both Article 2(i) of the Statute and Article 3(a) of the Statute are permissible.

F. Alternative submission

678. If the Appeals Chamber, contrary to the submissions above, decided to reject the present ground of appeal, and to find that if would amount to a duplicitous charge to consider both (i) "mutilations", and (ii) other acts of physical violence (such as beatings and ill treatment), under the same count, the Prosecution submits that the Trial Chamber erred in deciding to consider mutilations under Count 10 only (as a war crime), and other acts of ill-treatment such as beatings under Count 11 only (as crimes against humanity). The Prosecution submits that the Trial Chamber should have adopted the opposite course, namely, to consider mutilations under

Count 11 only (as crimes against humanity), and other acts of ill-treatment such as beatings under Count 10 only (as war crimes).

679. As submitted above, amputations were one of the most shocking and notorious features of the widespread and systematic attack against the civilian population during the armed conflict in Sierra Leone.[1020] The Prosecution submits that if a choice had to be made between entering convictions for these crimes as crimes against humanity or war crimes, the only reasonable choice open to any reasonable trier of fact would be to treat them as crimes against humanity.

G. Conclusion

680. The Prosecution requests the Appeals Chamber to reverse the Trial Chamber's decision, and to revise the Trial Chamber's Judgement by entering corresponding convictions against each of the three Accused on Count 11 in respect of the mutilations for which they are convicted under Count 10, in addition to the convictions under Count 10. The Prosecution also requests the Appeals Chamber to make any resulting amendments to the Disposition of the Trial Chamber's Judgement; and to increase the sentences imposed on Brima, Kamara and Kanu to reflect the additional criminal liability.

681. The Prosecution further submits that if, following the decision of the Appeals Chamber on the Prosecution's other Grounds of Appeal, it is found that any of the Accused is individually responsible for any other acts of mutilations (amputations) of which they were not convicted by the Trial Chamber, or is found to be individually responsible for acts of mutilations (amputations) on modes of liability in addition to those on which they were found liable by the Trial Chamber, the Appeals Chamber should find that that additional criminal liability is reflected in convictions under Count 11, as well as under Count 10.

[1020] See paragraph 652 above.

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X. Prosecution's Ninth Ground of Appeal: The Trial Chamber's approach to cumulative convictions under Article 6(1) and Article 6(3) of the Statute

A. Introduction

682. As is normal in indictments before international criminal courts and tribunals, the Indictment in this case charged the Accused with a number of different crimes in respect of each Count.[1021] In respect of each Count in the Indictment, all Accused were charged under both Article 6(1) and Article 6(3) of the Statute.

683. The Accused were convicted of certain crimes under Article 6(1). In respect of many of these crimes, the Trial Chamber's findings indicated that the Article 6(3) responsibility of the Accused for these same crimes was also established.

684. Additionally, in some cases, the Trial Chamber found that the Accused were responsible for some crimes encompassed within a single Count under Article 6(1), and for other crimes encompassed within the same Count under Article 6(3) only.

685. The Trial Chamber's approach to dealing with this situation is set out in paragraph 800 of the Trial Chamber's Judgement. The Trial Chamber said that:

> Where both Article 6(1) and Article 6(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, it would constitute a legal error invalidating a judgement to enter a concurrent conviction under both provisions. Where a Trial Chamber enters a conviction on the basis of Article 6(1) only, an accused's superior

[1021] Compare, for instance, ***Brđanin* Brima Preliminary Motion Decision**, para. 61: "Where, however, the offence charged, such as persecution and other crimes against humanity, almost always depends upon proof of a number of basic crimes (such as murder), the prosecution is not required to lay a separate charge in respect of each murder. The old pleading rule was that a count which contained more than one offence was bad for duplicity, because it did not permit an accused to plead guilty to one or more offences and not guilty to the other or other offences included within the one count. Such a rule is completely impracticable in this Tribunal, given the massive scale of the offences which it has to deal with."

> position may be considered as an aggravating factor in sentencing.[1022]

686. The Prosecution takes no issue with the approach taken by the Trial Chamber *in principle*. The Trial Chamber notes that it has been held by the ICTY Appeals Chamber that:

> Where criminal responsibility for an offence is alleged under one count pursuant to both Article 7(1) and Article 7(3) [= Special Court Statute, Articles 6(1) and Article 6(3)], and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3) responsibility (as discussed above) *or* the accused's seniority or position of authority aggravating his direct responsibility under Article 7(1).[1023]

687. In paragraph 800 of the Trial Chamber's Judgement, it is evident that the Trial Chamber adopted the second of the three permissible approaches described by the ICTY Appeals Chamber in the above quote. The Prosecution therefore accepts that the approach taken by the Trial Chamber in paragraph 800 of the Trial Chamber's Judgement was in principle one of three approaches that it was open to the Trial Chamber to adopt, although not the only solution that the Trial Chamber was *bound* to adopt.[1024]

688. The Prosecution submits, however, that the Trial Chamber erred in its application of this approach to the circumstances of the present case.

689. In respect of some of the Counts in the Indictment, the Trial Chamber found that an Accused was individually responsible for some of the crimes comprised within

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[1022] **Trial Chamber's Judgement**, para. 800 (footnote omitted). See also paras 2110-2111.

[1023] ***Čelebići* Appeal Judgement**, para. 745.

[1024] In other words, the Prosecution does not accept, as stated in paragraph 800 of the **Trial Chamber's Judgement**, that it "it would constitute a legal error invalidating a judgement to enter a concurrent conviction under both provisions". However, the Prosecution accepts that it is *open* to a Trial Chamber, in its discretion, to decline to enter a concurrent conviction under both provisions.

the Count under Article 6(1) of the Statute, and was individually responsible for other crimes comprised within the same Count under Article 6(3) only.[1025]

690. To give an example, Counts 3 and 4 of the Indictment charged Kamara, under both Article 6(1) and Article 6(3) of the Statute, with the crimes against humanity of extermination and murder (Article2(b) and 2(a) of the Statute respectively) in respect of a number of different incidents (as alleged in paragraphs 42-50 of the Indictment). In respect of the killings committed in Bombali District, Freetown and the Western Area, and Port Loko District (as alleged in paragraphs 48-50 of the Indictment), Kamara was found to be individually responsible under Article 6(1) of the Statute only for (1) ordering the killing of five girls in Karina in Bombali District,[1026] and (2) aiding and abetting one killing incident in the Fourah Bay area in Freetown.[1027] However, he was found to be individually responsible under Article 6(3) for a massive number of other killings in Bombali District, Freetown and the Western Area, and Port Loko District and Kono District.[1028] Despite this, in respect of Counts 3 and 4 of the Indictment, the Disposition of the Trial Chamber's Judgement recorded a conviction of Kamara on Counts 3 and 4 of the Indictment under Article 6(1) only.[1029]

691. Thus, the Trial Chamber proceeded on the basis that where a *Count* in the Indictment charged an Accused with various crimes of the same legal categorization, and where the Trial Chamber found that the individual responsibility of the Accused was established for only some of those crimes under

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[1025] For details, see Appendix E to this **Appeal Brief**.

[1026] **Trial Chamber's Judgement**, paras 1915-1916.

[1027] **Trial Chamber's Judgement**, paras 1934-1935, 1939-1940.

[1028] For instance, in Bombali District, Kamara was found individually responsible under Article 6(3) (see **Trial Chamber's Judgement**, para. 1928), in respect of the killing of an unspecified number of civilians in Bornoya (**Trial Chamber's Judgement**, paras 883-885, 897), the killing of at least 200 civilians in Karina (**Trial Chamber's Judgement**, paras 886-894, 897), and the killing of 25 civilians in Pendembu (also known as Gbendembu) (**Trial Chamber's Judgement**, paras 896, 1715-1716). In Freetown and the Western Area, Kamara was found individually responsible under Article 6(3) (see **Trial Chamber's Judgement**, paras 1944-1950) in respect of the killing of at least 145 civilian men, women, and children (see **Trial Chamber's Judgement**, para 951). In Port Loko District, Kamara was found individually responsible under Article 6(3) for crimes committed by his subordinates in Manaarma (see **Trial Chamber's Judgement**, paras 1956-1969), including the killing of an unspecified number of civilians (**Trial Chamber's Judgement**, para. 963). In Kono District, Kamara was found to be individually responsible under Article 6 (3) (see **Trial Chamber's Judgement,** para 1893) for a large number of unlawful killings (**Trial Chamber's Judgement,** paras 848-849, 857).

[1029] **Trial Chamber's Judgement**, para. 2117.

Article 6(1), but for others of those crimes under Article 6(3) only, the Disposition of the Trial Chamber should record a conviction of that Accused on that *Count* under Article 6(1) only.

692. The Prosecution submits that the Trial Chamber thereby erred in law in its application of the approach that it decided to adopt in paragraph 800 of the Trial Chamber's Judgement. In such circumstances, the Trial Chamber's entry, in the Disposition of its Judgement, of a conviction under Article 6(1) only, on the *entire Count* in question means that the formal conviction fails to reflect the Accused's individual responsibility for large numbers of crimes charged in that Count for which the Accused was individually responsible under Article 6(3) but not under Article 6(1).

693. The Prosecution submits that even on the approach adopted in paragraph 800 of the Trial Chamber's Judgement, the Disposition of the Trial Chamber should in circumstances such as these record a conviction of the Accused on the Count in question under *both* Article 6(1) *and* Article 6(3), in order to reflect the Accused's individual responsibility for all of the crimes under that count for which the Trial Chamber has found the Accused to be individually responsible. Recording a conviction on a single Count under *both* Article 6(1) *and* Article 6(3) in such circumstances does not amount to a concurrent conviction under Article 6(1) and Article 6(3) for the same crime, but rather, reflects the fact that the Accused was individually responsible under different provisions of Article 6 for different crimes encompassed within in the same Count.

B. Argument

694. The Prosecution acknowledges that a sentencing concern arises where an Accused is found to have satisfied the elements of both Article 6(1) and Article 6(3) in respect of the *same crime*. If an Accused is convicted of both Article 6(1) and Article 6(3) in respect of the *same crime*,[1030] the Trial Chamber must ensure that

[1030] That is, where the Trial Chamber adopts the first of the three permissible possibilities referred to in paragraph 686 above.

the sentence imposed reflects the overall culpability of the offender so that it is both just and appropriate,[1031] and must ensure that the dual responsibility under both Article 6(1) and Article 6(3) does not lead to "double-counting" in sentencing.[1032] The danger of "double counting" is clearly easier to avoid if the accused is convicted, in respect of a single crime, under either Article 6(1) or Article 6(3) only, with the other mode of liability being taken into account as an aggravating factor in sentencing.[1033]

695. However, these concerns in respect of double counting do not arise if an Accused is convicted of one crime under Article 6(1), and of a separate crime (of the same legal categorization) under Article 6(3), whether or not the two crimes are charged in the same count in the Indictment.

696. Thus, the case law dealing with the approach adopted by the Trial Chamber in paragraph 800 of the Trial Chamber's Judgement[1034] indicates that this approach is applicable where a conviction under Article 6(1) and Article 6(3) for the same count is *based on the same facts.* This case law suggests that if an accused is found to have directly participated in a specific crime at a particular place and time, he should not also be convicted, separately, of command responsibility for the very same crime,[1035] since the resulting convictions would rest on the exact same set of facts.

697. However, if the accused is found to have directly participated in a specific crime and is convicted for that crime under Article 6(1), it cannot be duplicitous to convict him as a superior for his command responsibility regarding *other* crimes that were committed by his subordinates, even if the other crimes are charged in the same count, as long as the other crimes rest on different sets of facts. There is no jurisprudence to suggest that the Accused cannot or should not be convicted simultaneously of two distinct crimes, one under Article 6(1) liability, and another under Article 6(3) liability, where those two crimes are based on separate facts,

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[1031] ***Čelebići* Appeal Judgement**, paras 429-430.
[1032] ***Deronjić* Appeal Judgement**, paras 106-107; ***Stakić* Appeal Judgement**, paras 412-413, 694.
[1033] That is, where the Trial Chamber adopts the second or third of the three permissible possibilities referred to in paragraph 686 above.
[1034] That is, the second of the three permissible possibilities referred to in paragraph 686 above.
[1035] ***Orić* Trial Judgement**, para 342 30 June 2006 (emphasis added), ***Kordić* Appeal Judgement**, para 35, (emphasis added).

regardless of whether the two crimes are charged in a single count. Indeed, the jurisprudence cited in the Trial Chamber's Judgement does not support, and even contradicts, the Trial Chamber's position.

698. For example, paragraph 800 of the Trial Chamber's Judgement refers to paragraph 91 of the *Blaškić* Appeal Judgement, which does indeed state that "[w]here both Article 7(1) and Article 7(3) responsibility [= Special Court Statute, Article 6(1) and 6(3) responsibility] are alleged under the same count, and where legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing".[1036] However, the very next paragraph of the *Blaškić* Appeal Judgement goes on to state that only "concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute in relation to the same counts *based on the same facts* ... constitutes a legal error invalidating the Trial Judgement".[1037] The *Blaškić* Appeal Judgement thus indicates that the factual basis of Article 6(1) and Article 6(3) liabilities must be the same in order for concurrent convictions under both modes of liability to constitute a legal error.

699. The other jurisprudence cited in paragraph 800 of the Trial Chamber's Judgement follows the *Blaškić* Appeal Judgement. The Trial Chamber refers only to paragraph 34 of the *Kordić* Appeal Judgement, which adopts the language of paragraph 22 of the *Blaškić* Appeal Judgement. But again, the Trial Chamber did not refer to the following paragraph of the *Kordić* Appeal Judgement which clarifies that "[t]he Appeals Chamber therefore considers that the concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute in relation to the same counts *based on the same facts*, as reflected in the Disposition of the Trial Judgement, constitutes a legal error invalidating the Trial Judgement in this regard".[1038]

700. The *Orić* Trial Judgement, which is also cited in paragraph 800 of the Trial Chamber's Judgement, analyzes the *Blaškić* and *Kordić* precedents, and then

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[1036] ***Blaškić* Appeal Judgement**, para 91.
[1037] ***Blaškić* Appeal Judgement**, para 92 (emphasis added).
[1038] ***Kordić* Appeal Judgement**, para 35 (emphasis added).

concludes that the holdings in those other cases "concern instances in which Article 7(1) and 7(3) were invoked in one count on *basically the same facts*".[1039] The *Orić* Trial Judgement then concludes that the correct standard is as follows: "if the accused's conduct fulfils the elements both of commission or of participation according to Article 7(1) of the Statute and of superior criminal responsibility according to Article 7(3) of the Statute with regard to *the same principal crime on basically the same facts*, regardless of whether indicted in the same or in different counts, the accused will be convicted only under the heading of Article 7(1) of the Statute in terms of the more comprehensive wrongdoing."[1040]

701. The Prosecution submits that the Trial Chamber therefore misinterpreted and misapplied the case law on which it relied in paragraph 800 of the Trial Chamber's Judgement, and erred in law in finding that it "would constitute a legal error invalidating a judgement" to enter concurrent convictions under both Article 6(1) and Article 6(3) in respect of a single Count in circumstances where an Accused was found to be individually responsible under Article 6(1) and Article 6(3) respectively for different crimes based on separate facts encompassed within that Count.

702. The Trial Chamber's decision not to enter concurrent convictions in such circumstances was an error of law, or at least, an error in the exercise of the Trial Chamber's discretion.[1041] The Trial Chamber's decision leads to unreasonable results in that the Disposition of its Judgement does not truly reflect the gravity of the criminal responsibility of the Accused. If, for example, an Accused is found to be responsible under Article 6(1) for a few specific amputations, but is found to be responsible under Article 6(3) as a superior for hundreds of other amputations, the Disposition of the Trial Chamber's Judgement simply fails to reflect the overall criminal responsibility of the Accused if it records a conviction only under Article 6(1) for all of those amputations, given that only a few of the hundreds of amputations for which the Accused was found to be individually responsible are

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[1039] ***Orić* Trial Judgement**, para. 342 (emphasis added).
[1040] ***Orić* Trial Judgement** , para. 343 (emphasis added).
[1041] See ***CDF* Subpoena Appeal Decision**, paras 4-6.

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reflected in such a conviction. It would not be an adequate reflection of the overall criminal responsibility of the Accused to say that the hundreds of other amputations for which he was responsible under Article 6(3) will merely be taken into account as an aggravating factor in sentencing.

703. The Trial Chamber's decision to decline to enter convictions under both Article 6(1) and Article 6(3) in such circumstances also creates a potential problem at the appeals stage. If a conviction is entered by the Trial Chamber under Article 6(1) only in such circumstances, and if on appeal it is held that the Accused was not responsible under Article 6(1) for any of the crimes encompassed within that Count, then no conviction will remain at all under that Count. If there remains no conviction under the count, the aggravating factor of Article 6(3) liability for other separate crimes under the same Count will no longer "aggravate" anything. Of course, the Appeals Chamber could in such circumstances revise the Trial Chamber's Judgement by converting the conviction under Article 6(1) into a conviction under Article 6(3), but this course would be unnecessary if the convictions accurately reflected the true criminal responsibility of the Accused in the first place.

704. Another result of the approach taken by the Trial Chamber is that the convictions entered in the Disposition of the Trial Chamber's Judgement fail in some cases to reflect the criminal responsibility of an Accused for crimes committed in an entire district. For instance, as noted in paragraph 690 above, Kamara was convicted under Article 6(1) on Counts 3 and 4 (unlawful killings), and all of the unlawful killings for which he was found to be individually responsible under Article 6(1) were in Bombali District and Freetown and the Western Area. However, Kamara was also found to be individually responsible, under Article 6(3), for more than 265 murders committed by his subordinates in Tombodu, Kono District, in April 1998.[1042] As the Disposition stands, Kamara's conviction on Counts 3 and 4 under only Article 6(1) therefore fails to reflect Kamara's criminal responsibility under Article 6(3) for the unlawful killings in Kono District. It is submitted that it cannot be reasonably suggested that Kamara's Article 6(3) responsibility for the

[1042] **Trial Chamber's Judgement**, paras 848-855, 857.

Kono District crimes merely "aggravates" his Article 6(1) responsibility for the Bombali District and Freetown crimes, which were geographically and temporally remote from the Kono District crimes.

C. Conclusion

705. For the reasons given above, the Prosecution does not seek to challenge the approach taken in by the Trial Chamber in principle in paragraph 800 of the Trial Chamber's Judgement, to the extent that it has the effect of not entering concurrent convictions under Article 6(1) and Article 6(3) of the Statute in respect of a single Count where the concurrent convictions all relate to the *same facts*.

706. The question whether there will be any concurrent convictions under both Article 6(1) and Article 6(3) in respect of the same Count in this case will depend on the outcome of all of the Prosecution's other Grounds of Appeal. If, for instance, the Appeals Chamber upholds the Prosecution's Third Ground of Appeal, all Accused will be individually responsible under Article 6(1) for *all* crimes of which they are convicted, on the basis of joint criminal enterprise liability. The additional Article 6(3) responsibility of the Accused could be taken into account in sentencing, but as it would be based on the *same facts* as the Article 6(1) responsibility, there would be no need for the Disposition of the Judgement to record concurrent convictions under Article 6(3) in respect of any of the Counts.

707. However, if, following the determination of all of the Prosecution's other Grounds of Appeal, any of the Accused is found to be individually responsible for certain crimes charged in a given Count under Article 6(1), and individually responsible under Article 6(3) only for other crimes charged in the same Count and based on different facts, the Prosecution requests the Appeals Chamber to revise the Trial Chamber's Judgement, and to enter convictions against the Accused on that Count under Article 6(3) of the Statute, in addition to Article 6(1) of the Statute.

708. For convenience, Appendix E to this Appeal Brief sets out the amendments that would be made to the Trial Chamber's Judgement, assuming that the present

ground of appeal is upheld, but without taking into account the effect of any of the Prosecution's other grounds of appeal.

709. The Prosecution also requests the Appeals Chamber to make any resulting amendments to the Disposition of the Trial Chamber's Judgement, and to increase the sentences imposed on Brima, Kamara and Kanu to reflect the additional criminal liability.

XI. Submissions regarding sentences

710. The Prosecution does not appeal, as such, against the Sentencing Judgement of the Trial Chamber dated 19 July 2007 in Case No. SCSL-04-16-T, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (the "**Sentencing Judgement**").[1043] However, the remedies sought by the Prosecution in respect of the above Grounds of Appeal against the Trial Chamber's Judgement include requests that the Appeals Chamber increase in the sentence imposed on each of the three Accused, to reflect their additional criminal liablility.

711. Where the Appeals Chamber reverses acquittals pronounced by the Trial Chamber for one or more crimes, or makes additional findings on appeal that increase the criminal liability of an accused, it will be necessary to determine what additional sentence will be imposed on the accused in respect of that additional criminal liability. The Statute and Rules of the Special Court do not make clear whether in such situations the Appeals Chamber may itself amend the sentence, or whether it should remit that matter to a Trial Chamber for further sentencing proceedings.

712. In the ICTY and ICTR, there are precedents for both courses of action.[1044] However, it is currently the normal practice at the ICTY and ICTR for the Appeals Chamber itself to impose a new sentence following any findings of additional criminal liability by the Appeals Chamber on appeal.[1045]

713. In the present case, one of the alternative remedies requested by the Prosecution in relation to some of its Grounds of Appeal is a request for the Appeals Chamber to remit this case to the Trial Chamber for further findings on whether these crimes were committed and whether each of the Accused is individually

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[1043] **SCSL-16-624**, Registry page nos. 22984-23019.

[1044] Sentencing was remitted to a Trial Chamber in the *Čelebići* case, ***Čelebići* Appeal Judgement**, paras 710–713 and disposition, paras 2–4; ***Tadić* Appeal Judgement**, paras 27–28, 327 (3) and (6); and see also ***Čelebići* Sentencing Appeal Judgement**, para. 3. Examples of where the Appeals Chamber itself revised the sentence include *Krstić* Appeal Judgement, para. 266; ***Blaskić* Appeal Judgement**, para. 680; ***Gacumbisti* Appeal Judgement**, para 207; ***Aleksovski* Appeal Judgement**, para. 192, ***Galić* Appeal Judgement**, para 456, ***Krnojelac* Appeal Judgement**, para 264.

[1045] *Ibid.*

responsible for these crimes.[1046] In the event that the case is remitted to the Trial Chamber, the Prosecution submits that the Appeals Chamber should also remit to the Trial Chamber the question of what additional sentence should be imposed on each of the Accused in this case in respect of any additional criminal liability arising from the additional findings of the Trial Chamber, as well as in respect of any additional findings that are made by the Appeals Chamber in this appeal. This will have the advantage of affording the Defence the opportunity to appeal against any additional sentence imposed by the Trial Chamber.

714. In the event that the Appeals Chamber does not remit this case to the Trial Chamber for any for further findings on whether crimes were committed and the individual responsibility of the Accused for these crimes, the Prosecution submits that the appropriate course, in line with the current practice at the ICTY and ICTR, would be for the Appeals Chamber itself to impose an increased sentence following any findings of additional criminal liability by the Appeals Chamber in this appeal. This will have the advantage of expedition and efficiency.

Filed in Freetown,

13 September 2007
For the Prosecution,

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[1046] See **Prosecution's Notice of Appeal**, paras 8(ii), 14(ii) and 24(ii).

APPENDIX A

LIST OF CITED AUTHORITIES AND DOCUMENTS

I. Authorities and documents for which abbreviated citations are used

1. Documents in this Case

(i) Decisions, Orders and Judgements

***Brima* Preliminary Motion Decision**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16-164, "Decision on Defence Motion for Defects in the Form of the Indictment", Trial Chamber, 3 March 2005
Decision on Renewed *Brima* Preliminary Motion	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16-279, "Decision on Renewed Defence Motion for Defects in the Form of the Indictment and Application for Extension of time", Trial Chamber, 24 May 2005
Dissenting Opinion of Justice Doherty	*Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-16-613, "Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 ('Forced Marriages')" , Trial Chamber, 20 June 2007
***Kamara* Preliminary Motion Decision**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16-46, "Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment", Trial Chamber, 1 April 2004
***Kanu* Preliminary Motion Decision**	*Prosecutor v. Kanu*, SCSL-13-36, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 19 November 2003
Prosecution Amended Indictment Decision	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-2004-16-70, "Decision on Prosecution Request for Leave to Amend the Indictment", Trial Chamber, 6 May 2004
Rule 98 Decision	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16-469, "Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98" Trial Chamber, 31 March 2006
Rule 98 Decision Justice Sebutinde Concurrence	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16-469, "Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98" Trial Chamber, 31 March 2006

Sentencing Judgement	*Prosecutor v. Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* , SCSL-04-16-T-624, "Sentencing Judgement", Trial Chamber, 19 July 2007
Trial Chamber's Judgement	*Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-16-T-613, "Judgement", Trial Chamber, 20 June 2007, as revised pursuant to the Corrigendum issued by the Trial Chamber on 19 July 2007 (SCSL-16-T-628, Registry page nos. 23675-23678)

(ii) Other documents

Appeal Brief	The Present Appeal Brief
***Brima* Final Trial Brief**	Prosecutor v. *Brima, Kamara, Kanu*, SCSL-16-595, "Confidential Brima Final Trial Brief, 1 December 2006
Brima Preliminary Motion	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-158, "Defence Motion for Defects in the Form of the Indictment", 1 March 2005
***Brima* Rule 98 Motion**	*Prosecutor v. Brima,* SCSL-16-442, "Brima Motion for Acquittal Pursuant to Rule 98", 12 December 2005
Defence Joint Legal Rule 98 Submission	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16-445, "Joint Legal Part Defence Motion for Acquittal under Rule 98", 13 December 2005
Indictment	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-PT, "Further Amended Consolidated Indictment", 18 February 2005
***Kamara* Final Trial Brief**	Prosecutor v. *Brima, Kamara, Kanu*, SCSL-16-597, "Confidential Kamara Final Trial Brief, 1 December 2006
***Kamara* Preliminary Motion**	*Prosecutor v. Kamara*, SCSL-10-56, "Brief in Support of Preliminary Motion for Defects in the Form of the Indictment", 15 January 2004
***Kamara* Rule 98 Motion**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16-443, "Defence Motion for Judgement of Acquittal of the Second Accused - Brima Bazzy Kamara", 12 December 2005
***Kanu* Final Trial Brief**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16-607, "Kanu Defence Trial Brief", 8 January 2007
***Kanu* Preliminary Motion**	*Prosecutor v. Kanu*, SCSL-2003-13-22 "Motion on Defects in the Form of the Indictment and for Particularization of the Indictment", 16 October 2003

***Kanu* Rule 98 Motion**	*Prosecutor v Kanu*, SCSL-16-444, "Kanu – Factual Part Defence Motion for Judgement of Acquittal under Rule 98", 13 December 2005
Prosecution Amended Indictment Motion	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-2004-16-11, "Request for Leave to Amend the Indictment", 9 February 2004
Prosecution *Kamara* Preliminary Motion Response	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-2003-10-57, "Prosecution Response to Defence Preliminary Motion on Defects in the Form of the Indictment, 19 January 2004
Prosecution *Kanu* Preliminary Motion Response	*Prosecutor v. Kanu*, SCSL-2003-13-27 "Prosecution Response to Defence Motion on Defects in the Form of the Indictment and for Particularisation of the Indictment", 24 October 2003
Prosecution's Notice of Appeal	*Prosecutor v. Brima, Kamara, Kanu* , SCSL-16-630, "Prosecution's Notice of Appeal", 2 August 2007
Prosecution Supplemental Pre-Trial Brief	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16-56, "Prosecution Supplemental Pre-Trial Brief Pursuant to Order to The Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004", 21 April 2004
Renewed Brima Preliminary Motion	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16-167, "Renewed Defence Motion for Defects in the Form of the Indictment and Application for Extension of Time (If Applicable)", 4 March 2005

2. Other SCSL Case Law and Documents

***CDF* Evidence Decision**	*Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa,* SCSL-04-14-434, "Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", Trial Chamber, 24 May 2005
***CDF* Indictment**	*Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa,* SCSL-2004-14-3, "Indictment", 5 February 2004
***CDF* Indictment Appeal Decision**	*Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, SCSL-04-14-AR73, "Decision on Amendment of Consolidated Indictment, Appeals Chamber, 16 May 2005
***CDF* Subpoena**	*Prosecutor v. Norman, Moinina Fofana and Allieu Kondewa,* SCSL-2004-14-

Appeal Decision	688, "Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone" Appeals Chamber, 11 September 2006
***CDF* Trial Judgement**	*Prosecutor v. Moinina Fofana and Allieu Kondewa,* SCSL-2004-14-785, "Judgement", Trial Chamber, 2 August 2007
***Kondewa* Preliminary Motion Decision**	*Prosecutor v. Allieu Kondewa,* SCSL-12-50, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 27 November 2003
***RUF* Indictment**	*Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao,* SCSL-04-15, "Corrected Amended Consolidated Indictment", 2 August 2006
***Sesay* Preliminary Motion Decision**	*Prosecutor v. Issa Hassan Sesay*, SCSL-2003-05-080, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 13 October 2003

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APPENDIX B

PROSECUTION'S SECOND GROUND OF APPEAL

ALLEGED CRIMES ON WHICH FINDINGS WERE NOT MADE BY THE TRIAL CHAMBER

ANNEX B

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ANNEX B

The following table sets out :
Column 1: the locations that the Trial Chamber failed to take into consideration in its Judgement.[1]
Column 2: the count(s) for which the Trial Chamber failed to consider the particular location.
Column 3: the evidence presented by the Prosecution to prove the count for the particular location.
Column 4: the existence or absence of cross-examination(s) by the Defence.
Column 5: the paragraph(s) of the Indictment[2] also mentioning the location, although not for the particular count.
Column 6: the evidence presented by the Defence in rebuttal of the counts for these particular locations.
Column 7: the paragraph(s) of the Prosecution Pre-trial Brief[3] mentioning the location for the particular count.
Column 8: the paragraph(s) of the Prosecution Supplemental Pre-Trial Brief[4] mentioning the location for the particular count.
Column 9: the paragraph(s) of the Prosecution Response to the Rule 98 Defence Motions for Acquittal[5] mentioning the location for the particular count.
Column 10: the paragraph(s) of the Prosecution Final Brief[6] mentioning the location for the particular count.
Column 11: the relevant paragraph(s) (if any) of the Trial Chamber's Judgement.

Unless otherwise specified, the numbers refer to the paragraph(s) of the relevant document

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[1] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu,* SCSL-04-16-T-613, "Judgement", Trial Chamber, 20 June 2007, as revised pursuant to the Corrigendum issued by the Trial Chamber on 19 July 2007 (SCSL-16-T-628, Registry page nos. 23675-23678).
[2] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu,* SCSL-04-16-T-147, "Further Amended Consolidated Indictment", 18 February 2005.
[3] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu,* SCSL-04-16-PT-29, "Prosecution Pre-Trial Brief pursuant to Order for filing Pre-Trial Brief(under Rules 54 and 75bis) of 13 February 2004", 5 March 2004.
[4] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu,* SCSL-04-16-PT-56, "Prosecution Supplemental Pre-Trial Brief pursuant to Order to the Prosecution to file a Supplemental Pre-Trial Brief on 1 April 2004", 21 April 2004.
[5] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu,* SCSL-04-16-T-459, "Prosecution Response to Defence Motions for Judgment of Acquittal pursuant to Rule 98", 27 January 2006.
[6] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu,* SCSL-04-16-T-601, "Prosecution Final Trial Brief", 6 December 2006.

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1	2	3	4	5	6	7	8	9	10	11
Location	**Count**	**Prosecution evidence**	**Cross-Examination**	**Defence evidence**	**Indictment**	**Pre-Trial Brief**	**Sup. PTB**	**R. 98 Brief**	**Final Brief**	**Paragraph TC Judgement**
KOINADUGU DISTRICT										
Yiffin/ Yifin	1 Acts of Terror	TF1-153, TT 22 September 2005, p. 32 TF1-033, TT 11 July 2005, pp. 15-16 TF1-133, TT 7 July 2005, p. 82	none	DAB-090[1], DAB-092[2] DAB-087[3], DAB-086[4], DAB-014[5]	none	82 *See also* Prosecution Opening Statement, TT 7 March 2005, p. 35	53 d	189	1412 1422	none
Yiffin/ Yifin	3-5 Killings	TF1-310, TT 5 July 2005, pp. 65-74 TF1-033, TT 11 July 2005, pp. 15-16 TF1-153, TT 22 September 2005, p. 32	TF1-310: yes[6] TF1-033: yes[7]	DAB-092[8], DAB-090[9], DAB-086[10], DAB-087[11], DAB-014[12]	none	82 *See also* Prosecution Opening Statement, TT 7 March 2005, p. 35	53 d., 51. d., 334 d., 617	134	1412 1422 1489	1688 (Trial Chamber declines to consider evidence of killings in Yiffin because not pled in the Indictment)

		Exhibit P57, No Peace Without Justice Report, 10 March 2004, p. 174								
Yiffin/ Yifin	14 Looting	TF1-153, TT 22 September 2005, pp. 33, 36.	TF1-153: yes[13]	DAB-092[14], DAB-086[15]	none	82	256 e. 539 e. 822 e. 255 d. 538 d. 821 d	189	1412 - 1422 1494	1688 (Trial Chamber declines to consider evidence of killings in Yiffin because not pled in the Indictment)
Yiffin/ Yifin	10-11 Physical violence	TF1-272, TT 4 July 2005, p. 52 TF1-310; TT 5 July 2005, p. 66	TF1-272: yes[16] TF1-310: yes[17]	DAB-092[18], DAB-090[19], DAB-086[20], DAB-087[21]	none	82	434 d. 437 c.	none	1428 1491	1688 (Trial Chamber declines to consider evidence of killings in Yiffin because not pled in the Indictment)
Yiffin/ Yifin	6-9 Rape	TF1-033, TT 11 July 2005, p. 16 TF1-153, TT 22 September 2005, pp. 32-33	TF1-033: yes[22] TF1-153: yes [23]	DAB-086[24], DAB-090[25] *See also* Kamara Rule 98 Motion, para. 30.6	none	82	94 c. 380 d.	38, 157,	1433 1490	none

Kurubonla/ Krubola	13 Enslave ment	TF1-133, TT 7 July 2005, pp. 92-93, p. 102	TF1-133: yes[26]	DAB-096[27], DAB-028[28], DAB-095[29], DAB-156[30], DAB-014, DAB-005, DBK-037, DBK-058[31]	47 (Count 3-5)	82 83, 84	none	none	1438 1493	1120-1133: (factual findings mention Krubola for sexual slavery but not for enslavement)
Kurubonla/ Krubola	6-9 Outrages upon Personal Dignity	TF1-133, TT 7 July 2005, pp 97-101.	TF1-133: yes[32]	DAB-156[33], DAB-096[34], DAB-095[35], DAB-014, DAB 019, DAB-028, DAB-005, DBK-037, DBK-058[36]	47 (Count 3-5)	82 83, 84	92 d. 375 d., 658 d.	none	1438 1490	1120-1133: (factual findings mention Krubola for sexual slavery) 1833 (Brima has no Individual Criminal Responsibility under 6(1) for Koinadugu District.) 2095 (Kanu has no Individual Criminal Responsibility for other Districts than Bombali and Freetown and Western Area)

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										Kamara: ICR in Kurubonla not examined
Kurubonla/ Krubola	10-11 Physical Violence	TF1-133, TT 7 July 2005, p. 97.	TF1-133: yes[37]	DAB-028[38], DAB-095[39], DAB-014, DAB-028, DAB-005, DAB-096, DAB-156 DBK-037, DBK-058[40]	47 (Count 3-5)	82 83, 84	none	none	1491	none
Kurubonla/ Krubola	1 Acts of Terror	TF1-133, TT 7 July 2005, pp. 93-95, 118	none	DAB-028[41], DAB-156[42], DAB-096[43], DAB-095[44], DAB-014, DAB-028, DAB-005, DBK-037, DBK-058[45]	47 (Count 3-5)	82-91 *See also* Prosecution Opening Statement, TT 7 March 2005, pp. 35-36	none	none	none	1533: ("The Trial Chamber has found that a number of acts of violence were committed in …Kurubonla during the indicted period.") 195: ("Significant evidence was adduced regarding the commission of crimes by the troops under the command of SAJ Musa and Denis Mingo including at

										…Kurubonla,[46]") 1541: (The Trial Chamber is neither satisfied that the elements in relation to Count 2 (Collective Punishment) are established in relation to Koinadugu District.) No specific findings for Acts of Terror in Kurubonla
Kurubonla /Krubola	8 Forced Marriage	TF1-133, TT 7 July 2005, pp. 97-100, 113-122.	TF1-133: yes[47]	DAB-156[48], DAB-096[49], DAB-095[50], DAB-014, DAB-028, DAB-005, ,DBK-037, DBK-058[51]	47 (Count 3-5)	82 83, 84	92 d, 375 d, 658 d	none	1897	none
Mongo Bendugu	13 Enslave ment	TF1-184, TT 27 September 2005, p. 22, and TT 29 September	TF1-184: yes[52]	DBK-012, 037, DAB-018, DAB-023, DAB 034, DAB-	none	none	none	362	1493	none[54]

		2005, p. 33		096, DBK-037, DAB 148, DSK 101, DAB-057[53]						
Mongo Bendugu	1 Acts of Terror	TF1-209, TT 7 July 2005, pp. 40-41	none	DBK-012, 037, DAB-018, DAB-023, DAB 034, DAB-096, DBK-037, DAB 148, DSK 101, DAB-057[55]	none	none	none	none	1439	none (see paras. 1528-1541)
Koinadugu Town	10 Physical violence	TF1-209, TT 7 July 2005, pp. 31, 70-71	TF1-209: yes[56]	DAB-089[57]	47 (Counts 3-5), 53 (Counts 6-9), 69 (Count 13)	none	none	none	1447 1491	none (see paras. 1214-1218)
Bumbunkura	3-5 Killings	TF1-094, TT 13 July 2005, pp. 27-32	TF1-094: yes[58]	DAB-088[59], DAB-089[60]	none	none	none	134	1458 1489	195 (evidence of "commission of crimes by the troops under the command of SAJ Musa and Denis Mingo including at …Bambukura") No specific finding of killings (see paras 865-879)

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Yomadugu/ Yemadugu	10 Physical Violence	TF1-094, TT 13 July 2005, p. 32	TF1-094: yes [61]	DAB-091[62], DAB-088[63]	none	none	none	none	1462 1491	none
Yomadugu/ Yemadugu	3-5 Killings	TF1-094, TT 13 July 2005, p. 32	TF1-094: yes [64]	DAB-091[65], DAB-088[66]	none	none	none	134	1489	none
Yomadugu/ Yemadugu	6-9 Sexual Violence	TF1-094, TT 13 July 2005, pp. 28-29, 48 TF1-133, TT 7 July 2005, pp. 97-98	TF1-094: yes [67]	DAB-091[68], DAB 088[69]	none	none	none	none	1463 1490 1466 1894	none
Yomadugu/ Yemadugu	1 Acts of Terror	None	none	DAB-091[70], DAB 088[71]	none	none	none	none	1461 - 1465	none
Yiraia	6-9 Sexual violence	TF1-153, TT 22 September 2005, pp. 47-50	TF1-153: yes [72]	none	none	192	none	none	1466 1490	192
Bafodia/ Bafodeya	6-9 Sexual violence	TF1-199, TT 6 October 2005, pp. 79-80	none	DAB-085[73],DBK-131[74]	none	none	none	none	1490 1492	none
Bafodia/ Bafodeya	13 Enslavement	TF1-199, TT 6 October 2005, pp. 80-	TF1-199: yes [75]	DAB-085[76], DBK-131[77]	none	none	none	none	1480	none[78]

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Bafodia/ Bafodeya	1 Acts of Terror	TF1-199, TT 6 October 2005, p. 81	none	DAB-085[79], DBK-131[80]	none	none	none	none	1488 - 1491	none
Woronbia	10-11 Physical Violence	TF1-133, TT 7 July 2005, pp. 89-90	TF1-133: yes [81]	none	none	none	none	none	1491	none
Woronbia	13 Enslave ment	TF1-133, TT 7 July 2005, pp. 89-92	none	none	none	none	none	none	1493	none
Serekolia	13 Enslave ment	TF1-133, TT 7 July 2007, p. 107	TF1-133: yes [82]	none	none	82	207 b. 490 b 773 b	none	1493	none[83]
PORT LOKO DISTRICT										
Mammah Town/ Mamamah[84]	1-2 Acts of Terror and Collective Punishment	TF1-167, TT 16 September 2005, pp. 65-66; TF1-334, TT 15 June 2005, p. 20-23; TF1-023, TT 10 March 2005, pp. 36-37	none	DBK-129[85], DBK-126[86]	none	none	none	51, footnote 150, 78, 219	1756 1768 1769	1615, 1617-1620, 1630 (Trial Chamber declines to consider evidence of counts 1 and 2 in Mammah Town because not pled in the Indictment)
Mammah Town/	3-5 Killings	TF1-334, TT 15 June	TF1-334: yes[87]	DBK-129[88], DBK-126	none	none	none	51, footnot	1759 1769	none

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Mamamah		2005, pp. 17-23. TF1-167, TT 16 September 2005, pp. 65-66 TF1-023, TT 10 March 2005, pp. 35-37						e 150, 219	1769 1771 1772, 1774	
Mammah Town/Mamamah	12 Child soldiers	TF1-167, TT 16 September 2005, p. 72 TF1-334, TT 14 June 2005, p. 122 TF1-023, TT 10 March 2005, 7 November 2005	none	DBK-129[89]	none	none	none	none	1756	none
Gberibana	3-5 Killings	TF1-334, TT 15 June 2005, pp. 28-29, p. 32 TF1-167, TT 16 September 2005, pp. 70-71	TF1-334: yes [90]	DBK-129[91]	none	none	none	none	1759, 1778	none

Gberibana	1-2 Acts of Terror	TF1-334, TT 15 June 2005, p. 32	none	DBK-129[92]	none	none	none	none	1778, 1779	1615-1616: attacks on Gberibana However no findings for Acts of Terror or Collective Punishment.[93]
Gberibana	6-9 Rape	TF1-334, TT 15 June 2005, pp. 50-56, Exhibits p. 21	TF1-334: yes [94]	DBK-129[95]	none	none	none	none	1780	None
Gberibana	12 Child soldiers	Witness TF1-167, TT 16 September 2005, p. 72	none	DBK-129[96]	none	none	none	174	none	none
Makolo	3-5 Killings	TF1-334, TT 15 June 2005, pp. 38-39	none	DBK-129[97]	none	none	none	none	1759 1789 1790	None
Makolo	1-2 Acts of Terror and Collective Punishment	TF1-334, TT 15 June 2005, pp. 38-39	none	DBK-129[98]	none	none	none	none	1759	1626, 1630 (Trial Chamber declines to consider evidence of counts 1 and 2 in Makolo because not pled in the Indictment)
Mile 38	1-2 Acts of Terror and Collective Punishment	TF1-334, TT 15 June 2005, pp. 25, 50-56 TF1-023, TT	none	DBK-129[99]	none	none	none	none	1760, 1776,	1615 (The Trial Chamber accepts the evidence of Prosecution Witness TF1-334,

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		7 November 2005, pp. 33, 10 March 2004, p. 34 Exhibit p. 21								not previously evaluated by the Chamber, that the troops leaving Freetown went through … Mile 38.) 1617, 1627, 1630 (Trial Chamber declines to consider evidence of counts 1 and 2 in Mile 38 because not pled in the Indictment)
Gberi Junction	1-2 Acts of Terror and Collective Punishment	TF1-334, TT 15 June 2005, p. 41 TF1-167, TT 16 September 2005, p. 80	none	DBK-129[100]	none	none	none	none	1791	none
Masiaka	10-11 Physical Violence	Witness TF1-085, TT 7 April 2005, p. 43	TF1-085: yes [101]	DBK-129[102]	none	none	none	348	1703	none
KAILAHUN DISTRICT										
Segbwema	3-5 Killings	TF1-122, TT 24 June 2005, pp. 76-77	TF1-122: yes[103] TF1-045: yes[104]	none	none	none	none	none	1375; 1379	none

		TF1-045, TT 19 July 2005, pp. 22-25, pp. 104-5								
Segbwema	13 Enslavement	TF1-122, TT 24 June 2005, pp. 76-77	TF1-122: yes[105]	none	none	none	none	none	1375	none
Segbwema	6 Rape	TF1-045, TT 22 July 2005, pp. 22-25	TF1-045: yes[106]	none	none	none	none	none	1379	none
Segbwema	1-2 Terrorism and Collective Punishment	TF1-045, TT 19 July 2005, pp. 22-25, 104-5	TF1-045: yes[107]	none	none	none	none	none	1379 (killing, raping, burning) 1375 (killing)	none
Segbwema	14 Looting	TF1-045, TT 19 July 2005, pp. 22-25, 104-5	TF1-045: yes[108]	none	none	none	none	none	1379	none
Buedu/Bueda / Beudu/ Bedu/ Burkina	12 Sexual Slavery	None	None	DAB-142[109]	none	none	none	234 (rape)	1381	1326-1327 "Burkina (also known as Buedu)"[110] (enslavement, but by RUF)

										1369-1370 (enslavement, forced labour) No specific findings for Sexual Slavery
Buedu/Bueda / Beudu/ Bedu/ Burkina	6 Rape	none	none	DAB-140[111]	none	none	none	234 (rape)	1381	1326-1327 "Burkina (also known as Buedu)"[112] (enslavement, killings of enslaved civilians, but by RUF) No specific findings for Rape
Daru	14 Looting	TF1-045, TT 19 July 2005, pp. 37, 82-83	TF1-045: yes[113]	DAB-147, DAB-018[114]	none	none	none	185	1388	none
FREETOWN/ WESTERN AREA										
Wellington	13 Enslavement	TF1-085, p 62, TT 06 April 2005, p. 62 and TT 7 Apr 2005, pp. 7-15 TF1-023, TT 11 July 2005,	TF1-085: yes[115] TF1-023: yes[116]	none	none	none	798; 801	none	1716	950 (Recognizes TF1-085 evidence of abduction) 1098 (more on abduction) No specific findings for

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		pp. 8-9 and TT 9 March 2005, p. 29								enslavement
Wellington	1-2 Acts of Terror and Collective Punishment	TF1-023, TT 9 March 2005, p. 29, and TT 11 July 2005, pp. 8-9	TF1-023: yes[117]	DBK-037[118], DBK-113[119], DBK-126[120], Brima[121], DAB-095[122]	79 (Count 14)	none	684 (rape); 798; 801 (forced labour)	196, 390 (Looting) 315 (Kanu present)	1719; 1741;	950 dismisses TF1-085 evidence on burning as too general, but doesn't mention TF1-023's evidence
Wellington	14 Looting	TF1-085, TT 6 April 2005, p. 62	TF1-085: yes[123] TF1-023[124]	DAB-063[125]	79	none	none	196, 390 315 (Kanu present)	1749	950 No specific findings for looting
Waterloo	3-5 Killings	TF1-334, TT 15 June 2005, pp. 11-12. TF1-085, TT 7 April 2005, pp. 23, 28	TF1-334: yes[126] TF1-085: yes[127]	DBK-037[128], DBK-113[129], DBK-126[130], Brima[131], DAB-095[132], DBK-012[133],	none	58	75 ; 358; 641	p. 27	741	476/613/621/1576 (as a location where planning took place) 477 (places the 3 accused at Waterloo) No specific findings for killings
Waterloo	10-11	TF1-334, TT	TF1-334:	DBK-	none	58	75 ; 358;	p. 27	741	476/613/621/1576

	Physical Violence	15 June 2005, pp. 11-12 TF1-085, TT 7 April 2005, pp. 23, 28	yes[134] TF1-085: yes [135]	012[136]			641			(as a location where planning took place) 477 (places the 3 accused at Waterloo) No specific findings for physical violence
KONO DISTRICT										
Penduma	3-5 Killings	TF1-217, TT 17 October 2005	TF1-217: yes [137]		none	none	none	127	1307 - 1311, 1332 - 1333	186, 235 village "targeted" during indictment period and civilians "attacked" No specific findings for killings
BOMBALI DISTRICT										
Rosos	3-5 Killings	TF1-334, TT 23 May 2005, pp. 104-110 and TT 24 May 2005, pp. 2-5.	TF1-334: yes[138]	DBK-113[139], DBK-126[140], Brima[141]	none	none	none	138	1547	1713 (Trial Chamber declines to consider unlawful killings because not pled in the indictment.)
Col. Eddie Town/ Major Eddie Town/	3-5 Killings	TF1-167, TT 15 September 2005, pp. 72-	TF1-167: yes[142]	DAB-023[143]	none	none	none	none	1548 (Killings)	1714-1716 (orders given in Col. Eddie Town to kill

Major Eddy Town		74.								civilians in neighboring towns) No specific findings for killings
Mandaha	3-5 Killings	TF1-157, TT 26 September 2005, pp. 28, 81-82	TF1-157: yes [144]	DBK-089[145], DBK-094[146]	none	none	none	69	1544 - 1546	192; 234 (Mandaha "attacked" by AFRC and/or RUF) No specific findings for killings
Karina	6-9 Sexual Violence	TF1-334, TT 23 May 2005, pp. 40-71 TF1-157, TT 22 July 2005, pp. 74-76	TF1-334: yes [147]	Defence R 98 motion: Kamara: 30.7 and 30.9	none	none	none	160	1549 - 1550	1710 ("Witness TF1-033 testified that he heard 'Gullit' order that civilian women should be stripped naked and raped during the attack on Karina" TC finds this evidence detailed, consistent and credible") No specific findings for sexual violence
Karina	10-11 Physical Violence	TF1-334, TT 23 May 2005, pp. 40-71 TF1-055, TT	TF1-334: yes [148] TF1-055: no	DBK-095, TT 17 July 2006, p 85-88, 90-94[149]	none	none	157-158, 440-441, 723-724	252	1552 - 1554	1224 (Trial Chamber declines to consider physical violence because not pled in the indictment.)

		12 July 2005, p. 137		DBK-113, TT 13 October 2006, p. 77-78, 20-22, 104-106[150] DBK-089, TT 14 July 2006, p. 10-20, 25-35, 46-52, 58-60, 65-68[151]						
Mateboi	10-11 Physical Violence	TF1-158, TT 26 July 2005, pp. 32-34 TF1-167, TT 15 September 2005, pp. 61-62 TF1-157, TT 27 July 2005, pp. 90-92	TF1-167: yes[152] TF1-158: yes[153] TF1-157: yes[154]	DBK-126[155], DBK-090[156], DBK-085[157], Brima[158], DBK-094[159]	none	none	157-158, 440-441, 723-724	70	1541, 1506	192 (Mataboi "attacked" by AFRC and/or RUF) 895, 897 (unlawful killings 1416, burnings) No specific findings for physical violence

[1] DAB-090, Transcript 24 July 2006, pp. 75, 78, 84-90, 106-107, pp. 111-112.
[2] DAB-092, Transcript 8 September 2006, pp. 32-36.
[3] DAB-087, Transcript 25 July 2006, pp. 47-48.
[4] DAB-086, Transcript 25 July 2006, p. 16-17.

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[5] See Witness Summaries provided by the Defence.
[6] Cross by Kamara (TF1-310, Transcript 05 July 2005, pp. 72-76).
[7] Cross by all three Defence teams; Brima (Transcript 12 July 2005, pp. 25-31), Kamara (Transcript 12 July 2005, p. 80), Kanu (Transcript11 July 2005, pp. 94-98).
[8] DAB-092, Transcript 8 September 2006, pp. 33, 35.
[9] DAB-090, Transcript 24 July 2006, pp. 75, 77, 80-81, 89-90, 106-107.
[10] DAB-086. Transcript 25 July 2006, pp. 7, 16, 20.
[11] DAB-087, Transcript 25 July 2006, pp. 43, 47, 65.
[12] See Witness Summaries provided by the Defence.
[13]Cross by Brima (Transcript 23 September 2005, p. 77).
[14] DAB-092, Transcript 8 September 2006, pp. 32-36.
[15] DAB-086, Transcript 25 July 2006, p. 22.
[16] Cross by Brima and Kanu; Brima (Transcript 04 July 2005, p. 69), Kanu (Transcript 04 July 2005, p. 67).
[17] Cross by Kamara (Transcript 05 July 2005, pp. 72-76).
[18] DAB-092, Transcript 8 September 2006, pp. 33, 35.
[19] DAB-090, Transcript 24 July 2006, pp. 75, 77, 80-81, 89-90, 106-107.
[20] DAB-086, Transcript 25 July 2006, pp. 7, 16, 20.
[21] DAB-087, Transcript 25 July 2006, pp. 43, 47, 65.
[22] Cross by Brima (Transcript 11 July 2005, pp. 150-2).
[23] Cross by Kamara (Transcript 8 September 2005, p. 77).
[24] DAB-086, Transcript 25 July 2006, p. 23.
[25] DAB-090, Transcript 24 July 2006, p. 109.
[26] Cross by Kamara (Transcript 07 July 2005, p. 118).
[27] DAB-096, Transcript 18 September 2006, p. 103.
[28] See Witness Summaries provided by the Defence.
[29] DAB-095, Transcript 20 and 28 September 2006, pp. 48-59; Witness mentions the location, however not specifically for this count.
[30] See Witness Summaries provided by the Defence.
[31] See Witness Summaries provided by the Defence for all these witnesses; Witnesses mention the location, however not specifically for this count.
[32] Cross by all three Defence teams (Transcript 07 July 2005, pp. 114-118).
[33] See Witness Summaries provided by the Defence.
[34] DAB-096, Transcript 18 September 2006, p. 103.
[35] DAB-095, Transcript 20 and 28 September 2006, pp. 48-59.
[36] See Witness Summaries provided by the Defence for all these witnesses.
[37] Cross by all three Defence teams; Kanu (Transcript 07 July 2005, p. 114), Kamara (Transcript 07 July 2005, p. 118), Brima (Transcript 07 July 2005, p. 117).
[38] See Witness Summaries provided by the Defence.
[39] DAB-095, Transcript 20 and 28 September 2006, pp. 48-59.

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[40] See Witness Summaries provided by the Defence for all these witnesses.
[41] See Witness Summaries provided by the Defence.
[42] See Witness Summaries provided by the Defence.
[43] DAB-096, Transcript 18 September 2006, p. 103.
[44] DAB-095, Transcript 20 and 28 September 2006, pp. 48-59.
[45] See Witness Summaries provided by the Defence for all these witnesses.
[46] TF1-133, Transcript 7 July 2005, pp. 93-95, 118. Kurubonla is also known as Krubola.
[47] Cross by all three Defence teams; Kanu (Transcript 7 July 2005, p. 114), Kamara (Transcript 7 July 2005, p. 118), Brima (Transcript 7 July 2005, p. 117).
[48] See Witness Summaries provided by the Defence.
[49] DAB-096, Transcript 18 September 2006, p. 103.
[50] DAB-095, Transcript 20 and 28 September 2006, pp. 48-59.
[51] See Witness Summaries provided by the Defence for all these witnesses.
[52]Cross by Brima (Transcript 29 September 2005, p. 33).
[53] See Witness Summaries provided by the Defence for these witnesses.
[54] However, Trial Chamber's Judgement para. 1350 says: "In light of the preceding evidence, the Trial Chamber is satisfied beyond reasonable doubt that between about 14 February 1998 and 30 September 1998, an unknown number of civilians were abducted and used as forced labour by AFRC/RUF forces in various locations in Koinadugu District, including Kabala, Kumala, Koinadugu, Yifin and Yomadugu."
[55] See Witness Summaries provided by the Defence for these witnesses.
[56] Cross by Kamara (Transcript, 07 July 2005, pp. 70-71).
[57] DAB-089, Transcript 24 July 2006, pp. 51-54.
[58] Cross by Brima and Kanu; Brima (Transcript 14 July 2005, p. 30); Kanu (Transcript 13 July 2005, pp. 47-48, 53).
[59] DAB-088, Transcript 24 July 2006, pp. 20-25.
[60] DAB-089, Transcript 24 July 2006, pp. 43-57.
[61] Cross by Kamara and Kanu; Kamara (Transcript 14 July 2005, p. 38), Kanu (Transcript 13 July 2005, p. 49).
[62] DAB-091, Transcript 24 July 2006, p. 10.
[63] DAB 088, Transcript 24 July 2006, pp. 25-27
[64] Cross by Kamara and Kanu; Kamara (Transcript 14 July 2005, p. 38) Kanu (Transcript 13 July 2005, p. 49).
[65] DAB-091, Transcript 24 July 2006, p. 10.
[66] DAB 088, Transcript 24 July 2006, pp. 25-27
[67] Cross by Kamara and Kanu; Kamara (Transcript 14 July 2005, p. 38), Kanu (Transcript 13 July 2005, p. 49).
[68] DAB-091, Transcript 24 July 2006, p. 10.
[69] DAB 088, Transcript 24 July 2006, pp. 25-27
[70] DAB-091, Transcript 24 July 2006, p. 10.
[71] DAB 088, Transcript 24 July 2006, pp. 25-27
[72] Cross by Brima and Kanu; Brima (Transcript 23 September 2005, p. 59), Kanu (Transcript 23 September 2005, p. 92).
[73] DAB-085, Transcript 20 July 2006, p. 49.

[74] DBK-131, Transcript 10 October 2006, pp. 45-46.
[75] Cross by all three Defence teams; Brima (Transcript 6 October 2005, pp. 118-119), Kamara (Transcript 06 October 2005, pp. 114-116), Kanu (Transcript 06 October 2005, pp. 102-103).
[76] DAB-085, Transcript 20 July 2006, p. 49.
[77] DBK-131, Transcript 10 October 2006, pp. 45-46.
[78] However, Trial Chamber's Judgement para. 1350 says: "In light of the preceding evidence, the Trial Chamber is satisfied beyond reasonable doubt that between about 14 February 1998 and 30 September 1998, an unknown number of civilians were abducted and used as forced labour by AFRC/RUF forces in various locations in Koinadugu District, including Kabala, Kumala, Koinadugu, Yifin and Yomadugu."
[79] DAB-085, Transcript 20 July 2006, p. 49.
[80] DBK-131, Transcript 10 October 2006, pp. 45-46.
[81] Cross by Kamara and Kanu; Kamara (Transcript 7 July 2005, p. 118), Kanu (Transcript 7 July 2005, p. 113).
[82] Cross by Kamara (Transcript 7 July 2005, pp. 119-121).
[83] However, Trial Chamber's Judgment para. 1350 says: "In light of the preceding evidence, the Trial Chamber is satisfied beyond reasonable doubt that between about 14 February 1998 and 30 September 1998, an unknown number of civilians were abducted and used as forced labour by AFRC/RUF forces in various locations in Koinadugu District, including Kabala, Kumala, Koinadugu, Yifin and Yomadugu."
[84] Spelling used by TF1-167.
[85] DBK-129, Transcript 18 October 2006, pp. 17-18; 9 October 2006, pp. 87-90
[86] See Witness Summaries provided by the Defence.
[87] Cross by Kanu (Transcript, 16 June 2005 p. 103).
[88] DBK-129, Transcript 9 October 2006, pp. 92-95.
[89] DBK-129, Transcript 9 October 2006, pp. 92-95.
[90] Cross by Kanu (Transcript 16 June 2005, pp. 29-32).
[91] DBK-129, Transcript 9 October 2006, pp. 92-95.
[92] DBK-129, Transcript 9 October 2006, pp. 92-95.
[93] See Trial Chamber's Judgement para. 1630: "Regardless, the Trial Chamber finds that there is insufficient evidence linking the acts of violence found by the Chamber to have occurred in Manaarma, Nonkoba and Tendekum - the only acts of violence which have been established beyond a reasonable doubt by this Chamber and the only acts particularised in the Indictment in which the Defence was put on notice - with the attacks ordered by the Accused Brima".
[94] Cross by Brima (Transcript 17 June 2005, pp. 39-41).
[95] DBK-129, Transcript 9 October 2006, pp. 92-95.
[96] DBK-129, Transcript 9 October 2006, pp. 92-95.
[97] DBK-129, Transcript 9 October 2006, pp. 98-101.
[98] DBK-129, Transcript 9 October 2006, pp. 98-101.
[99] DBK-129, Transcript 9 October 2006, pp. 89-90.
[100] DBK-129, Transcript 9 October 2006, pp. 89-90.
[101] Cross by Kanu and Kamara; Kanu (Transcript 7 May 2005, pp. 83-84, 92), Kamara (Transcript 7 May 2005, p. 126).
[102] DBK-129, Transcript 9 October 2006, pp. 89-90.

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[103] Cross by all threeDefence teams, but not specifically regarding this location (TF1-122, Transcript 24 June 2006, pp. 81-126).
[104] Cross by all three Defence teams, especially Kamara Defence, but not directly relating to this location. (TF1-045, Transcript 22 July 2005, pp. 25-28).
[105] Cross by all three Defence teams, but not specifically regarding this location (TF1-122, Transcript 24 June 2005, pp. 81-126).
[106] Cross by all three Defence teams, especially by Kamara Defence, but not specifically regarding events at Segbwema. (TF1-045 , Transcript 22 July 2005, pp. 25-28).
[107] Cross by all three Defence teams, especially by Kamara Defence, but not specifically regarding events at Segbwema. (TF1-045 , Transcript 22 July 2005, pp. 25-28).
[108] Cross by all three Defence teams, especially Kamara Defence, but not directly relating to this location. (TF1-045 , Transcript 22 July 2005, pp. 25-28).
[109] DAB-142, Transcript 19 September 2006, pp. 8-29; DAB-142 was Brima's witness, cross by Kanu and Kamara; Kanu (Transcript 19 September 2006, pp. 28-29), Kamara (Transcript 19 September 2006, pp. 8-24) regarding Buedu (Transcript 19 September 2006, pp. 19, 20-21, 35-36).
[110] The witnesses' testimony appears to support that Buedu is a town and Burkina is a chiefdom, one of 12 chiefdoms in Kailahun, and therefore, although they are overlapping locations, they are not interchangeable names.
[111] DAB-140, Transcript 19 September 2006, pp. 66-94; Cross by Kamara and Kanu; Kamara (Transcript 19 September 2006, pp. 66-77),Kanu (Transcript 19 September 2006, pp. 89-94); Witness DAB-140 testifies that he was captured and forced to labour in Buedu. He testifies that civilians were killed and thrown in a pit grave, sometimes after severe raping, and that his own child shared this fate. He claims these crimes happened under the supervision of Mosquito (Bockarie) and Johnny Paul Koroma. Witness claims not to know who ordered the mass killing of 67 people in Buedu.
[112] The witnesses' testimony appears to support that Buedu is a town and Burkina is a chiefdom, one of 12 chiefdoms in Kailahun, and that therefore, although they are overlapping locations, they are not interchangeable names.
[113] Cross by all three Defence teams, but only Kamara cross-examined TF1-045 about the bringing of looted goods to Daru; trucks were filled with looted items from Kenema and taken to Daru; Kamara (Transcript 22 July 2005, p. 11).
[114] See Witness Summaries provided by the Defence for all these witnesses.
[115] Cross by all three Defence teams; Kanu (Transcript 7 April 2005, pp. 55-73); Kamara and Brima Counsel only cross-examined TF1-085 regarding the date on which the rebels came to her house in Wellington (Transcript 7 April 2005, pp. 116, 126) and the witness' background. (Transcript 7 April 2005, pp. 114, 122).
[116] Cross by all three Defence teams, but only Brima Defence questions the witness regarding Wellington (Transcript 7 November 2005, pp. 8-9).
[117] Cross by all three Defence teams (Transcript 9 March 2005, p. 29;Transcript 11 July 2005, pp. 8-9).
[118] DBK-037, cross by Kanu, Transcript 4 October 2006, p. 34.
[119] DBK-113, Transcript 13 October 2006, pp. 44-45.
[120] DBK-126, cross by Kanu, Transcript 12 October 2006, p. 75.
[121] Accused Alex Tamba Brima, Transcript 15 June 2006, pp. 73-74.
[122] DAB-095, Transcript 28 September 2006, pp. 68-69.
[123] Cross by all three Defence teams regarding Wellington; Kanu (Transcript 7 May 2005, pp. 55-73); Kamara and Brima Defence only cross-examined TF1-085 regarding the on which date rebels came to her house in Wellington (Transcript 7 May 2005, pp. 116 , 126) and witness' background. (Transcript 7 May 2005, pp. 114, 122).
[124] Cross by all three Defence teams about the background (Transcript 7 November 2005); Cross by Brima regarding Wellington (Transcript 7 November 2005, pp. 8-9).
[125] DAB-063, Transcript 02 August 2006, p. 18.

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[126] Cross by Kanu and Brima, however not regarding killing or violence in Waterloo, (Transcript 15 June 2005, pp. 11-12).
[127] Cross by all three Defence teams, however not regarding killing or violence in Waterloo, (Transcript 7 April 2005, pp. 23, 28).
[128] DBK-037, Transcript 4 October 2006, p. 34, cross by Kanu.
[129] DBK-113, Transcript 13 October 2006, pp. 44-45.
[130] DBK-126, Transcript 12 October 2006, p. 75, cross by Kanu.
[131] Accused Alex Tamba Brima, Transcript 15 June 2006, pp. 73-74.
[132] DAB-095, Transcript 28 September 2006, cross, pp. 68-69.
[133] DBK-012, Transcript 18 October 2006, cross, pp. 70-71,
[134] Cross by Kanu and Brima, but not regarding killing or violence in Waterloo, (Transcript 15 June 2005, pp. 11-12)
[135] Cross by all three Defence teams, but not regarding killing or violence in Waterloo, (Transcript 7 April 2005, pp. 23, 28)
[136] DBK-012, Transcript 18 October 2006, pp. 70-71.
[137] Cross by Kamara and Kanu , (Transcript 17 October 2005).
[138] Cross by Brima and Kanu, Kanu in particular regarding the meeting that initiated Operation Clear the Area (Transcript 16 June 2005, p. 52).
[139] DBK-113, Transcript 13 October 2006, pp. 26-27.
[140] DBK-126, Transcript 25 October 2006, cross, p. 44.
[141] Accused Alex Tamba Brima,Transcript, 12 June 2006, pp. 74-76.
[142] Cross by all three Defence teams. Brima questioned specifically about the killing of the "witches" at Col. Eddie Town. (TF1-167, Transcript 19 September 2005, pp. 74-80).
[143] DAB-023, Transcript 31 July 2006, pp. 62-63.
[144] Cross by all three Defence teams; Brima and Kamara cross-examined specifically regarding a civilian killing in Mandaha by Brima; Brima (Transcript 26 September 2005, p. 9-10), Kamara (Transcript 26 September 2005, p. 28);.Kanu (Transcript 26 September 2005).
[145] DBK-089, Transcript 14 July 2006, pp. 26-28.
[146] DBK-094, Transcript 11 July 2006, pp. 58-60.
[147] Cross by Brima and Kanu, (Transcript 23 May 2005, pp. 40-71).
[148] Cross by Brima and Kanu (Transcript 23 May 2005, pp. 40-71).
[149] DBK-095, Transcript 17 July 2006, pp. 85-88, 90-94.
[150] DBK-113, Transcript 13 October 2006, pp. 77-78, 20-22, 104-106.
[151] DBK-089, Transcipt 14 July 2006, pp. 10-20, 25-35, 46-52, 58-60, 65-68.
[152] Cross by all three Defence teams, however not specifically regarding this count at this location, (Transcript 15 September 2005, pp. 61-62).
[153] Cross by all three Defence teams (Transcript 26 July 2005, pp. 32-34).
[154] Cross by all three Defence teams; Brima (Transcript 26 September 2005, pp. 6-20); Kamara (Transcript 26 September 2005, pp. 26-32);,Kanu (Transcript 25 July 2005, pp. 54-65); Brima and Kamara cross-examined TF1-157 directly about violence in Mateboi.
[155] DBK-126, Transcript 25 October 2006, p. 41, Transcript 12 October 2006, p. 86.
[156] DBK-090, Transcript 17 July 2006, pp. 40-48.
[157] DBK-085, Transcript 10 Jul 2006, pp. 34, 48-49.
[158] Accused Alex Tamba Brima, Transcript 8 Jun 2006, pp. 53-54.

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[159] DBK-094, Transcript 13 July 2006, pp. 30-31, Transcript 11 July 2006, pp. 73-74.

APPENDIX C

PROSECUTION'S FOURTH GROUND OF APPEAL (JOINT CRIMINAL ENTERPRISE)

Findings in the Trial Chamber's Judgement establishing the existence of a joint criminal enterprise, and the participation of the Accused in the joint criminal enterprise

(1) Junta period

"On 25 May 1997, the SLPP Government of President Kabbah was overthrown by low level soldiers of the Sierra Leone Army ("SLA") belonging to the 'other/lower ranks.' Those involved in the coup immediately released Major Johnny Paul Koroma from the prison in Freetown where he had been held on charges of participating in an earlier coup attempt against the Government. Johnny Paul Koroma was appointed Chairman of the new government which was named the *Armed Forces Revolutionary Council* ("AFRC")."[1047]

"Subsequently, Johnny Paul Koroma invited the Revolutionary United Front ("RUF") leadership to join the Government."[1048]

"After the coup, the armed conflict continued but was now conducted by RUF and former SLA troops, on behalf of the AFRC/RUF government, fighting against ECOMOG and the CDF/Kamajors, on behalf of the Kabbah Government. Documentary evidence establishes that regular armed clashes between the two sides occurred throughout the remainder of 1997."[1049]

"Exhibits P-6 and P-7, both Government Gazettes, name 34 persons as members of the *Armed Forces Revolutionary Council*, including Johnny Paul Koroma, Foday Sankoh, SAJ Musa, the three Accused, as well as members of the RUF such as Sam Bockarie, Morris Kallon, Issa Sesay, Gibril Massaquoi, Mike Lamin and Eldred Collins."[1050]

"In the initial stages of the AFRC Government period, there was a high degree of cooperation between the upper ranks of the AFRC and the RUF. Commanders of both factions attended coordination meetings at which they planned operations and organised joint efforts to obtain arms and ammunition."[1051]

[1047] Trial Chamber Judgement, para. 264.
[1048] Trial Chamber Judgement, para. 266.
[1049] Trial Chamber Judgement, para. 252.
[1050] Trial Chamber Judgement, para. 277.
[1051] Trial Chamber Judgement, para. 170.

"The Trial Chamber finds that the Prosecution has established beyond a reasonable doubt that the Government headed by Johnny Paul Koroma was named the *Armed Forces Revolutionary Council*, colloquially known as the 'Junta'. Within that Government, there was a governing body, called interchangeably the *Council* or the *Supreme Council*. This council had both legislative and executive powers, and it was the body responsible for the day-to-day decision making of the AFRC government. The Trial Chamber also finds it established beyond a reasonable doubt that as "the Highest Council in the Land", the Governing Council exercised political control over the military branch of the government."[1052]

"The Trial Chamber is satisfied on the evidence that security issues and other urgent matters were discussed at these meetings. Therefore, the Trial Chamber finds that *Supreme Council* members were apprised of all major developments around the country."[1053]

"Reliable documentary evidence establishes that after the May 1997 coup, violence and human rights abuses against civilians increased. Extrajudicial killings, mutilation, amputations, rape and beatings of unarmed civilians were frequent."[1054]

"The Trial Chamber finds that it is established beyond reasonable doubt that a widespread or systematic attack by AFRC/RUF forces was directed against the civilian population of Sierra Leone at all times relevant to the Indictment."[1055]

"Although it is sufficient for the general requirements of crimes against humanity to establish that the attack was systematic, the Trial Chamber is satisfied that it was also widespread as AFRC/RUF attacks were carried out frequently against a large number of civilian victims and involved the simultaneous commission of multiple serious offences."[1056]

"Certain features of this evidence prove that the attack against the civilian population was systematic. First, it was executed at the behest of the State, as AFRC/RUF government officials were routinely responsible for the commission of the crimes. In Bo District, for example, AFRC officials were involved in the burning down of the SLPP party office. In Kenema Town, several alleged Kamajor supporters were arrested and detained at the police station, released on bail and then subsequently re-arrested and executed by AFRC officials. A similar incident occurred in Kailahun District, where least 57 alleged Kamajor supporters were arrested and shot by AFRC/RUF officials."[1057]

"The execution of the attack pursuant to pre-conceived policies or plans is an additional feature that demonstrates the systematic nature of the attack. The Trial

[1052] Trial Chamber Judgement, para. 285.
[1053] Trial Chamber Judgement, para. 288.
[1054] Trial Chamber Judgement, para. 227.
[1055] Trial Chamber Judgement, para. 224.
[1056] Trial Chamber Judgement, para. 232.
[1057] Trial Chamber Judgement, para. 230.

Chamber is satisfied that civilians were forced to labour in the diamond mines in Tongo Field pursuant to a policy formulated and administered by the AFRC Secretariat. In addition, the pattern of crimes evinces a policy that inflicting violence on civilians served to eradicate support for the Kamajors. The Trial Chamber emphasises in this regard that the alleged presence of Kamajors among the civilians does not preclude the characterisation of the attack as one directed primarily against the civilian population. The Trial Chamber accepts the submission of the Prosecution that throughout the junta period, the AFRC/RUF government sanctioned the commission of crimes against civilian population generally as a means of consolidating control and eliminating opposition to the regime."[1058]

"Approximately three days later, 'Mosquito' gathered the civilians of Tongo Field in a public meeting at Tongo Park attended by witness TF1-062. He informed the civilians that the AFRC/RUF government, formed in Freetown, was now in control of Tongo. The civilians were told that 'Mosquito' had set up a secretariat, under Lieutenant Dennis, to handle any of their complaints. In addition, 'Mosquito' told the civilians that they were going to mine for diamonds. Witness TF1-062 testified that soon after this meeting, 'Mosquito' left Tongo Field, leaving SLA commander Jamayo Kati in charge of the mining. Kati was subsequently killed and replaced by SLA soldier Set Marrah. However, 'Mosquito' would visit Tongo Field more or less at weekly intervals."[1059]

"Witness TF1-062 stated that the civilians of Tongo Field were subsequently required to elect from their number a chairman, named Mompleh, who would be responsible for organising the civilian mining. Commander Pa Set Marrah informed the civilians, through Mompleh, that 'Mosquito' had ordered that they should mine for "the Government" two days a week. Witness TF1-062 testified that thereafter the AFRC/RUF would designate certain days as 'government days'. On 'government days', the civilians of Tongo Field were forced to go and work in the mines in an area known as Cyborg Pit."[1060]

"Witness TF1-062 estimated that over a thousand civilians worked in the mines on 'government days'. The AFRC/RUF government did not provide the civilians with food or mining equipment. Witness TF1-062 testified that civilians would not refuse to work on 'government days' since they knew that if they did so, the AFRC/RUF would mete out "discipline". The witness stated, as an example, that one of his workers hid in an attempt to avoid work, but was found and beaten."[1061]

"On 'government days', civilians were compelled to hand over any diamonds found to the AFRC/RUF soldiers supervising the mine work. The supervising soldiers at Cyborg Pit were armed with guns, such as RPGs, LMGs, G-3s, and AK-47s, and would watch the civilian miners to ensure that all diamonds found were surrendered. Civilians who attempted to keep diamonds found during a government

[1058] Trial Chamber Judgement, para. 231.
[1059] Trial Chamber Judgement, para. 1290.
[1060] Trial Chamber Judgement, para. 1291.
[1061] Trial Chamber Judgement, para. 1292.

mining day would be flogged almost to death. Witness TF1-062 watched AFRC/RUF soldiers shoot and kill civilian miners that disobeyed orders on two occasions. In addition, the witness regularly saw corpses being brought out of the Cyborg pit, and he was informed by his workers that these civilians had been shot by AFRC/RUF soldiers. Even on non-government days, AFRC/RUF soldiers would be present at Cyborg Pit and would take diamonds found by civilians."[1062]

"Witness TF1-062 worked for the AFRC/RUF government at Cyborg Pit for about four months, until they were ousted from Tongo Field by the CDF Kamajors in approximately December 1997.[1063] His evidence regarding events at Cyborg Pit was corroborated by that of witnesses TF1-045 and TF1-122, each of whom testified that the AFRC/RUF forced civilians to labour in the diamond mines at Tongo Field in the period May 1997 through February 1998."

"The attack against the civilian population was therefore state-sponsored, aimed broadly at quelling opposition to the regime and punishing civilians suspected of supporting the CDF/Kamajors."[1064].

"In Bo District, for example, civilians were killed, property was looted and homes were burned during attacks executed jointly by AFRC/RUF troops on the villages of Tikonko, Gerihun, Sembehun and Telu Bongor in June 1997. Kenema District was controlled by the AFRC/RUF from Kenema Town and frequent beatings and killings of civilians took place there throughout the junta period. In December 1997, in Kenema Town, the AFRC/RUF declared a campaign code named 'Operation No Living Thing' which mandated the killing of civilians accused of being Kamajors."[1065]

"The diamond mines in Kenema District were also the site of sustained attacks on civilians. The AFRC/RUF mining operations at Tongo Field were particularly well-organised, with a system established for abducting large numbers of civilians and forcing them to work in the mines on certain days Witnesses testified that many civilians were assaulted or killed during this process. This testimony is corroborated by documentary evidence from the US Department of State describing physical violence inflicted on civilian miners near Tongo Field." [1066]

"Outside of Freetown, AFRC and RUF troops engaged in joint operations in Bo and Kenema Districts and also cooperated with regards to diamond mining, a critical government resource."[1067]

"The Trial Chamber has previously found in its Factual Findings that civilians in Kenema Town were accused of being Kamajors or of supporting the Kamajors and

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[1062] Trial Chamber Judgement, para. 1293.
[1063] Trial Chamber Judgement, para. 1294.
[1064] Trial Chamber Judgement, para. 225.
[1065] Trial Chamber Judgement, para. 228.
[1066] Trial Chamber Judgement, para. 229.
[1067] Trial Chamber Judgement, para. 172.

were unlawfully killed or subject to physical violence by members of the AFRC/RUF."[1068]

"In particular, the Trial Chamber relies on its findings that after the Coup in 1997, both "RUF" rebels" and "AFRC Juntas" took over control of Kenema Town and remained in Kenema until February, 1998."[1069]

"The Trial Chamber also accepts the evidence of Prosecution Witness TF1-122, not previously examined by the Chamber, that later, in December 1997, the AFRC/RUF launched 'Operation No Living Thing' in Kenema and that as part of this operation members of the AFRC/RUF would parade the streets of Kenema Town during the day accusing people of being Kamajors, entering people's homes, harassing them, and looting their property alleging that they had Kamajors in their houses. The Witness testified that members of the AFRC/RUF would 'search you in the street, take whatever you have in your pocket and they will allege that you have Kamajor in your pocket' and that the RUF/AFRC 'were shooting all over the air.'"[1070]

"The Trial Chamber has found that during this time, "RUF rebels" and "AFRC juntas" were seen dancing around the body of a civilian singing that they would kill all Kamajors. The rebels and juntas then split his abdomen and stretched his intestines across Hangh Road where the body stayed for three days."[1071]

"The Trial Chamber has previously found that in early February 1998 Sam Bockarie arrested a number of persons on the grounds that they were 'Kamajor supporters'. They were brought to the AFRC Secretariat, physically abused and detained for about three days. They were brought to the police and later rearrested by members of the AFRC/RUF, beaten and killed."[1072]

"The Trial Chamber also found that in Kenema District between 25 May 1997 – 14 February 1998, AFRC/RUF forces committed a number of crimes including unlawfully killing a number of civilians, as charged under Counts 4 and 5; inflicting physical violence on an unknown number of civilians as charged under Count 10; illegally recruiting and using children under the age of 15 years for military purposes, as charged under Count 12; abducting an unknown number of civilians and using them as forced labour at Cyborg Pit in Tongo Field, as charged under Count 13; and terrorising civilians and subjecting them to collective punishment, as charged under Count 1 and 2."[1073]

"On the basis of the preceding evidence, and without predetermining the individual responsibility of the three Accused, the Trial Chamber is satisfied beyond reasonable doubt that between about 1 August 1997 and about 31 January 1998, the

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[1068] Trial Chamber Judgement, para. 1470.
[1069] Trial Chamber Judgement, para. 1471.
[1070] Trial Chamber Judgement, para. 1472.
[1071] Trial Chamber Judgement, para. 1473.
[1072] Trial Chamber Judgement, para. 1474.
[1073] Trial Chamber Judgement, para. 1642.

AFRC/RUF forced an unknown number of civilians to mine for diamonds at Cyborg Pit in Tongo Field in Kenema District. The Trial Chamber accordingly finds that the elements of enslavement, as charged in Count 13, are established."[1074]

"The Trial Chamber has found that children abducted by the AFRC/RUF were forced to undergo military training and were organised into "Small Boy Units" (SBUs) and battalions. Child soldiers were forced to fight along side the AFRC/RUF and to guard strategic points of interest such as Cyborg Pit, a diamond mine in Kenema District, diamonds being the main source of conflict in the region. Child soldiers were forced into labour which supported and maintained the troops. Such labour included carrying loads of food and other "luggage fetching water and pounding rice. Child soldiers were forced to flog captured civilians, act as bodyguard amputate civilians and were used as human shields."[1075]

"The Trial Chamber is further satisfied that AFRC and RUF forces abducted children for military purposes in Kenema District during the AFRC government period."[1076]

"By virtue of the foregoing evidence, and leaving aside for the present the individual responsibility of the three Accused, the Trial Chamber is satisfied beyond reasonable doubt that between about 25 May 1997 and about 19 February 1998, members of the AFRC/RUF unlawfully killed a minimum of 17 civilians in Kenema Town in Kenema District, amounting to the elements of Counts 4 and 5."[1077]

"In light of the foregoing evidence, and leaving aside for the present the individual responsibility of the three Accused, the Trial Chamber is satisfied that AFRC/RUF troops carried out beatings and ill-treatment of at least seven civilians who were in their custody in Kenema Town in Kenema District. The Trial Chamber accordingly finds that the elements in relation to Counts 10 and 11 are established in respect of these incidents."[1078]

"On the basis of the circumstances of the attacks, namely that civilians were deliberately targeted on the premise that they supported Kamajors; the sustained duration of attacks of a similar nature, spanning May 1997 through December 1998; and the particularly brutal nature of some of the attacks including the burning of civilians in a house and the grotesque public display of a mutilated body, the Trial Chamber is satisfied that it has been proven beyond reasonable doubt that the primary purpose of the acts of violence described in Kenema Town was to spread terror among the civilian population."[1079]

[1074] Trial Chamber Judgement, para. 1309.
[1075] Trial Chamber Judgement, para. 1447.
[1076] Trial Chamber Judgement, para. 1277.
[1077] Trial Chamber Judgement, para. 840.
[1078] Trial Chamber Judgement, para. 1197.
[1079] Trial Chamber Judgement, para. 1475.

"The Trial Chamber is satisfied, on the basis of the evidence specified above, that protected persons were collectively punished for allegedly being or supporting Kamajors by members of the AFRC/RUF."[1080]

"In its factual findings, the Trial Chamber found that in Bo District in June 1997 AFRC/RUF forces unlawfully killed an unknown number of civilians, as charged under Counts 3 through 5, and terrorised civilians and subjected them to collective punishment, as charged under Count 1 and 2."[1081]

"By virtue of the foregoing, and leaving aside for the present the individual responsibility of the three Accused, the Trial Chamber is satisfied beyond reasonable doubt that between about 1 June 1997 and 30 June 1997, a minimum of 27 civilians were unlawfully killed in Bo District as charged under Counts 4 and 5. On the evidence adduced, the Trial Chamber has been unable to establish beyond reasonable doubt whether the perpetrators were members of the AFRC and/or RUF."[1082]

"The Trial Chamber notes the targeted nature of the attacks against civilians in Tikonko by the second group of soldiers described by Witness TF1-004. Specifically the Trial Chamber notes that the soldiers were not making any selection in their killings which, taken together with the evidence of civilian deaths, the Trial Chamber is satisfied is indicative of the intent of the soldiers to target civilians and Kamajors alike. This inference is supported by the express statement, relayed."[1083]

"The Trial Chamber is satisfied on the basis of this evidence that the acts of violence described in Tikonko and Gerihun were carried out with the primary purpose of spreading terror."[1084]

"The Trial Chamber is satisfied, on the basis of the evidence specified above, that protected persons were collectively punished for allegedly being or supporting Kamajors or members of the SLPP Government by members of the AFRC/RUF."[1085]

"The Trial Chamber has further found that RUF troops abducted civilians and used them as forced labour in Kailahun District during the AFRC Government period"[1086]...

"The Trial Chamber is therefore satisfied that the Accused was a member of the AFRC's Supreme Council and that he obtained his seat in return for his

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[1080] Trial Chamber Judgement, para. 1476.
[1081] Trial Chamber Judgement, para. 1641.
[1082] Trial Chamber Judgement, para. 826.
[1083] Trial Chamber Judgement, para. 1492.
[1084] Trial Chamber Judgement, para. 1495.
[1085] Trial Chamber Judgement, para. 1497.
[1086] Trial Chamber Judgement, paras1844 and 1643.

participation in the coup. As a council member, Brima attended coordination meetings between high-ranking members of the AFRC and RUF."[1087]

"The Trial Chamber is satisfied that the Accused Brima was a member of the group that organised the 25 May 1997 coup, that he was a member of the AFRC Supreme Council, and that he was an "Honourable." It is further satisfied that he was Principal Liaison Officer 2 in the AFRC government and was responsible for overseeing mining activities and reporting to SAJ Musa, the Mines Minister, in Freetown."[1088].

"The Trial Chamber is satisfied that the governing council of the AFRC government was the *Supreme Council*, sometimes simply referred to as the "*Council.*" It had both legislative and executive powers and was responsible for the day-to-day decision making of the AFRC Government. It further finds that the Principal Liaison Officers were members of that Council, that they were responsible for supervising various ministries, and that they were superior to other members of the Supreme Council and the Council of Secretaries."[1089]

"The Trial Chamber also finds it established beyond a reasonable doubt that as "the Highest Council in the Land", the Governing Council exercised political control over the military branch of the government."[1090]

"The Trial Chamber is satisfied on the evidence that security issues and other urgent matters were discussed at these meetings. Therefore, the Trial Chamber finds that *Supreme Council* members were appraised of all major developments around the country."[1091]

"The Trial Chamber finds that it is established beyond reasonable doubt that a widespread or systematic attack by AFRC/RUF forces was directed against the civilian population of Sierra Leone at all times relevant to the Indictment."[1092]

"The Trial Chamber is also satisfied beyond reasonable doubt that the Accused knew that their conduct formed part of this pattern of widespread or systematic attack."[1093]

"The Trial Chamber is satisfied that in return for his participation in the coup, the Accused Kamara was rewarded with specific functions in the AFRC Government. He remained in those positions until the Government was ousted by the ECOMOG forces in February 1998."[1094]

[1087] Trial Chamber Judgement, para. 318.
[1088] Trial Chamber Judgement, para. 332.
[1089] Trial Chamber Judgement, para. 300.
[1090] Trial Chamber Judgement, para. 285.
[1091] Trial Chamber Judgement, para. 288.
[1092] Trial Chamber Judgement, para. 224.
[1093] Trial Chamber Judgement, para. 239.
[1094] Trial Chamber Judgement, para. 433.

"The Trial Chamber is satisfied that the Accused Kamara was a member of the group that organised the 25 May 1997 coup, that he was a member of the AFRC's Supreme Council, that he was an "Honourable" and that he was PLO 3 in the AFRC Government."[1095]

"The Trial Chamber is satisfied that that the Accused Kamara attended coordination meetings of high level members of the AFRC and RUF."[1096]

"However, no evidence was adduced regarding his activities, if any, in those positions. The Trial Chamber is therefore unable to establish whether the Accused Kamara had any *de facto* powers beyond his *de jure* titles."[1097]

"The Trial Chamber is satisfied that in return for his participation in the coup, the Accused Kanu was rewarded with a position on the AFRC Supreme Council. He remained in this position until that government was ousted by the ECOMOG forces in February 1998."[1098]

"The Trial Chamber finds that the Accused Kanu was a member of the Supreme Council during the AFRC junta. It further concludes the Accused was an 'Honourable.'"[1099]

"There is further evidence of the presence of the Accused Kanu at coordination meetings between high level members of the AFRC and RUF in Freetown. In addition, TF1-019 testified that he saw Sam Bockarie and "Honourable Five Five" address a meeting at the Koidu community centre during the Junta period. The men told those present that they were now in control of the government and that they wanted the support of the youth. Defence witness DAB-042 also testified that Kanu addressed a meeting in Koidu town in which he encouraged the cleaning and upkeep of the town. The Trial Chamber concludes that while this evidence corroborates documentary evidence that the Accused had a position in the AFRC government, it provides no indication of his seniority within that government."[1100]

"The Prosecution has adduced no evidence that the Accused Kanu held a ministerial or other high ranking government position. In addition, there is no evidence regarding his role and/or contributions at coordination meetings. Thus, while the Trial Chamber concludes that the Accused Kanu was a member of the Supreme Council, and that he attended coordination meetings with high level members of the AFRC and RUF, it is unable to determine whether he played an influential role in the running or policy-making of the AFRC Government."[1101]

[1095] Trial Chamber Judgement, para. 438.
[1096] Trial Chamber Judgement, para. 437.
[1097] Trial Chamber Judgement, para. 439.
[1098] Trial Chamber Judgement, para. 508.
[1099] Trial Chamber Judgement, para. 509.
[1100] Trial Chamber Judgement, para. 510.
[1101] Trial Chamber Judgement, para. 511.

(2) Post-Junta period

"The second stage was precipitated by the removal of the AFRC/RUF government from Freetown, from which point onwards the two factions operated as non-state actors. The focal points of violence shifted as AFRC/RUF troops moved throughout the various provinces, faced with the challenge of more limited resources and poorer organisational capacity. The point has been made in the jurisprudence of the ICTY that such practical difficulties may typically result in attacks by non-State actors being less obviously classifiable as 'widespread' or 'systematic'. However, the Trial Chamber finds that this was not the case in Sierra Leone. Instead, the ***continued attack*** against the civilian population was in most instances more frequent and brutal."[1102] (Emphasis added.)

"The armed conflict ***continued*** along the same lines after the ECOMOG intervention which saw the Kabbah government reinstated. The May 1999 Ceasefire Agreement and the July 1999 Lomé Peace Treaty both provided for the cessation of the armed conflict, which did not eventuate. Although these agreements referred only to the RUF, it is apparent from documentary evidence that the AFRC/RUF staged joint attacks periodically throughout 1999. In addition, AFRC and RUF leaders made a joint public statement in October 1999 which referred repeatedly to the prior state of 'war' and proclaimed their unified commitment to implementing the Lomé Treaty. The Trial Chamber is therefore satisfied that the AFRC remained actively engaged in hostilities until the end of the Indictment period in January 2000."[1103] (Emphasis added.)

"After the chaotic retreat from Freetown, the AFRC and RUF troops gathered in Masiaka but organisation and control remained minimal. At Masiaka senior AFRC and RUF officers discussed the future of their movement. An initiative to recapture Freetown was abandoned due to insufficient arms and ammunition."[1104]

"The Trial Chamber recalls that on several occasions, senior AFRC and RUF commanders declared operations that authorised their forces to plunder civilian property. Following the retreat from Freetown in February 1998, Johnny Paul Koroma [AFRC] declared "Operation Pay Yourself" over BBC Radio. Witness TF1-334 testified that Koroma announced this operation, which encouraged the troops to loot property, since without access to state revenue he could no longer pay them. Sam Bockarie [RUF] declared a similar operation to his soldiers in Kenema District in February 1998. Looting with reference to 'Operation Pay Yourself' continued long after their announcement."[1105]

[1102] Trial Chamber Judgement, paras 225-226.
[1103] Trial Chamber Judgement, para. 253.
[1104] Trial Chamber Judgement, para. 177.
[1105] Trial Chamber Judgement, para. 1398.

"The retreat of the AFRC/RUF from Freetown in 1998 was characterised by the infliction of violence against civilians. Documentary evidence authored by the United Nations and Human Rights Watch reports that attacks in villages across Sierra Leone continued regularly throughout the year. Such attacks "exhibited a characteristic modus operandi: amputation of limbs, mutilation, actual or attempted decapitation, rape, burning alive of men, women and children, destruction of homes, abduction and looting" Numerous instances appear in the oral evidence of pregnant women being killed, beaten or raped in these attacks. Civilians suffered amputations including arms, hands, feet, breasts, lips and ears. The abducted civilians, numbered in their thousand, were forced to serve the AFRC/RUF as "porters, potential recruits or sex slaves." Women were actively targeted through sexual violence. The phenomenon of the 'bush wives' witnessed thousands of women forcibly married to rebels."[1106]

"The fact that civilians were the primary target of the attack is amply demonstrated by the nature of the offences described above, the majority of which served no military purpose. Instead, evidence establishes that the infliction of mass violence on the civilian population was on occasion regarded as a legitimate method for advancing the AFRC/RUF cause. The town of Karina in Bombali District was attacked in May 1998 because it was the alleged home town of President Kabbah. The stated aim of the attack was to shock the entire country and the international community. In addition to Karina, AFRC and/or RUF forces attacked civilians in a number of other villages in Bombali District, including Mandaha, Rosos, Bornoya, Mateboi, Gbendembu, Madina Loko, Kamadogbo, Kamalu, Kamagbengbe and Batkanu." [1107]

"A report admitted in evidence, authored by UNHCR officers, details numerous incidents of killings, mutilations, beatings and rapes of civilians in Kono and Koinadugu Districts in 1998. This report is corroborated by documentary evidence and the testimony of both Prosecution and Defence witnesses pertaining to attacks by the AFRC and/or RUF in Kono, Koinadugu and Kailahun Districts. In Kono District, civilians were attacked in Tombodu, Kaima (or Kayima), Koidu Town, Foendor, Bomboafuidu, Yardu Sandu, Penduma and Mortema. In Koinadugu District, civilians were attacked in Koinadugu Town, Kabala, Yiffin, Yiraye, Yomadugu, Bafodeya, Krubola, Bambukura and Fadugu. In Kailahun District, civilians were attacked in Kailahun Town, Daruand Buedu. These locations are named on the basis that reliable evidence of attacks was adduced with respect to them. The Trial Chamber notes that these villages therefore represent a minimum assessment of the attack on the civilian population of Sierra Leone in the post-intervention period."[1108]

"This attack culminated in the invasion of Freetown in January 1999, which has been described as "the most intensive and concentrated period of human rights

[1106] Trial Chamber Judgement, para. 233.
[1107] Trial Chamber Judgement, para. 234.
[1108] Trial Chamber Judgement, para. 235.

abuses and international humanitarian law violations in Sierra Leone's civil war." Reliable documentary evidence from several sources estimates that up to five thousand civilians were killed, one hundred had limbs amputated, thousands were raped, thousands were abducted, civilians were used by rebels as human shields and entire neighbourhoods were burnt to the ground, often with civilians inside their houses. Eyewitnesses described the execution of members of religious orders and civilians in mosques were also killed on suspicion that they had been harbouring ECOMOG soldiers. A military expert testified that the damage to Freetown during the subsequent retreat appeared to have been a policy driven by spite as there was little military justification for the crimes committed. Witnesses testified that violence against civilians continued over the following months in Port Loko, at locations including Masiaka Geribana, Manaarma, Sumbuya, Nonkoba and Tendakum."[1109]

"The above evidence suffices to establish the widespread nature of the attack against the civilian population in the post-intervention period, given the frequency with which attacks occurred over a prolonged period throughout much of the territory of Sierra Leone and the untold number of civilian victims affected."[1110]

"The Trial Chamber finds that it is established beyond reasonable doubt that a widespread or systematic attack by AFRC/RUF forces was directed against the civilian population of Sierra Leone at all times relevant to the Indictment. The context in which the crimes alleged in the Indictment were committed has been described earlier in this Judgement."[1111]

"Although it is not strictly necessary, the Trial Chamber finds that the regular pattern of crimes committed demonstrates that the attack was also systematic. In addition, it is evident from the declaration by AFRC/RUF leaders of a number of 'operations' targeted at civilians that pre-conceived plans or policies for the execution of the attack existed. One of the most notorious of these was 'Operation Pay Yourself' which officially sanctioned the looting of civilian property on an unprecedented scale so that the soldiers could support themselves. 'Operation Spare No Soul' saw troops instructed to kill, maim or amputate any civilian with whom they came into contact, burn villages and rape girls and women freely. The area surrounding the AFRC headquarters in Rosos, Bombali District, was secured through "Operation Fearful" and "Operation Clear the Area" which respectively mandated the killing of any civilian in the vicinity and the looting and burning of surrounding villages."[1112].

"A large group of former soldiers, AFRC officials and RUF fighters travelled to Kabala in Koinadugu District. At Kabala the senior commanders met to discuss strategies. SAJ Musa called for an attack on Kono District. He believed that, given

[1109] Trial Chamber Judgement, para. 236.
[1110] Trial Chamber Judgement, para. 237.
[1111] Trial Chamber Judgement, para. 224.
[1112] Trial Chamber Judgement, para. 238.

the strategic importance of the District, such an operation would lead to international recognition."[1113]

"Another group of AFRC/RUF rebels launched a second successful attempt to capture Koidu Town on 1 March 1998. Johnny Paul Koroma arrived in Koidu town shortly thereafter."[1114]

"In about August 1998, witness DAB-081 was captured by RUF rebels near Koinadugu. The rebels made the witness take them at gunpoint to Dankawalli village and then the following day to Koinadugu. In Koinadugu, the witness was housed with 50 other abductees and kept captive for several months. He testified that while he worked for the RUF, both RUF and SLA fighters used civilians for labour. The captives were forced to search for food for the RUF and SLA troops in Koinadugu. Abductees also had to build over 20 huts and guard posts along the road to Koinadugu for the RUF fighters. The RUF flogged their civilian workers, including witness DAB-081, with sticks."[1115]

"Witness TF1-153 states that the commanders and soldiers in Yirayie were from both the AFRC and the RUF. The Trial Chamber accepts that the witness was able to distinguish between the two factions as he came from a family background of affiliation with the military."[1116]

"The evidence establishes that between February and June 1998, AFRC/RUF forces were in control of Kono District. Defence witnesses testified that the AFRC soldiers present in Kono were under the overall command of RUF."[1117]

"Johnny Paul Koroma took overall command of the AFRC/RUF troops. Koroma and other former soldiers and RUF commanders attended a meeting at RUF commander Denis Mingo's house. The discussion, chaired by Mingo, revolved around the relative positions of the AFRC and RUF. Koroma agreed with Mingo that the AFRC troops would be subordinate to the RUF, a decision which was unpopular with some of his own commanders."[1118]

"Once larger parts of Kono District fell to rebel control, Johnny Paul Koroma announced that he would travel abroad, via Kailahun District, in order to organise logistics for the troops."[1119]

"In early March 1998, Johnny Paul Koroma [AFRC] declared Koidu Town a "no go area" for civilians. This declaration was reiterated by Issa Hassan Sesay of the RUF. Many civilians were killed following this order by AFRC and RUF troops in Koidu

[1113] Trial Chamber Judgement, para. 179.
[1114] Trial Chamber Judgement, para. 182.
[1115] Trial Chamber Judgement, para. 1341.
[1116] Trial Chamber Judgement, para. 1343.
[1117] Trial Chamber Judgement, para. 844.
[1118] Trial Chamber Judgement, para. 183.
[1119] Trial Chamber Judgement, para. 184.

Town and surrounding villages. This testimony is generally corroborated by witnesses TF1-206 and TF1-217, who heard about killings in Koidu Town."[1120]

"The Trial Chamber therefore finds that an unknown number of civilians were unlawfully killed in Koidu, but is unable to determine beyond reasonable doubt whether these killings are attributable to AFRC and/or RUF forces in Kono District."[1121]

"Within three days of his arrival in Koidu Town, around 4 March 1998, Johnny Paul Koroma departed for Kailahun. The majority of AFRC fighting forces remained in Kono District alongside the RUF troops. Although the AFRC were subordinate to the RUF, there was cooperation between them and the two factions planned and participated in joint operations."[1122]

"The Trial Chamber recalls its finding that after the departure of Johnny Paul Koroma from Kono District, the AFRC was subordinated to the RUF and the Accused Kamara became the highest ranking AFRC soldier in the District. The Trial Chamber further found that the AFRC and RUF worked closely together in Kono District. AFRC and RUF commanders each supervised mixed battalions of AFRC and RUF troops."[1123]

"The villages targeted by the rebels in Kono District during the Indictment period included Koidu Geya, Koidu Buma, Paema, Penduma, Tombodu, Kaima (or Kayima), Koidu Town, Foendor, Bomboafuidu, Yardu Sandu, Penduma and Mortema."[1124]

"It appears from the available evidence, in particular that of Defence witnesses present throughout this period, that much of the planning and decision making may have been the prerogative of the RUF. Witness TF1-334 stated that whenever an operation took place, 'Superman' would call 'Bazzy' and the AFRC commanders to his residence and they would listen to whatever he told them. The two factions participated in a number of joint operations. One example is the joint attack to Sewafe to destroy a bridge in order to prevent ECOMOG forces advancing to Koidu Town. In addition, commanders went on patrols and maintained contact with battalion commanders situated in different villages."[1125]

"In the Trial Chamber's view, despite the absence of specific evidence detailing the process by which orders were transmitted in the AFRC faction, it is inferable from the fact that operations were successfully coordinated in cooperation with the RUF that a functioning planning and orders process existed." [1126]

[1120] Trial Chamber Judgement, para. 485.
[1121] Trial Chamber Judgement, para. 847.
[1122] Trial Chamber Judgement, para. 185.
[1123] Trial Chamber Judgement, para. 1865.
[1124] Trial Chamber Judgement, para. 186.
[1125] Trial Chamber Judgement, para. 572.
[1126] Trial Chamber Judgement, para. 573.

"The Prosecution did not generally attempt to differentiate between crimes committed by AFRC troops and those committed by RUF rebels, they instead referred to 'AFRC/RUF troops' as the perpetrators of crimes in Kono District. For many crimes, the Trial Chamber has been unable to determine beyond reasonable doubt the affiliation of the perpetrators nor to which specific commanders they were subordinate."[1127]

"The Trial Chamber is satisfied that as a senior commander of the AFRC, the Accused Kamara himself, or together with other senior commanders such as his immediate superior Denis Mingo, would have had the material ability to control 'Savage' and his subordinates."[1128]

"AFRC troops maintained control over Kono District until April 1998 when ECOMOG forces advanced into Kono District. Tensions between the AFRC and RUF forces in Kono had been escalating. As a result of the enemy advance and the exacerbating tensions between the two factions, the majority of the AFRC troops moved north to Mansofinia in Koinadugu District. Some former soldiers remained in Kono District and chose to operate independently or work more closely with the RUF, most notably a former soldier named 'Savage', who remained in Tombodu where he was the commander."[1129]

"The other faction of AFRC soldiers, under the command of SAJ Musa, remained in Koinadugu District throughout this period, working on and off together with RUF rebels there. However, the main stronghold of the RUF was Kailahun District, which was under the control of Sam Bockarie ('Mosquito')."[1130]

"The faction of AFRC fighting forces under the command of SAJ Musa remained in Koinadugu District where they worked together with RUF troops loyal to RUF commander Denis Mingo, also known as 'Superman'. Significant evidence was adduced regarding the commission of crimes by the troops under the command of SAJ Musa and Denis Mingo including at Koinadugu Town, Kabala, Yomadugu, Bafodeya, Kurubonla Bambukura and Fadugu."[1131]

"AFRC and RUF forces under the command of SAJ Musa [AFRC] and 'Superman' [RUF] attacked and occupied Koinadugu Town in late July 1998. Many civilians were killed upon the orders of 'Superman'. Specifically, Witness DAB-081 testified that more than ten civilians were beaten to death with machetes or sticks by the RUF."[1132]

"In cross-examination, Defence Counsel referred the witness to a prior statement in which she stated that her son was two, and not six years old. The witness

[1127] Trial Chamber Judgement, para. 1872.
[1128] Trial Chamber Judgement, para. 1887.
[1129] Trial Chamber Judgement, para. 189.
[1130] Trial Chamber Judgement, para. 187.
[1131] Trial Chamber Judgement, para. 195.
[1132] Trial Chamber Judgement, para. 872.

maintained that her child was six years of age when he was killed. She was able to provide a detailed account of the events and explained the inconsistencies with her prior statement. The Trial Chamber is thus satisfied that the witness's husband and son were killed by fighters loyal to SAJ Musa [AFRC] and 'Superman' [RUF]."[1133]

"The Trial Chamber finds the witness's evidence with regards to this attack credible and not significantly shaken on cross-examination. From the description of her attackers as armed "rebels and soldiers", as "juntas", and as members of 'Superman' and SAJ Musa's groups, known commanders of the RUF and the AFRC respectively, the Trial Chamber is satisfied that the perpetrators of the attack belonged to either the AFRC or the RUF. The Trial Chamber infers from the context of violence and coercion that the witness did not and could not have validly consented to the sexual intercourse. The Trial Chamber is thus satisfied that the *actus reus* and *mens rea* elements of rape are met with regards to this incident."[1134]

"From the date given of the attacks and the overall evidence adduced, the Trial Chamber finds beyond reasonable doubt that the attacks on Kabala were conducted by troops associated with SAJ Musa [AFRC] and/or Dennis Mingo [RUF]."[1135]

"The Trial Chamber has found that Kabala Town was attacked by AFRC/RUF forces in mid-May 1998 and that the hands of an unknown number of civilians were amputated after the forces had successfully captured the town. On 27 July 1998 AFRC troops under the command of 'Savage' accompanied by "rebels" attacked Kabala Town for four to five days. Seven loyal SLA soldiers were captured and executed and the fighters looted civilian property. The Trial Chamber has found that Kabala was attacked again by 'Savage' and fighters under his command on 17 September 1998 and that fighters looted civilian property from houses."[1136]

"The Trial Chamber has found that Koinadugu Town was attacked by "SLA" and "RUF fighters" under the command of SAJ Musa and Superman respectively in late July 1998 and that at least ten civilians were killed on the orders of 'Superman'. The Trial Chamber has also found that at least one civilian was repeatedly raped."[1137]

"The Trial Chamber finds that the Accused Kamara was in a position of superior responsibility and criminally responsible under article 6(3) of the Statute, for crimes committed by his subordinates in Kono District; namely, unlawful killings and physical violence, committed with the primary purpose to spread terror and to collectively punish civilians for allegedly failing to provide sufficient support to the AFRC/RUF."[1138]

[1133] Trial Chamber Judgement, para. 869.
[1134] Trial Chamber Judgement, para. 996.
[1135] Trial Chamber Judgement, para. 1408.
[1136] Trial Chamber Judgement, para. 1534.
[1137] Trial Chamber Judgement, para. 1536.
[1138] Trial Chamber Judgement, para. 1893.

"On the basis of the foregoing evidence, and leaving aside for the present the individual responsibility of the three Accused, the Trial Chamber is satisfied beyond reasonable doubt that between about 14 February 1998 and 30 June 1998, members of the AFRC unlawfully killed a minimum of 265 civilians in Tombodu, Kono District, as charged under Counts 4 and 5."[1139]

"By virtue of the foregoing, and leaving aside for the present the question of the criminal responsibility of the Accused, the Trial Chamber is satisfied beyond reasonable doubt that between 14 February 1998 and 30 June 1998, troops under the command of 'Savage' intentionally mutilated at least sixteen civilians by cutting off their limbs in Tombodu in Kono District, as charged under Counts 10 and 11. The Trial Chamber further finds beyond reasonable doubt that in this same period AFRC/RUF soldiers carved the letters 'AFRC' and 'RUF' on the bodies of eighteen civilians in Kayima in Kono District, as charged under Counts 10 and 11."[1140]

"The Trial Chamber found that in the period February through June 1998, AFRC/RUF troops in Kono District unlawfully killed civilians, as charged under Counts 3 through 5, and inflicted sexual and physical violence on civilians as charged under Counts 6 through 9 and 10 respectively. AFRC/RUF troops also abducted civilians and used them as forced labour, as charged under Count 13, and used illegally recruited children for military purposes, as charged under Count 12. Finally, AFRC/RUF troops engaged in widespread looting, as charged under Count 14, terrorised the civilian population, as charged under Count 1, and committed collective punishments, as charged under Count 2."[1141]

"By virtue of the foregoing and of the Trial Chamber's findings with regards to Count 6 and the chapeau elements of war crimes, the Trial Chamber is satisfied that the elements in relation to Count 9 (Outrages on Personal Dignity) are established in Kono."[1142]

"The Trial Chamber infers from the circumstances of the attacks against civilians in Koidu Town and Tombodu, namely that civilians were repeatedly targeted and that a great number were deliberately killed; the sustained duration of the attacks; the particularly brutal nature of some of the attacks including civilians who were burnt alive when they were locked in houses which were set on fire; the great number of repeated mutilations of civilians whose missing hands were left as a grotesque and lingering public reminder of the attacks; the widespread destruction of civilian property in Tombodu; as well as the repeated and express statements of members of the AFRC/RUF that such attacks were committed to intimidate civilians; proves that the primary purpose of the attacks was to spread terror among the civilian

[1139] Trial Chamber Judgement, para. 897.
[1140] Trial Chamber Judgement, para. 1213.
[1141] Trial Chamber Judgement, para. 1997.
[1142] Trial Chamber Judgement, para. 1188.

population. The Trial Chamber is therefore satisfied that acts of terror were committed in Koidu Town and Tombodu."[1143]

"The Trial Chamber is further satisfied that the crimes committed in Koidu Town and Tombodu also served as a punishment against protected persons."[1144]

"By virtue of the foregoing, and leaving aside for the present the individual responsibility of the three Accused, the Trial Chamber is satisfied that between 14 February 1998 and 30 June 1998, Sam Bockarie and his subordinates unlawfully killed 67 persons in Kailahun Town in Kailahun District. As the Prosecution has not proved beyond reasonable doubt that the detained 'Kamajors' were part of the civilian population but only that they were *hors de combat*, the Trial Chamber concludes that only the elements of murder (Count 5) are established in respect of the killings in Kailahun Town."[1145]

"In light of the foregoing evidence, the Trial Chamber is satisfied beyond reasonable doubt that during the Indictment period, RUF troops abducted an unknown number of civilians and used them as forced labour, including military training, in various locations in Kailahun District, including Jagbwema Town, Buedu and Bunumbu. The Trial Chamber accordingly finds that the elements of enslavement, as charged in Count 13, are established. However, the Trial Chamber finds that the Prosecution has not established beyond reasonable doubt that AFRC troops were involved in the enslavement of civilians in Kailahun District."[1146]

"The Trial Chamber finds that the crimes committed in Koinadugu District were perpetrated by AFRC/RUF forces associated with groups led by SAJ Musa and 'Superman'. While there is evidence that the Accused Brima was in sporadic contact with SAJ Musa between May and July 1998, the Prosecution has not submitted, nor is there evidence to the effect that, the Accused Brima exercised effective control over the troops of SAJ Musa or Superman."[1147]

"By virtue of the foregoing, and leaving aside for the present the individual responsibility of the three Accused, the Trial Chamber is satisfied beyond reasonable doubt that between about 14 February 1998 and 30 September 1998, members of the AFRC/RUF unlawfully killed a minimum of 21 civilians in Kabala, Koinadugu Town and Fadugu in Koinadugu District, amounting to the elements of Counts 4 and 5."[1148]

"The Trial Chamber is satisfied on the evidence of witness TF1-133 that women captured in Koinadugu District were subject to repeated rape by members of the AFRC/RUF; were made to labour for members of the AFRC/RUF, namely to cook,

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[1143] Trial Chamber Judgement, para. 1525.
[1144] Trial Chamber Judgement, para. 1527.
[1145] Trial Chamber Judgement, para. 864.
[1146] Trial Chamber Judgement, para. 1374.
[1147] Trial Chamber Judgement, para. 1699.
[1148] Trial Chamber Judgement, para. 879.

launder clothes and wash dishes; were labelled as "wives", in this context a label of possession, and placed in exclusive relationships of ownership by certain rebels; were punished with physical violence if the exclusive sexual relationship was violated; and were detained at rebel bases in Krubola and Serekolia and made to travel together with the troops; are all indicative of the deprivation of liberty and the exercise of ownership over captured women together with acts of sexual violence satisfying the *actus reus* and *mens rea* of the crime of sexual slavery."[1149]

"Trial Chamber found that AFRC/RUF forces unlawfully killed or inflicted sexual or physical violence on an unknown number of civilians in Koinadugu District in the period February through September 1998, as charged under Counts 3 through 5, 6 through 9 and 10 respectively. In addition, the Trial Chamber found that AFRC/RUF forces abducted an unknown number of civilians and used them as forced labour in that District, as charged under Count 13. In addition, the Trial Chamber found that AFRC/RUF forces illegally recruited children under the age of 15 years and used them for military purposes in that District, as charged under Count 12 Finally, the Trial Chamber found that AFRC/RUF forces also engaged in widespread looting of civilian homes, as charged in Count 14."[1150]

"While the advance team of the AFRC fighting forces travelled across the country from east to west, RUF troops under the command of Sam Bockarie maintained control over Kailahun District and parts of Kono District. Villages attacked by RUF fighters in Kailahun District included Kailahun Town, Daru and Buedu."[1151]

"While the AFRC troops were advancing on Freetown, RUF troops in the east recaptured Koidu and planned an advance on Makeni in Bombali District. They reached Makeni in the final days of 1998."[1152]

"Following the death of SAJ Musa, the troops reorganised. On 6 January 1999, they invaded Freetown. From Benguema, the troops passed through the villages of Waterloo, Hastings, Wellington and Kissy. During the advance, the civilian population was increasingly targeted. The AFRC troops were able to capture the seat of government at State House on the morning of the 6th of January. That same day, Sam Bockarie announced over Radio France International (RFI) that the troops led had taken Freetown and that that "they" would continue to defend Freetown."[1153]

"Mosquito announced over Radio France International on 6 January that the troops commanded by the Accused Brima had captured Freetown and would continue to defend Freetown."[1154]

[1149] Trial Chamber Judgement, para. 1126.
[1150] Trial Chamber Judgement, para. 1686.
[1151] Trial Chamber Judgement, para. 194.
[1152] Trial Chamber Judgement, para. 199.
[1153] Trial Chamber Judgement, para. 202.
[1154] Trial Chamber Judgement, para. 1796.

"On one occasion during the advance, SAJ Musa and the AFRC troops heard the British Broadcasting Corporation (BBC) interview Sam Bockarie over the radio. Bockarie revealed the position of the AFRC fighting forces and explained that it was RUF troops who were approaching Freetown. Soon after, ECOMOG bombarded the area. Musa immediately contacted Sam Bockarie, insulted him and told him he had no right to claim that the troops approaching Freetown were RUF troops."[1155]

"From State House, senior AFRC officers established radio contact with Sam Bockarie and asked for reinforcement. Bockarie instructed them to burn down Freetown if they could not hold the city. Bockarie then announced over the BBC that if ECOMOG did not stop attacking troop positions the whole of Freetown would be burnt down. In a second communication, Bockarie promised to send manpower, arms and ammunition, and arranged a location at which the AFRC troops should meet the RUF reinforcements. However, the support never arrived."[1156]

"The Trial Chamber is satisfied, on the basis of the evidence that follows, that the Prosecution has proved beyond reasonable doubt that the Accused Kamara exercised effective control over some mixed battalions of AFRC/RUF troops in Kono District."[1157]

"The Accused Kamara remained overall commander of the AFRC troops until the return of Brima from Kailahun. ...Upon arrival in Kono District, Brima took overall command of the AFRC troops. The Accused Kamara became Brima's second in command and travelled with him to Koinadugu District where both men met with SAJ Musa. There the two Accused and Musa defined the new objectives of the AFRC rebel movement."[1158]

"Following the retreat from Freetown, the Accused Brima took part in a second attack on Freetown with the participation of RUF commanders. This operation was unsuccessful. The Accused Brima and his troops then retreated to Newton and Benguema in the Western Area."[1159]

"The Accused Kamara remained overall commander of the AFRC troops until the return of Brima from Kailahun. ... Upon arrival in Kono District, Brima took overall command of the AFRC troops. The Accused Kamara became Brima's second in command and travelled with him to Koinadugu District where both men met with SAJ Musa. There the two Accused and Musa defined the new objectives of the AFRC rebel movement."[1160]

[1155] Trial Chamber Judgement, para. 200.
[1156] Trial Chamber Judgement, para. 204.
[1157] Trial Chamber Judgement, para. 1866.
[1158] Trial Chamber Judgement, para. 462.
[1159] Trial Chamber Judgement, para. 421.
[1160] Trial Chamber Judgement, para. 462.

"The Accused Kamara spoke with Sam Bockarie [RUF] on the radio prior to the capture of State House [during the Freetown Invasion]."[1161]

"The witness [Gibril Massaquoi] corroborated evidence that while at State House the Accused Brima on at least one occasion spoke to Sam Bockarie. Indeed, on this occasion Brima asked the witness to plead with Bockarie to send reinforcements to assist the AFRC soldiers."[1162]

"George Johnson stated that the Accused Kamara did not take any disciplinary action in response to his report regarding the killings in Manaarma. Rather, the Accused Kamara radioed Sam Bockarie [RUF] in Kailahun and recommended that the witness be promoted to Colonel, and Bockarie subsequently endorsed this promotion."[1163]

"'Mosquito' [RUF] announced over Radio France International on 6 January that the troops commanded by the Accused Brima had captured Freetown and would continue to defend Freetown."[1164]

"Following the retreat from Freetown, the Accused Kamara took part in a second attack on Freetown that took place with the participation of RUF commanders."[1165]

"The Trial Chamber has found that following the second unsuccessful attack on Freetown staged jointly by AFRC/RUF commanders, the Accused Kanu accompanied the Accused Brima to Lunsar to assist Superman, who was fighting against Issa Sesay at the time."[1166]

"Both witnesses TF1-334 and George Johnson testified that after the attack, 'Bazzy' [the Accused Kamara, AFRC] contacted Mosquito [RUF] to inform him of its success and the capture of the Malian soldiers."[1167]

[1161] Trial Chamber Judgement, para. 473. See also para. 1945.
[1162] Trial Chamber Judgement, para. 404.
[1163] Trial Chamber Judgement, para. 1968.
[1164] Trial Chamber Judgement, para. 1796.
[1165] Trial Chamber Judgement, para. 473.
[1166] Trial Chamber Judgement, para. 2087.
[1167] Trial Chamber Judgement, para. 1965.

APPENDIX D

PROSECUTION'S FOURTH GROUND OF APPEAL

(JOINT CRIMINAL ENTERPRISE)

Relevant paragraphs from the Prosecution's Final Trial Brief, referring to evidence additional to that referred to in the Trial Chamber's Judgement

These paragraphs bear footnoting indicating the source of the evidence relied upon. In large part these were witnesses TFI 334, TF1 167 (alias George Johnson aka Junior Lion), TF1 184 and Gibril Massaquoi.

The Trial Chamber made the following credibility findings in relation to these witnesses (and see Trial Chamber's Judgement, paras. 96-133 generally).

TF1-334 (Trial Chamber's Judgement, para. 359)

> The Trial Chamber observes that witness TF1-334 spent 16 days on the stand, including five days of cross-examination in which his testimony in chief was not shaken. The witness provided a substantial amount of detail corroborated by other witnesses as well as plausible explanations for his knowledge of such information. The Trial Chamber finds that his evidence throughout was consistent and any discrepancies minor. In addition, the witness presented a truthful demeanor. Thus, the Trial Chamber finds that he was a credible and reliable witness.

TF1-184 (Trial Chamber's Judgement, para. 362)

> The Trial Chamber notes that Prosecution witness TF1-184 was one of SAJ Musa's closest associates and that he believed that the Accused Brima deliberately killed SAJ Musa at Benguema because he wanted to regain command over the AFRC troops. [1168] The witness further believed that Brima, unlike Musa, was not loyal to the Army.[1169] However, numerous witnesses testified that Musa's death was an accident.[1170] It is the view of the Trial Chamber that although the evidence in chief of the witness was unclear at times, in its cross-examination of the witness the

[1168] TF1-184, Transcript 29 September 2005, pp. 56.
[1169] TF1-184, Transcript 29 September 2005, p. 61.
[1170] TF1-153, Transcript 22 September 2005, pp. 93-94; George Johnson, Transcript 16 September 2005, p. 10; DAB-095, Transcript 21 September 2006, pp. 9-10; DAB-156, Transcript 29 September 2006, pp. 59-61; DAB-023, Transcript 31 July 2006, pp. 77-79; DBK-131, Transcript 10 October 2006, pp. 87-88.

Defence raised no significant inconsistencies between his evidence in chief and his prior statement to the Prosecution. In addition, the Trial Chamber finds that the witness was not shaken on cross-examination and was generally corroborated by other witnesses.

George Johnson (Trial Chamber's Judgement, para. 370)

The Trial Chamber has considered the objections raised by the Defence on the credibility and reliability of George Johnson.[1171] The Trial Chamber observes that the witness provided consistent and detailed evidence during his examination in chief and that he was not shaken on cross-examination. The Trial Chamber further found that his overall demeanor on the stand indicated candour. Thus, it concludes that the witness was generally credible and reliable.

Gibril Maasaquoi (Trial Chamber's Judgement, para. 405)

The Trial Chamber takes into account that the witness was a high-ranking member of the RUF who may have participated in the commission of crimes during Sierra Leone's civilwar.[1172] The Trial Chamber further observes that the witness obfuscated on cross-examination in response to questions about Prosecution promises of immunity in return for the witness' testimony in proceedings.[1173] Morever, the witness testified that he blamed the AFRC Government for his 14 month imprisonment.[1174] However, there is no evidence that the witness held a particular animus against the Accused in this case. The Trial Chamber has no doubt that the witness was released from Pademba Road prison on 6 January 1999 and was thereafter in a position to observe events.

The Paragraphs below are taken from the Prosecution's Final Trial Brief dated 1st December 2006

The period from Mansofinia to Colonel Eddie Town

Paragraph 611

At Mansofinia the First and Second Accused left the troop whilst they travelled to report to SAJ Musa at Mongo Bendugu. Whilst the SLA had been operating together with the RUF in Kono, SAJ Musa (who was the most senior commander after Johnny Paul Koroma) was commanding the SLAs in the Koinadugu Axis.[1175]

[1171] Brima Final Brief, paras 198-200.
[1172] Gibril Massaquoi, Transcript 11 October 2005, p. 145.
[1173] Gibril Massaquoi, Transcript 11 October 2005, pp. 50-55.
[1174] Gibril Massaquoi, Transcript 11 October 2005, p. 101.
[1175] TF1-184, Transcript 30 September 2005, p. 62

Paragraph 612

Accordingly, as the most senior commanders in the field, the First and Second Accused reported to SAJ Musa, who ordered them to find a base in the north.[1176] After this meeting the First and Second Accused returned to Mansofinia, where the First Accused was in command of the whole troop.[1177] SAJ Musa sent the Third Accused with some soldiers[1178] to join the First Accused's troop at Mansofinia. SAJ Musa had confirmed the First Accused as the commander of the SLAs in Mansofinia.[1179]

Paragraph 621

After leaving Mansofinia the troop passed back through Yarya, which was the First Accused's own village.[1180] The First Accused had a radio set with him when he left Mansofinia, and initially over the radio he declined Superman's invitation to return to Kono.[1181]

Paragraph 622

The Prosecution submits that these regular radio conversations, when possible, between the First Accused and the RUF leadership is a significant piece of evidence of how the two factions were working together.

Paragraph 623

The Prosecution accepts that there may have been times when the different leaders in each faction fell out with each other or even amongst themselves for short periods. It is however the submission of the Prosecution that this is not fatal to the joint criminal enterprise, as ultimately both groups were working in unison towards the same goal, namely the reinstatement of the Junta Government in Freetown. This plan became more apparent after the death of SAJ Musa at Benguema in December 1999.

Paragraph 625

Shortly after the attack on Karina the First Accused's troop lost its radio man and microphone, which meant that the First Accused could only monitor the radio communications of other commanders who were using the airwaves.[1182] The First Accused could therefore listen to the radio communications of the RUF and SAJ Musa's forces but could not call them to let them know of his position.

Paragraph 634

It is telling that as soon as a microphone was found at Batkanu (Whilst the AFRC faction was at Rosos) and radio contact could be re-established, the First Accused, in addition to calling SAJ Musa and Brig. Mani, also called Issa Sesay and Morris Kallon, both of whom

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[1176] TF1-334, Transcript 20 May 2005, pp. 82-86
[1177] TF1-334, Transcript 20 May 2005, pp. 86-87
[1178] TF1-334, Transcript 20 May 2005, p. 87-88.
[1179] TF1-334, Transcript 20 May 2005, p. 88
[1180] TF1-167, Transcript 15 September 2005, p. 51
[1181] TF1-334, Transcript 23 May 2005, p. 41
[1182] TF1-334, Transcript 23 May 2005, pp. 79-81

were senior RUF commanders.[1183] From this it can clearly be inferred that the First Accused regarded himself as still working with the RUF leadership.

Paragraph 635

When the First Accused reported to SAJ Musa it is important to note that at that time SAJ Musa was still working together with Superman on the Koinadugu axis. It is also significant that the First Accused also immediately made radio contact with Brig. Mani and informed him that he was unable to find him. This corroborates TF1-334's evidence that at Mansofinia SAJ Musa had ordered the First Accused to find Brigadier Mani and set up a base camp in the north. .....

Paragraph 636

During the First Accused's radio conversation with Issa Sesay he reported his position and told Issa Sesay that Issa Sesay should have confidence in him and that he was relying on Issa Sesay's co-operation.[1184] The First Accused then spoke to Morris Kallon and explained to him why he moved from Kono and that he was still pursuing the cause. Morris Kallon was happy that communication between the two had been restored.[1185]

Paragraph 637

The case of the Prosecution is that it can be inferred from all the evidence, including the crime-base evidence dealt with elsewhere in this Brief, that the common intention as between the Accused, other members of the AFRC, and the RUF leadership, was the reinstatement of the Joint SLA/RUF Government in Freetown (that is, to regain and to retain political power and control over the territory of Sierra Leone), and to do so by any means necessary, including through the commission of crimes within the jurisdiction of the Special Court.

Paragraph 638

On a later occasion SAJ Musa informed the First Accused of his position in Mongo Bendugu, which had just been recaptured from the Guineans along with arms and ammunition. SAJ Musa also told the First Accused of his plan to attack Kabala by pretending to surrender.[1186]

Paragraph 639

Other evidence in the Koinadugu section of this brief suggests that this attack did take place and that it was a joint attack with Superman's RUF forces. At this stage (i.e. before the Accused reached Colonel Eddie Town) the evidence suggests that the SLAs and RUF were still working together.

Paragraph 640

The First Accused also called Mosquito on the radio to renew their relationship, which had been in existence since the Junta period and throughout the First Accused's stay in

[1183] TF1-334, Transcript 24 May 2005, pp. 31-36.
[1184] TF1-334, Transcript 24 May 2005, p. 36
[1185] TF1-334, Transcript 24 May 2005, p. 36
[1186] TF1-334, Transcript 24 May 2005, p. 44.

Kailahun, before he left for Kono with logistics for the joint SLA/RUF troop based there under the Second Accused and Superman.

Paragraph 641

During his radio communication with Mosquito the First Accused explained why he had been out of contact, briefed Mosquito on the areas that his troop had attacked, and updated him on his current position.[1187] Mosquito in return informed the First Accused that he was happy, that the two sides (RUF and SLA) were brothers, and that Johnny Paul Koroma was safe.

Paragraph 642

It is these and other later continuing radio contacts, especially after the death of SAJ Musa at Benguema, between the First Accused and the RUF leadership which the Prosecution mainly relies on to show that the First Accused and the other Accused were always working with the RUF to re-establish the Junta in Freetown notwithstanding SAJ Musa's stated aim of reinstating the SLA.

Paragraph 643

In particular, this shared intention of collectively reinstating the Junta became apparent through the radio communications between the Accused and the senior RUF leadership after the death of SAJ Musa. These continued through to the attack on Freetown, the retreat from Freetown by the SLAs and the joint re-attack on Freetown by both the SLA and RUF after the SLAs have been driven from Freetown by ECOMOG at the end of January 1999.

Paragraph 645

After remaining in Camp Rosos for about three months, in around September 1998 under pressure from ECOMOG the First Accused with his Brigade moved from Camp Rosos to a new camp referred to as Major/Colonel Eddie Town (so-named because it was discovered by Major/Colonel Eddie on the orders of the First Accused).[1188] In particular, this followed an ECOMOG jet attack where Jalloh the radio operator died.[1189] Witness DBK-126 gave evidence of how the SLA faction in Camp Rosos was harnessing solar power in order to recharge the batteries for their radios.[1190]

Paragraph 668

Whilst at Colonel Eddie Town the First Accused had further radio communications with Mosquito, Issa Sesay and Morris Kallon where greetings were exchanged.[1191] SAJ Musa banned communications with the RUF once he arrived at Colonel Eddie Town following his split with Superman in Koinadugu.

[1187] TF1-334, Transcript 24 May 2005, p. 56.
[1188] TF1-167, Transcript 15 September 2005, p. 68; TF1-334, Transcript 24 May 2005, pp. 72-73.
[1189] TF1-334, Transcript 24 May 2005, p. 72.
[1190] DBK-126, Transcript 25 October 2006, pp. 47-48.
[1191] TF1-334, Transcript 13 June 2005, pp. 33-37

Freetown

Paragraph 682

According to the Prosecution friction continued between SAJ Musa and the First Accused before SAJ Musa's death at Benguema. Such friction mainly revolved around the First Accused's eagerness to keep in contact with the RUF who were in the rear and SAJ Musa's disowning of the RUF following his split with Superman in Koinadugu.

Paragraph 683

According to TF1-184, before Lunsar SAJ Musa and the First Accused had an argument where SAJ Musa shouted at the First Accused not to communicate with the RUF who were in the rear, at which point the First Accused grumbled about the fact that SAJ Musa was telling them what to do.[1192]

Paragraph 684

The Prosecution considers this important evidence of the First Accused's intention to take over the troop and link up with the RUF, especially when viewed in the context of his earlier communications with RUF Mosquito, Issa Sesay and Morris Kallon whilst at camp Rosos and Colonel Eddie Town and the First Accused arranging for the arrest of Bio and Bomblast at Colonel Eddie Town for refusing to support his bid to retain command when SAJ Musa arrived at Colonel Eddie Town.

Paragraph 685

At Mamamah Mosquito announced that his troops had attacked RDF and that troops under his command were moving toward Freetown. On hearing this, SAJ Musa accused radio operator Alfred Brown of passing on information to the RUF and warned Alfred Brown not to come near the set again.[1193] Once again the Prosecution submits it can be inferred that despite SAJ Musa's warning not to contact the RUF and his intention to reach Freetown before the RUF, other members of his troop were still secretly contacting the RUF behind SAJ Musa's back.

Paragraph 686

When the troop reached Newton shortly before the attack on Benguema, SAJ Musa and his men all took an oath that on reaching Freetown they will only say that they have come to reinstate the Army.[1194] It is telling that, according to TF1-184, after the oath was taken he heard the First Accused call his men who included the Second and Third Accused and other former members of the AFRC Council to discuss whether SAJ Musa's plan was to their benefit. According to this witness, they decided against SAJ Musa's plan to reinstate the army.[1195]

Paragraph 687

It is the case of the Prosecution that through the First Accused's continued contacts with the RUF and the fact that SAJ Musa's plan was not to the benefit of the Accused and other

[1192] TF1-184, Transcript 27 September 2005, pp. 43-44.
[1193] TF1-334, Transcript 13 June 2005, pp. 46-48.
[1194] TF1-184, Transcript 27 September 2005, pp. 46-47.
[1195] TF1-184, Transcript 27 September 2005, p. 47.

former AFRC members that it can be inferred that the Accused and the other former AFRC council members objective on reaching Freetown was to reinstate the old SLA/RUF Junta.

Paragraph 688

During the Junta period all the Accused had held senior positions as honourables and PLOs which entitled them to the benefits of high office. Whilst in the jungle the Accused also enjoyed senior command positions. It is the case of the Prosecution that if SAJ Musa was successful in reinstating the Army then the Accused all ran the risk of at best being restored to the army as members of the other ranks and at the worst facing court martial for there role in the May 1997 coup. Such court martial had already led to the execution of 28 former SLAs who were a part of the AFRC Government in October 1998.

Paragraph 689

After heavy fighting Benguema was captured in late December 1998. It was at Benguema that SAJ Musa was killed after an ammunition dump exploded. TF1-184 believed that the SAJ Musa had been shot in the back of the head from close range by the First Accused.[1196] Tellingly, all the Accused, Woyoh and other members on the AFRC Council were close by when SAJ Musa died.[1197] Before the troop left Goba Water there was grumbling amongst the troop that the First Accused had killed SAJ Musa.[1198]

Paragraph 691

....one of the first actions that the First Accused took when taking over command after the death of SAJ Musa was to re-establish the previously banned radio contacts with Mosquito to let him know that SAJ Musa was dead and that he was in command.[1199]

Paragraph 692

The Prosecution submits that the evidence shows that from the death of SAJ Musa until the attack, withdrawal and joint re-attack on Freetown with the RUF, the Accused were working with the RUF in order to capture Freetown and reinstate the Junta.

Paragraph 693

Even at Goba Water (where SAJ Musa was buried) a joint RUF/SLA force under SLA Brigadier Mani and RUF Superman had been advancing to Makeni.[1200]

Paragraph 695

During the advance to Freetown, after the operation to York but before they left for Hastings, the First Accused radioed Mosquito in Kailahun and informed him that the troop wanted to attack Freetown but that he lacked logistics and arms and ammunition and also needed reinforcements. Mosquito agreed to send reinforcements to the First Accused to enable him to enter Freetown.[1201]

[1196] TF1-184, Transcript 27 September 2005, pp. 49-61, pp. 105-107.
[1197] TF1-184, Transcript 27 September 2005, pp. 49-61, pp. 105-107; George Johnson, TF1-167, Transcript 16 September 2005, p. 10, TF1-334 Transcript 13 June 2005, pp. 53-54.
[1198] TF1-334, Transcript 13 June 2005, p. 57.
[1199] George Johnson, TF1-167, Transcript 16 September 2005, p. 11
[1200] George Johnson, TF1-167, Transcript 16 September 2005, p. 19
[1201] TF1-334, Transcript 13 June 2005, pp. 88-89

Paragraph 696

Later after the operation to Waterloo the First Accused radioed Issa Sesay who informed him that they (RUF) had captured Kono and were heading towards Makeni and that they were on the way to reinforce the First Accused. The First Accused told Issa Sesay that they were awaiting reinforcements then the entire troop (SLA and RUF) would enter Freetown.[1202]

Paragraph 697

The First Accused around the same time also contacted Superman. Superman told the First Accused that his troops were moving towards Makeni and promised to reinforce the First Accused's position so that they (RUF and SLA) can enter Freetown.

Paragraph 698

The Prosecution submits that through these radio contacts between the First Accused and the senior most leadership of the RUF in the field (Mosquito, Issa Sesay and Superman) it can be inferred that the First Accused was planning a joint attack on Freetown with the RUF in order to reinstate the Junta.

Paragraph 699

It is also significant that SAJ Musa died at Benguema around 22 December, yet the actual attack on Freetown did not take place until 6 January, nearly three weeks later. Benguema is only about 30 km from Freetown. The clear inference is that for those nearly three weeks the SLA faction under the First Accused was waiting for the RUF to reinforce them so that they could jointly attack Freetown.

Paragraph 700

As indicated in Col. Iron's report and the evidence of other witnesses, over this three week period food was running short, morale amongst the First Accused's troop was declining and they had been subject to an ECOMOG air attack at Allen Town where they had lost troops.[1203] Under these circumstances, the First Accused, in order to keep the structure and cohesion of his force together, could no longer afford to await the RUF reinforcements, who were bogged down after Makeni, and thus had no other option but to launch his assault on Freetown.[1204]

Paragraph 701

Even after the SLA Faction under the First Accused had successfully taken Freetown the expectation was that the RUF would join them and consolidate their gains in Freetown, as is evidenced by the continued radio communications between the two parties as set out below.

Paragraph 702

[1202] TF1-334 , Transcript 13 June 2005, p. 91

[1203] Exhibit P36, Military Expert Witness Report on the Armed Forces Revolutionary Council by Col. Richard Iron, August 2005, D2.8, D2.9.

[1204] Exhibit P36, Military Expert Witness Report on the Armed Forces Revolutionary Council by Col. Richard Iron, August 2005, D2.8, D2.9.

At around 7.30 to 8am on 6 January 1999 the SLA faction under the First Accused captured State House which became their headquarters.[1205] On the same day the Second Accused had made radio contact with Mosquito whilst he was outside State House.[1206]

Paragraph 703

.....On the same day Mosquito announced over Radio France that troops under the command of the First Accused had captured Freetown and State House and that he would continue to defend State House.[1207]

Paragraph 704

On 6 January, Gibril Massaquoi was released from Pademba Road Prison and taken to State House where the First Accused was in command.[1208] Gibril Massaquoi was a senior RUF leader who along with Steve Bio had been arrested by Issa Sesay and jailed in Sept 1997 for attempting to overthrow Johnny Paul Koroma.

Paragraph 705

Prior to leaving State House on 6 January, Gibril Massaquoi, Steve Bio and the First Accused discussed the failure of the RUF to reinforce the AFRC with arms and ammunition before they invaded Freetown.[1209] This, the Prosecution submits, is another clear indication that the First Accused waited as long as he could for RUF reinforcements before being compelled to attack Freetown alone without the RUF support he felt he needed.

Paragraph 706

Later the same day Gibril Massaquoi was called by the First and Third Accused to speak to the BBC and clarify that State House was under the control of a group comprised of both the AFRC and the RUF.[1210] This is another clear indication that the First Accused was working with the RUF and anticipating their support in order to re-establish the AFRC/RUF Junta Government.

Paragraph 707

If this had not been the First Accused's intention then there is no logical explanation why he would have called a senior RUF member to make the announcement and allow him to say that both the AFRC forces and RUF controlled State House.

Paragraph 708

The Prosecution submits that this statement was also for the consumption of Mosquito and the other RUF leaders so they should know that the plan to re-establish a joint AFRC/RUF Government was being implemented and that the RUF should hurry to Freetown to join them.

Paragraph 709

[1205] George Johnson, TF1-167, Transcript 16 September 2005, pp. 26-27.
[1206] TF1-184, Transcript 27 September 2005, pp. 60-61; Transcript 29 September 2005, pp. 99-100.
[1207] TF1-334, Transcript 14 June 2005, p. 20
[1208] Gibril Massaquoi, TF1-046, Transcript 7 October 2005, pp. 109-115
[1209] Gibril Massaquoi, TF1-046, Transcript 7 October 2005, p. 117
[1210] Gibril Massaquoi, TF1-046, Transcript 7 October 2005, p. 122

Gibril Massaquoi was a former senior member of the RUF and member of the AFRC Supreme Council along with the Accused until his arrest in September 1997. After his release on 6 January from Pademba Road Prison he reported daily to State House where he spent about two to three hours each day and drove around Freetown with Steve Bio in a vehicle given to him by the First Accused.[1211] This is another indication of the First Accused again striving to work with the RUF.

Paragraph 710

On the second day that Gibril Massaquoi was released from prison he overheard a conversation in State House between the First Accused and Sam Bockarie where the First Accused was discussing with Sam Bockarie his need for reinforcements and ammunition because he was running out. Gibril Massaquoi and Steve Bio also spoke to Sam Bockarie on the issue of sending reinforcements.[1212]

Paragraph 711

The next day Gibril Massaquoi heard the Second Accused tell the First Accused that he had spoken to Issa Sesay and Issa Sesay had promised him that Issa Sesay's men were moving to meet the First Accused's forces.[1213]

Paragraph 712

Whilst the First Accused's faction were struggling to resist the Nigerians, TF1-167 heard the First Accused speaking to Sam Bockarie. Sam Bockarie told the First Accused to hold their positions and that if the Nigerians were to break through the First Accused was to burn down central Freetown and all important buildings.[1214] Through the BBC radio Sam Bockarie sent the same message, namely that if ECOMOG did not stop attacking their position central Freetown its important buildings would be burned down.[1215]

Paragraph 713

During the second week after the SLA faction had been pushed out of State House by ECOMOG, the First Accused radioed Mosquito and told him that he was still awaiting reinforcements, that ECOMOG were beginning to penetrate and that he had heard about ceasefire talks with the government. Mosquito told the First Accused to ignore any ceasefire talks and to begin to burn some areas in Freetown, especially the important areas.[1216]

Paragraph 714

Mosquito then announced over the BBC that he was reinforcing the commander in Freetown and had ordered that strategic positions including government buildings,

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[1211] Gibril Massaquoi, TF1-046, Transcript 10 October 2005, p. 5
[1212] Gibril Massaquoi, TF1-046, Transcript 10 October 2005, pp. 8-10
[1213] Gibril Massaquoi, TF1-046, Transcript 10 October 2005, p. 9
[1214] George Johnson, TF1-167, Transcript 16 September 2005, pp. 40-41
[1215] George Johnson, TF1-167, Transcript 16 September 2005, p. 41
[1216] TF1-334, Transcript 14 June 2005, p. 49

commercial buildings and banks should be burned down.[1217] Shortly thereafter the First Accused gave the order to burn Freetown as the troop retreated.[1218]

Paragraph 715

During the third week as the troops were retreating at Shankardass the First Accused radioed Sam Bockarie and told him that the troop were now pulling out of Freetown and that they needed arms, ammunition and reinforcements. Mosquito agreed to send the reinforcements and set the meeting point at the Formex building.[1219] No reinforcements however were able to break through.[1220] Only SLA Rambo Red Goat was able to break through with about 50 reinforcements.[1221]

Paragraph 716

At Kissy Mental Hospital whilst the SLA faction was pulling out of Freetown the First Accused again contacted Sam Bockarie who told him to protect the politicians which they had freed from Pademba Road Prison so that they could be sent to him in Kailahun. The First Accused agreed to do this.[1222]

Paragraph 717

At Allen Town during the retreat the First Accused again contacted Sam Bockarie and told him that Freetown was lost and that no reinforcements had reached them. Sam Bockarie told the First Accused to pull out of Freetown and not get trapped.[1223]

Paragraph 718

Eventually the Accused and the SLA faction which had fled from Freetown met up at Benguema. An operation was planned at Benguema whereby a joint RUF and SLA force would ambush Guineans in the Hastings area. The ambush was carried out by the Third Accused and RUF Col. Rambo, whereby arms and ammunition was successfully captured and used as a G4 base under guard of SLAs and RUF.[1224]

Paragraph 719

Later Issa Sesay, Morris Kallon and Superman came to meet the Accused at Benguema. The First Accused addressed the men and said that he was happy that Issa Sesay had come to join the SLA and that a joint attack on Freetown should be planned. Issa Sesay was happy with the idea of a joint attack to retake Freetown.[1225]

Paragraph 720

A two pronged joint attack on Freetown was planned and carried out. The first group were to force their way into Freetown through Hastings. The Second Accused led this attack which included TF1-167 and RUF Rambo. This attack failed.

[1217] TF1-334, Transcript 14 June 2005, p. 48
[1218] TF1-334, Transcript 14 June 2005, pp.53-54
[1219] George Johnson, TF1-167, Transcript 16 September 2005, pp. 49-51
[1220] TF1-334, Transcript 14 June 2005, p. 59
[1221] TF1-334, Transcript 14 June 2005, pp. 56-59.
[1222] George Johnson, TF1-167, Transcript 16 September 2005, p. 58
[1223] George Johnson, TF1-167, Transcript 16 September 2005, p. 58
[1224] TF1-334, Transcript 14 June 2005, pp. 107-108
[1225] TF1-334, Transcript 14 June 2005, pp. 108-109

Paragraph 721

The second group were to force their way through to Freetown using the peninsula route via Tombo.[1226] The First Accused, Second Accused, Morris Kallon and Superman were all part of this attack which also failed.[1227]

Paragraph 722

After the failed attacks the Second Accused and other SLAs headed into the Westside Jungle in the Port Loko area where they were to form the Westside boys under the command of the Second Accused from at least the end of January 1999 to June 1999. The First and Third Accused pulled out to Makeni with RUF Issa Sesay, Morris Kallon and Rambo.[1228]

Paragraph 723

It is the case of the Prosecution that the SLA and RUF had been working towards the reinstatement of the joint SLA/RUF Government since the AFRC was driven out of power during the intervention in February 1998.

[1226] George Johnson, TF1-167, Transcript 16 September 2005, pp. 60-62
[1227] George Johnson, TF1-167, Transcript 16 September 2005, p.61.
[1228] George Johnson, TF1-167, Transcript 16 September 2005, p. 62

APPENDIX E

PROSECUTION'S NINTH GROUND OF APPEAL

Amendments that would be made to the Disposition of the Trial Chamber's Judgement if the Prosecution's Ninth Ground of Appeal is upheld (without taking into account the effect of any of the Prosecution's other grounds of appeal)

BRIMA

1. Brima was found individually responsible as a superior under Article 6(3) of the Statute for all crimes committed by his subordinates in **Bombali District** and in **Freetown and the Western Area.**[1229]

Counts 1-2 (Terrorizing and Collective Punishments)

2. The conviction was under Article 6(1) only.[1230]
3. **Article 6(1)** responsibility was established for:

Bombali District

(i). terrorisation of the civilian population in Karina[1231]

(ii) terrorisation of the civilian population in Rosos[1232]

Freetown and the Western Area

(iii) terrorisation of the civilian population in Freetown[1233]

(iv) collective punishment of civilians in Freetown[1234]

4. **Article 6(3)** responsibility was additionally established for:

acts of terrorizing and collective punishments in Bombali District[1235] and Freetown and the Western Area, other than those mentioned above.[1236]

[1229] Trial Chamber's Judgement, para. 1744 (Bombali District), 1810 (Freetown and the Western Area); Sentencing Judgement, para. 42.
[1230] Trial Chamber's Judgement, para. 2113.
[1231] Trial Chamber's Judgement, para. 1710-1711; Sentencing Judgement, para. 41(4).
[1232] Trial Chamber's Judgement, para. 1713; Sentencing Judgement, para. 41(4). .
[1233] Trial Chamber's Judgement, paras 1771-1776; Sentencing Judgment, para. 41(4).
[1234] Trial Chamber's Judgement, paras 1771-1776; Sentencing Judgment, para. 41(5).
[1235] Trial Chamber's Judgement, paras 1571-1572; Sentencing Judgement, para. 42.
[1236] Trial Chamber's Judgement, paras 1609-1611; Sentencing Judgement, para. 42.

Counts 3-5 (Unlawful killings)

5. The conviction was under Article 6(1) only.[1237]

6. **Article 6(1)** responsibility was established for:

Bombali District

(i) Murder of at least 12 civilians at a mosque during the attack on Karina[1238]

(ii) Ordering the unlawful killing of 6 civilians in a village near Mateboi[1239]

(iii) Ordering the unlawful killing of at approximately 25 civilians in Gbendembu[1240]

Freetown and the Western Area

(i) Killing of three civilian Nigerian men at the State House[1241]

(ii) Killing the wife of a soldier outside State House[1242]

(iii) Killing a nun in Freetown[1243]

(iv) Ordering killings in the Fourah Bay area[1244]

(v) Ordering the killing of police[1245]

(vi) Ordering the killing of 14 Nigerian soldiers at State House who were *hors de combat*[1246]

(vii) Ordering the killing of 8 nuns at Kissy Mental Home[1247]

(viii) Ordering the killing of civilians (about 71) at Rogbalan Mosque [1248]

7. Other crimes found to have been committed and for which Brima was found to be individually responsible under **Article 6(3)** included:

8. *Bombali District*

(i) The killing of an estimated 200 civilians in Karina[1249]

9. *Freetown and the Western Area*

[1237] Trial Chamber's Judgement, para. 2113.
[1238] Trial Chamber's Judgement, para. 1709; Sentencing Judgment, paras 41(1), 43.
[1239] Trial Chamber's Judgement, para. 1714; Sentencing Judgement, para. 41(7).
[1240] Trial Chamber's Judgement, para. 1715; Sentencing Judgement, para. 41(7).
[1241] Trial Chamber's Judgement, para. 1755; Sentencing Judgement, para. 41(2).
[1242] Trial Chamber's Judgement, para. 1760; Sentencing Judgement, para. 41(2).
[1243] Trial Chamber's Judgement, para. 1764; Sentencing Judgement, para. 41(2).
[1244] Trial Chamber's Judgement, para. 1770; Sentencing Judgement, para. 41(8).
[1245] Trial Chamber's Judgement, para. 1777; Sentencing Judgement, para. 41(8).
[1246] Trial Chamber's Judgement, para. 1779; Sentencing Judgement, para. 41(7).
[1247] Trial Chamber's Judgement, para. 1780; Sentencing Judgement, para. 41(7).
[1248] Trial Chamber's Judgement, para. 1782; Sentencing Judgement, para. 41(7).
[1249] Trial Chamber's Judgement, para. 894.

(i) The killing of at least 145 civilians.[1250]

10. The conviction on these Counts should therefore have been under both Article 6(1) and Article 6(3).

Counts 10 and 11 (Physical Violence)

11. The convictions was under Article 6(1) only.[1251]

12. **Article 6(1)** responsibility was established for:

13. *Freetown and the Western Area*:

(i) Amputation of one civilian at Shell Company, Old Road[1252]

14. Other crimes found to have been committed and for which Brima was found to be individually responsible under **Article 6(3)** [1253] included:

(i) the mutilations of at least 237 civilians and one soldier in Freetown and the Western Area[1254].

15. The conviction on these Counts should therefore have been under both Article 6(1) and Article 6(3).

Count 14 (Looting)

16. The conviction was under Article 6(1) only. [1255]

17. **Article 6(1)** responsibility was established for:

18. *Freetown and the Western Area*:

(i) Ordering the looting of UN vehicles[1256]

(ii) Ordering looting as payment for AFRC soldiers[1257]

19. Other crimes found to have been committed and for which Brima was found to be individually responsible under **Article 6(3)** [1258] included:

(i) looting at the State House,[1259]

(ii) looting the property of numerous individuals in Kissy.[1260]

[1250] Trial Chamber's Judgement, para. 951.
[1251] Trial Chamber's Judgement, para. 2113.
[1252] Trial Chamber's Judgement, para. 1769; Sentencing Judgement, para. 41(3).
[1253] Trial Chamber's Judgement, paras 1744 (Bombali District), 1810 (Freetown and Western Area); Sentencing Judgement, para. 42.
[1254] Trial Chamber's Judgement, para. 1243.
[1255] Trial Chamber's Judgement, para. 2113.
[1256] Trial Chamber's Judgement, para. 1778; Sentencing Judgement, para. 41(10).
[1257] Trial Chamber's Judgement, para. 1778; Sentencing Judgement, para. 41(10).
[1258] Trial Chamber's Judgement, paras 1744 (Bombali), 1810 (Freetown and Western Area).
[1259] Trial Chamber's Judgement, para. 1423.
[1260] Trial Chamber's Judgement, paras 1424-1428.

20. The conviction on Count 14 should therefore have been under both Article 6(1) and Article 6(3).

KAMARA

21. Kamara was found individually criminally responsible under Article 6(3) for all crimes committed by his subordinates in the Western Area, Port Loko District, Bombali District and Tombodu, Kono District.[1261]

Counts 3-5 (Unlawful killings)

22. The conviction was under Article 6(1) only.[1262]

23. **Article 6(1)** responsibility was established for:

24. *Bombali District*

    (i) murder of five young girls in Karina[1263]

25. *Freetown and the Western Area*

    (i) Aiding and abetting the murder and extermination of an unknown number of civilians at Fourah Bay[1264]

26. Other crimes found to have been committed and for which Kamara was found to be individually responsible under **Article 6(3)**[1265] include:

27. *Kono District*

    (i) the killing of at least 265 civilians in Tombodu, Kono District,[1266] (including the burning alive of 68 civilians,[1267] and the beheading of another 47 civilians.[1268])

28. *Bombali District*

    (i) The killing of an estimated 200 civilians in Karina[1269]

29. *Freetown and the Western Area*

    (i) The killing of at least 145 civilians.[1270]

[1261] Trial Chamber's Judgement, paras 1893 (Kono District); 1928 (Bombali District), 1950 (Freetown & Western Area), 1969 (Port Loko); Sentencing Judgement, para. 71.
[1262] Trial Chamber's Judgement, para. 2113.
[1263] Trial Chamber's Judgement, para. 1915; Sentencing Judgement, para 70(1).
[1264] Trial Chamber's Judgement, paras 1939-1940; Sentencing Judgment, para 70(5).
[1265] Trial Chamber's Judgement, paras 1893 (Kono District); 1928 (Bombali District), 1950 (Freetown & Western Area), 1969 (Port Loko); Sentencing Judgement, para. 71.
[1266] Trial Chamber's Judgement, para. 857.
[1267] Trial Chamber's Judgement, paras 848-849; Sentencing Judgement, para 73.
[1268] Trial Chamber's Judgement, para. 849; Sentencing Judgement, para 73.
[1269] Trial Chamber's Judgement, para. 894.

30. The convictions on these Counts should therefore have been under both Article 6(1) and Article 6(3).

Counts 10 and 11 (Physical Violence)

31. The conviction was under Article 6(1) only.[1271]

32. **Article 6(1)** responsibility was established (under Count 10 only) for:

33. *Freetown and the Western Area*

(i) Aiding and Abetting the mutilation of civilians in "Operation Cut Hand" in Freetown[1272]

34. Other crimes found to have been committed and for which Kamara was found to be individually responsible under **Article 6(3)**[1273] included:

35. *Tombodu, Kono District.*[1274]

(i) the mutilation of at least 16 civilians in Tombodu[1275]

36. The conviction on this Count should therefore have been under both Article 6(1) and Article 6(3).

KANU

37. Kanu was found individually criminally responsible under Article 6(3) for all crimes committed by his subordinates in Freetown and the Western Area.[1276]

Counts 3-5 (Unlawful killings)

38. The conviction was under Article 6(1) only[1277].

39. **Article 6(1)** responsibility was established for:

40. *Freetown and the Western Area*

(i) Ordering the killing of 14-16 captured ECOMOG soldiers at the State House[1278]

(ii) Ordering the killing of an unknown number of civilians at a mosque in Kissy[1279]

[1270] Trial Chamber's Judgement, para. 951.
[1271] Trial Chamber's Judgement, para. 2117.
[1272] Trial Chamber's Judgement, para. 1941; Sentencing Judgement, para 70(6).
[1273] Trial Chamber's Judgement, paras 1893 (Kono District); 1928 (Bombali District), 1950 (Freetown & Western Area), 1969 (Port Loko); Sentencing Judgement, para. 71.
[1274] Trial Chamber's Judgement, paras 1893 (Kono District), 1928 (Bombali District), 1950 (Freetown and the Western Area), 1969 (Port Loko District); Sentencing Judgement, para. 71.
[1275] Trial Chamber's Judgement para. 1213.
[1276] Trial Chamber's Judgement, paras 2080, 2106; Sentencing Judgement, para. 95.
[1277] Trial Chamber's Judgement, para. 2121.
[1278] Trial Chamber's Judgement, para. 2058; Sentencing Judgement, para. 94(iii).

(iii) Instigating the killing of civilians in Freetown[1280]

41. Other crimes found to have been committed and for which Kanu was found to be individually responsible under **Article 6(3)**[1281] included:

42. *Bombali District*

(i) the killings of an unknown number of civilians in Bombali District.[1282]

43. The conviction on these Counts should therefore have been under both Article 6(1) and Article 6(3).

Counts 10 and 11 (Physical Violence)

44. The conviction was under Article 6(1) only.[1283]

45. **Article 6(1)** responsibility was established for:

46. *Freetown and the Western Area:*

(i) The amputation of a civilian near Kissy Old Road to "demonstrate" to his troops how best to carry out amputations[1284]

(ii) The amputation of two civilians at Upgun as a further "demonstration" of how to perform ampuatations[1285]

(iii) The ordering of 200 amputations of civilians in Eastern Freetown before sending them to Ferry Junction[1286]

47. Other crimes found to have been committed and for which Kanu was found to be individually responsible under **Article 6(3)**[1287] included:

48. *Freetown and the Western Area*[1288]

(i) mutilations of at least 237 civilians and one soldier. [1289]

49. The conviction on this Count should therefore have been under both Article 6(1) and Article 6(3).

[1279] Trial Chamber's Judgement, para. 2059; Sentencing Judgement, para. 94(iv).
[1280] Trial Chamber's Judgement, para. 2063; Sentencing Judgement, para. 94(ix).
[1281] Trial Chamber's Judgement, paras 1893 (Kono District); 1928 (Bombali District), 1950 (Freetown & Western Area), 1969 (Port Loko); Sentencing Judgement, para. 71.
[1282] Trial Chamber's Judgement, para. 897.
[1283] Trial Chamber's Judgement, para. 2121.
[1284] Trial Chamber's Judgement, para. 2050; Sentencing Judgement, para. 94(i).
[1285] Trial Chamber's Judgement, para. 2053; Sentencing Judgement, para. 94(i).
[1286] Trial Chamber's Judgement, para. 2060; Sentencing Judgement, para. 94(v).
[1287] Trial Chamber's Judgement, paras 1893 (Kono District); 1928 (Bombali District), 1950 (Freetown & Western Area), 1969 (Port Loko); Sentencing Judgement, para. 71.
[1288] Trial Chamber's Judgement, paras 2080, 2106; Sentencing Judgement, para. 95.
[1289] Trial Chamber's Judgement, paras 1243, 2121.

Count 14 (Pillage)

50. The conviction was under Article 6(1) only.[1290]

51. **Article 6(1)** responsibility was established for:

52. *Freetown and the Western Area*:

(i) The looting of at least one vehicle at the State House[1291]

53. Other crimes found to have been committed and for which Kanu was found to be individually responsible under **Article 6(3)** [1292] included:

54. *Freetown and the Western Area*[1293]

(i) looting the State House in Freetown and Kissy in the Western Area.[1294]

55. The conviction on this Count should therefore have been under both Article 6(1) and Article 6(3).

[1290] Trial Chamber's Judgement, para. 2121.
[1291] Trial Chamber's Judgement, para. 2057; Sentencing Judgement, para. 92(ii).
[1292] Trial Chamber's Judgement, paras 2080, 2106; Sentencing Judgement, para. 95.
[1293] Trial Chamber's Judgement, paras 2080, 2106; Sentencing Judgement, para. 95.
[1294] Trial Chamber's Judgement, para. 1429.

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APPENDIX F

COPIES OF AUTHORITIES AND DOCUMENTS

ICTY Case Law and Documents

PROSECUTION V MOMCILO KRAJISNIC
AND
BILJANA PLAVSIC

IT-00-39&40-PT
D3276-D3263
04 MARCH 2002

3276
SF

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No: IT-00-39 & 40-PT

Date: 4 March 2002

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge Richard May, Presiding**
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: **Mr. Hans Holthuis**

Decision of: **4 March 2002**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK
&
BILJANA PLAVŠIĆ

DECISION ON PROSECUTION'S MOTION FOR LEAVE TO AMEND THE CONSOLIDATED INDICTMENT

Office of the Prosecutor:

Mr. Mark Harmon
Mr. Alan Tieger

Counsel for the Accused:

Mr. Deyan Brashich and Mr. Nikola P. Kostich, for Momčilo Krajišnik
Mr. Robert J. Pavich, Mr. Eugene O'Sullivan and Mr. Peter Murphy, for Biljana Plavšić

I. BACKGROUND

1. On 1 February 2002, the Office of the Prosecutor ("Prosecution") filed the "Prosecution's Motion for Leave to Amend the Consolidated Indictment" ("Motion"), in which it seeks leave to amend the Consolidated Indictment in the form attached to its Motion.

2. The proposed Amended Indictment contains the following general differences from the current Consolidated Indictment:

   (a) Count 6 in the current Consolidated Indictment dealing with offences under Article 2 of the Statute of the Tribunal ("Statute") has been left out, thus removing from contention the issue of internationality of the armed conflict in Bosnia during the period with which the Indictment is concerned;

   (b) The proposed Amended Indictment has reduced the number of municipalities in which it seeks to link crimes to the accused from 41 to 37 municipalities;

   (c) The individual criminal responsibility of the accused has been pleaded more clearly, indicating that they "committed" offences under Article 7(1) of the Statute as participants in a joint criminal enterprise; separating allegations under Articles 7(1) and 7(3), and giving a more detailed exposition of the Prosecution's allegations concerning genocide and the persecutory acts with which they are charged;

   (d) A number of schedules have been attached to the proposed Amended Indictment detailing the dates and locations of killings not related to detention facilities (Schedule A); the dates and locations of killings related to detention facilities (Schedule B); the names and locations of the detention facilities (Schedule C); and, the locations of cultural monuments and sacred sites that were damaged and destroyed (Schedule D). These schedules provide greater particularisation of some acts alleged, add some incidents not pleaded in the current Consolidated Indictment and remove some incidents pleaded in the current Consolidated Indictment. The schedules provide greater clarity in the structure of the Indictment.

3. On 14 February 2002, the Defence for Biljana Plavšić filed its "Response of Biljana Plavšić to Motion of Prosecutor to Amend Consolidated Indictment" ("Plavšić Response"), in which it argues that the proposed Amended Indictment is defective, lacks sufficient particularisation of material facts and is in violation of the applicable provisions of the Statute and Rules of Procedure and Evidence of the Tribunal ("Rules"). In particular, paragraphs 2, 8, 15-17, 18-19, 24 and 27 of the proposed Amend Indictment are objected to as lacking the particulars of charges against Plavšić such that she would be in a position to prepare her defence. The Plavšić Defence submits that the prosecution should be required to re-plead the mentioned paragraphs, failing which the Indictment against her should be dismissed.

4. On 15 February 2002, the Defence for Momčilo Krajišnik filed its "Opposition to Motion for Leave to Amend Indictment and Motion Directing Repleading of Proposed Amended Indictment with Full Specificity or in the Alternative Leave to File Motion for a Bill of Particulars" ("Krajišnik Response"), in which it argues that the proposed Amended Indictment is defective and seeks an Order that (a) the prosecution be required to further amend the Indictment or, (b) alternatively that the Krajišnik Defence be granted leave to file a motion for further and better particulars. In particular, paragraphs 1, 3, 4, 6, 8, 11, 12, 15-17, 18-19, 24 and 27 of the proposed Amend Indictment are objected to as lacking the degree of specificity required by the Statute and Rules of the Tribunal.

5. On 18 February 2002, the Prosecution sought leave to file a Reply to the Defence Responses to the Motion, which was granted by the Trial Chamber in its Order of 20 February 2002.[1] The Prosecution filed its "Prosecution's Reply to Defence Responses on Amended Indictment Application" on 21 February 2002 ("Reply"). That Reply addressed the arguments of the Defence in their Responses and provides some additional legal argument in support of the Motion.

[1] "Prosecution's Request for Leave to Reply to Defence Responses to Prosecution's Motion for Leave to Amend the Consolidated Indictment", 18 February 2002 and "Order Granting Prosecution's Request to Reply to Defence Responses on Amended Indictment Application", 20 February 2002.

6. On 25 February 2002, the Krajišnik Defence filed a Request for an oral hearing on the Motion and suggests that this argument take place at the time of the scheduled Status Conference on 8 march 2002.

II. THE LAW

7. The Motion of the Prosecution is made pursuant to Rule 50 (A)(i)(c) of the Rules, which provides that the Prosecution "may amend an indictment...after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties".

8. With respect to the pleading requirements for indictments before the Tribunal, Articles 18.4, 21.2 and 21.4 (a) of the Statute are applicable. Rule 47 (C) of the Rules sets out the requirements the Prosecution is under with respect to pleading in the indictment, and reads as follows:

> The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

9. What the Prosecution is required to set out in an Indictment are the material facts upon which the charges against the accused are based. The Prosecution is not required to provide any evidence or a summary of evidence it intends to rely upon to prove its case at trial.[2] The pleadings in an indictment will therefore be sufficiently particular when the material facts of the Prosecution case are concisely set out with sufficient detail to inform an accused clearly of the nature and cause of the charges against him, such that he is in a position to prepare a defence.[3] The legal prerequisites which apply to the offences charged are material facts and must also pleaded by the Prosecution.[4]

10. The Prosecution will, at the time of filing its pre-trial brief, be required to provide "a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the

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[2] *Prosecutor v. Kupreškić and Others*, Appeal Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgement"), para. 88; *Prosecutor v. Krajišnik*, "Decision Concerning Preliminary Motion on the Form of the Indictment", 1 August 2000 ("*Krajišnik* Decision of 1 August 2000"), footnote 27.

[3] *See Kupreškić* Appeal Judgement, para. 88.

[4] *Prosecutor v. Hadžihazanović and Others*, "Decision on Form of Indictment", 7 December 2001 ("*Hadžihazanović* Decision"), para. 10.

accused".[5] The Prosecution cannot, however, cure a defective indictment through its supporting material or its pre-trial brief.[6]

11. This case concerns allegations against civilians in senior positions of political power who are said to be liable as commanders as well as participants in a joint criminal enterprise with others. With respect to a case based upon superior responsibility, the Trial Chamber notes that it dealt with this issue in its previous considered decision on the form of the current Consolidated Indictment. Since then, a number of decisions have been issued by Trial Chambers and by the Appeals Chamber which support the general propositions set out in that previous decision. One material fact the Prosecution is obliged to plead is the nature of the superior-subordinate relationship between the accused and others whose acts he is alleged to be responsible for.[7] It must be pleaded that the accused knew or had reason to know that the crimes were about to be or had been committed by those others,[8] and the related conduct of those others for whom he is alleged to be responsible.[9] The facts relevant to the acts of those subordinates will usually be stated with less precision.[10] The reason for this is that the detail of those acts (by whom and against whom they are committed) is often unknown and, at any rate, the acts themselves often cannot be greatly in issue.[11] The Prosecution must also plead that the accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.[12]

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[5] Rule 65 *ter* (E) of the Rules.
[6] *Prosecutor v Brđanin & Talić*, Case IT-99-36-PT, "Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment", 23 February 2001 ("Second *Brđanin & Talić* Decision"), paras. 11-13.
[7] *Krajišnik* Decision of 1 August 2000, par 9; *Prosecutor v Krnojelac*, "Decision on Preliminary Motion on Form of Amended Indictment", 11 Feb 2000 ("*Krnojelac* Decision"), para. 9.
[8] *Krajišnik* Decision of 1 August 2000, par 9; *Prosecutor v Brđanin & Talić*, "Decision on Objections by Momir Talić to the Form of the Amended Indictment", 20 Feb 2001 ("First *Brđanin & Talić* Decision"), par 19;
[9] *Prosecutor v Krnojelac*, "Decision on Preliminary Motion on Form of Amended Indictment", 11 Feb 2000 ("*Krnojelac* Decision"), para. 38.
[10] First *Brđanin & Talić* Decision, para. 19.
[11] *Krajišnik* Decision of 1 August 2000, para. 9; *Prosecutor v Kvočka*, "Decision on Defence Preliminary Motions on the Form of the Indictment", 12 Apr 1999 ("*Kvočka* Decision"), para. 17; *Krnojelac* Decision, para. 18(A).
[12] *Krajišnik* Decision of 1 August 2000, para. 9; First *Brđanin & Talić* Decision, para. 19.

12. Both the Krajišnik and Plavšić Defence rely upon the *Kupreškić* Appeal Judgement in support of their arguments that the proposed Amendment Indictment is defective. The Appeals Chamber in its Judgement stated that the materiality of a particular fact cannot be decided in abstract, but depended upon the nature of the Prosecution case.[13] The Appeals Chamber went on to state:

> Obviously, there may be instances where the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'.[14]

13. Finally, the Trial Chamber notes that the material facts which must be pleaded with respect to an allegation that the accused participated in a joint criminal enterprise are as follows: the purpose and period of the enterprise; the identity of the participants in the enterprise, and the nature of the participation of the accused in that enterprise.[15]

[13] *Kupreškić* Appeal Judgement, para. 89.
[14] *Ibid.*
[15] *Krnojelac* Decision.

III. DISCUSSION OF THE APPLICATION

14. The Trial Chamber will deal with the relevant objections of the two accused, paragraph by paragraph.

15. The Krajišnik Defence argues that in paragraph 1, the Prosecution fails to specify the dates between which Krajišnik is alleged to have been a member of the National Security Council of the Bosnian Serb Republic. It is further argued that the proposed Amended Indictment does not allege acts that the accused in his capacity (in the SDS or in the governing bodies such as the National Security Council, the Expanded Presidency and the Assembly of the Republica Srpska) did or participated in which constituted violations of the law. It is submitted that any amendment of the Indictment must specify the acts and dates with which the accused is charged.

16. Whilst it is noted that the period in which the accused is alleged to have been a member of the National Security Council of the Bosnian Serb Republic is not completely clear from the drafting in paragraph 1, to the extent this matter constitutes a material fact, the Chamber is of the view that this could be dealt with by a simple official clarification by the Prosecution. The rest of the information sought by the Krajišnik Defence with respect to paragraph 1 deals with specific conduct of the accused and constitutes a request for evidence. The Prosecution is not obliged to plead these matters in more particularity than it has already done.

17. The Plavšić Defence raises the same concern with respect to the dates between which Plavšić is alleged to have been President of the Council for Protection of the Constitutional Order of the Presidency of Bosnia and Herzegovina and a member of the National Security Council of the Bosnian Serb Republic. Again, the Trial Chamber is of the view that to the extent this matter constitutes a material fact, this could be dealt with by a simple official clarification by the Prosecution.

18. Paragraphs 3 to 9 of the proposed Amended Indictment deal with the participation of the accused in a joint criminal enterprise. The Krajišnik Defence argues that the term "enterprise" is not described, defined or explained and that there is no

reference to any affirmative acts or statements made by the accused that would cause him to become a member of a joint criminal enterprise. It is further alleged that the proposed Amended Indictment does not mention the commencement date of the enterprise and does not reveal the identity of the other members (apart from a reference to thousands of individuals in paragraph 7). The Krajišnik Defence goes on to argue that the proposed Amended Indictment does not refer to any particular agreements made by Krajišnik with other members of the enterprise in order to fulfil the common goals. The Prosecution, in its Reply, argues that it has particularised the elements, participation and timing of the joint criminal enterprise alleged.

19. The Krajišnik Defence goes on to argue that in paragraph 5, the proposed Amended Indictment does not specify the acts (statements, written communications etc.) which would support this allegation. With respect to paragraph 7, the Krajišnik Defence argues that all the named entities that allegedly participated in the joint criminal enterprise, are and were legitimate political and governmental organs created through a democratic political process. In order to show how these legitimate office holders and entities became participants in a joint criminal enterprise the Indictment must, it is said, specify which legislative actions, statements, acts and omissions transformed the legitimate activities of the individuals and entities into illegal ones and when the agreement to commit illegal acts took place. The Indictment must also specify when and how Krajišnik became a participant or aider or abettor in the enterprise.

20. With respect to paragraph 8, both accused take issue with the manner in which they are alleged to have participated in the joint criminal enterprise. It is argued that instead of identifying the facts on which the charges are based, the paragraph merely states in a generalised language (i.e., "directing, instigating, promoting...") the alleged legal nature of their involvement. Once again, it is argued that the proposed Amended Indictment does not specify what acts the accused are alleged to have committed in the joint criminal enterprise.

21. The Trial Chamber recalls that what is required to be pleaded by the Prosecution with respect to an allegation that an accused participated in a joint criminal enterprise is the purpose and period of the enterprise; the identity of the participants in the enterprise, and the nature of the participation of the accused in

that enterprise. In paragraph 4, the Prosecution states that the "objective of the joint criminal enterprise was the permanent removal, by force or other means, of Bosnian Muslim, Bosnian Croat or other non-Serb inhabitants from large areas of Bosnia and Herzegovina". In paragraph 5, it is pleaded that the crimes enumerated in all counts in the Indictment were within the object of the joint criminal enterprise. The particularised crimes set out in paragraphs 15-17 and the Schedules attached to the Indictment are therefore incorporated as particulars of the result of the alleged joint criminal enterprise. In paragraph 6, it is pleaded that the joint criminal enterprise was in existence "at the time of the commission of the underlying criminal acts alleged...and at the time of the participatory acts of each of the accused". In paragraph 7, the Prosecution pleads that the accused worked in concert with seven named individuals and a number of identifiable political and military groups. In paragraph 8, the Prosecution lists 11 separate ways in which the accused participated in the joint criminal enterprise.

22. The Trial Chamber is satisfied that the Prosecution has discharged its obligation to specify the relevant aspects of the joint criminal enterprise. The legal elements which apply to this form of criminal liability are set out satisfactorily. Many of the articulated objections of the accused amount to demands for information which is properly characterised as evidence. Furthermore, whilst the list of co-perpetrators in the joint criminal enterprise is broad and far reaching, the nature of this case and the role of each accused is such that the Prosecution will necessarily plead the relevant material facts in this manner. The Prosecution will be required in its pre-trial brief, and more fully at trial, to show the evidence which establishes the plan and the role of the accused in it.

23. Paragraphs 10 to 14 of the proposed Amended Indictment deal with the alleged command responsibility of the two accused under Article 7 (3) of the Statute. Paragraph 11 alleges that Krajišnik as a member of the Expanded Presidency had *de jure* control and authority over the Bosnian Serb military forces and the political and governmental organs that were involved with the crimes. The Krajišnik Defence argues that the allegation fails to inform with any specificity the competence, authority and jurisdiction that his position held which would allow him to order or control the various government organs. Paragraph 12 of the Indictment alleges that he held a prominent position in the Bosnian Serb leadership and by virtue of his position and associations he had *de facto* control

and authority over the individuals and organs that participated in the alleged crimes. It is argued that the term "prominent" is a relative and loose concept and that the Indictment must specify acts and statements showing a course of conduct which would form the foundation of *de facto* control. Paragraph 14 of the Indictment alleges that Krajišnik failed to take measures to prevent crimes or to punish the perpetrators. It is argued that the proposed Amended Indictment does not specify which acts or omissions support this allegation and must allege that Krajišnik had the authority to control and discipline any member of the Bosnian Serb government, military force or police department.

24. The Trial Chamber finds that the particulars sought by the Defence are clearly matters for evidence and the Prosecution, having sufficiently pleaded the responsibility of the accused under Article 7 (3), is not required to supply further particulars with respect to this matter in the indictment. The objections of the Defence are therefore dismissed.

25. Paragraphs 15-17 deal with allegations of genocide and complicity in genocide by the accused. The Defence for the two accused argue that the Prosecution has failed to plead any material facts underpinning the allegations. Specifically, it is said that the Prosecution fails to identify the places and the times at which genocide is alleged to have occurred. Moreover, it is argued that the proposed Amended Indictment fails to plead with specificity what acts the accused are alleged to have committed which might amount to the crimes of genocide and complicity in genocide.

26. The Trial Chamber accepts the Prosecution's argument in its Reply that genocide is a legal characterisation applied to particular acts which are committed with a specific intent. So long as the Prosecution has pleaded the material facts concerning the acts constituting the *actus reus* of the genocide alleged and has pleaded the legal elements constituting the special *mens rea* requirement, it has satisfied the specificity requirements for the purposes of the indictment. In this case, the Prosecution has alleged that the genocidal acts were carried out as part of a manifest pattern of persecutions committed in furtherance of the objective of the joint criminal enterprise in which the accused participated. The acts particularised in paragraphs 15-17 and Schedules A, B and C attached to the proposed Amended

Indictment are incorporated. The Trial Chamber finds that these particulars are sufficient for the purposes of the material facts required to be pleaded in an Indictment. The Prosecution has also sufficiently pleaded the legal elements of the offences charged.

27. Both accused argue that paragraphs 18 to 19 and 24 are defective for the same reason that paragraph 8 is defective (they assert that these paragraphs are simply a repeat of what is pleaded in paragraph 8). In fact, paragraphs 18-23 deal with count 3, persecution. In paragraph 18, the accused are alleged to be liable for the alleged offences as participants in a joint criminal enterprise. In paragraph 19, particulars of the persecutions are set out and Schedules A to D are incorporated. Paragraph 24 sets out counts 4, 5 and 6 (extermination and wilful killing) and incorporates paragraphs 18 to 23.

28. The Trial Chamber has already made its findings with respect to paragraph 8 and the characterisation of the criminal responsibility of the accused under Article 7 (1) of the Statute.

29. It is noted that this Trial Chamber, in ruling on the current Consolidated Indictment, found there to be no lack of precision in the pleading of material facts in that indictment.[16] The Chamber made particular reference to the higher level of responsibility alleged against the accused.[17] It found that the Prosecution had satisfied, for the purposes of an indictment, the requirements for specificity in setting out the means by which the alleged crimes were committed, the persons who committed them, the locations, the victims and the approximate dates of the alleged crimes.[18] The Trial Chamber notes that the proposed Amended Indictment provides greater particularisation of the criminal responsibility of the accused. Furthermore, it drops the Article 2 charges, removing the necessity for the Defence to investigate and prepare its case with respect to the issue of whether or not there was an international armed conflict in Bosnia and Herzegovina during the relevant period. It reduces slightly the breadth of the case against the accused and reformats the indictment to enable greater ease of reference to particular

[16] *Krajišnik* Decision of 1 August 2000, para. 10.
[17] *Ibid.* It is noted that whilst this decision concerned an application made by the accused Krajišnik, the same general proposition applies to the other accused in these proceedings, and the Consolidated Indictment concerned her as well.

categories of crimes alleged. These are initiatives which the Trial Chamber welcomes.

30. Having found that most the objections of the two accused amount to demands for evidence or a level of specificity not required by the Prosecution in an Indictment, the Trial Chamber would like to comment on the application by the Krajišnik Defence that it be granted leave to file a motion for further and better particulars. The Trial Chamber has dealt with several motions by the accused to be provided with further particularisation than was provided by the Prosecution in the Consolidated Indictment.[19] We have noted in the past that the Prosecution will be required, at the time of filing its pre-trial brief pursuant to Rule 65 *ter* (E), to provide a summary of the evidence which it intends to bring regarding the commission of the alleged crimes and the role of the accused. The Trial Chamber will therefore reject the application made by the Krajišnik Defence, however it will consider any such application made after the Prosecution produces its pre-trial brief.

31. Finally, the Trial Chamber will reject the application made by the Krajišnik Defence for an oral hearing. The Chamber is satisfied that the parties have stated their arguments with fullness and is not of the view that an oral hearing will assist it further.

[18] *Ibid.*, paras. 10-11.
[19] *See*, for example, the "Decision on Motion from Momčilo Krajišnik to Compel the Prosecution to Provide Particulars", 8 May 2001; "Decision on Motion from Momčilo Krajišnik to Compel the Prosecution to Provide Identity of Subordinates", 19 July 2001.

IV. DISPOSITION

For the reasons set out above, the Trial Chamber:

1. **GRANTS** the application of the Prosecution in its Motion;

2. **REJECTS** the application of the Krajišnik Defence to be granted leave to file a motion for further and better particulars, but will consider any such application made after the Prosecution files its pre-trial brief; and

3. **REJECTS** the application of the Krajišnik Defence for an oral hearing on the Motion.

Done in English and French, the English text being authoritative.

Richard May
Presiding

Dated this fourth day of March 2002
At The Hague
The Netherlands

[Seal of the Tribunal]

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PROSECUTOR V SLOBODAN MILOSEVIC

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991

Cases: IT-99-37-AR73
IT-01-50-AR73
IT-01-51-AR73

Date: 18 April 2002

Original: French & English

BEFORE THE APPEALS CHAMBER

Before: Judge Claude Jorda, Presiding
Judge David Hunt
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron

Registrar: Mr Hans Holthuis

Decision of: 18 April 2002

PROSECUTOR

v

Slobodan MILOŠEVIĆ

REASONS FOR DECISION ON PROSECUTION INTERLOCUTORY APPEAL FROM REFUSAL TO ORDER JOINDER

Counsel for the Prosecutor:

Ms Carla Del Ponte, Prosecutor
Mr Geoffrey Nice
Ms Hildegard Uertz-Retzlaff
Mr Dirk Reyneveld

The Accused:

Mr Slobodan Milošević (unrepresented)

Amici Curiae

Mr Steven Kay
Mr Branislav Tapuškovic
Mr Mischa Wladimiroff

The appeal

1. Pursuant to leave granted by a Bench of the Appeals Chamber,[1] the Prosecutor ("prosecution") appealed against the decision of Trial Chamber III dismissing in part the application made to join the three indictments brought against Slobodan Milošević ("accused").[2] The Trial Chamber had ordered that two of the three indictments filed against the accused be joined, those relating to events in Croatia and Bosnia,[3] but it ordered that the first of the indictments, which related to events in Kosovo,[4] be tried separately and before the trial of the two joined indictments.[5]

2. Following an oral hearing of the interlocutory appeal,[6] the Appeals Chamber gave its formal decision by which it allowed the appeal. It ordered that there should be the one trial and that, for the purposes of that one trial, the three indictments were deemed to constitute one indictment.[7] It was stated that the Appeals Chamber's reasons for that decision would be issued in due course.[8] Those reasons are now stated.

The nature of the appeal

3. The prosecution accepts, correctly, that the decision of a Trial Chamber as to whether two or more crimes should be joined in the one indictment pursuant to Rule 49 of the Rules of Procedure and Evidence ("Rules") is a discretionary one.[9] A Trial Chamber exercises a discretion in many different situations – such as when imposing sentence,[10] in determining

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1 Decision on Prosecution Application for Leave to File an Interlocutory Appeal, 9 Jan 2002.
2 Decision on Prosecution's Motion for Joinder, 13 Dec 2001 ("Decision").
3 IT-01-50-I and IT-01-51-I, respectively.
4 IT-99-37-I.
5 Decision, par 53.
6 The hearing took place on 30 January 2002.
7 Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 1 Feb 2002 ("Formal Decision of Appeals Chamber"), p 3.
8 *Ibid*, p 4.
9 Interlocutory Appeal of the Prosecution Against "Decision on Prosecution's Motion for Joinder", 15 Jan 2002 ("Appellant's Written Submissions"), par 6. Rule 49, the full terms of which are discussed later, states: "Two or more crimes *may* be joined [...]" (the emphasis has been added).
10 *Prosecutor v Tadić*, IT-94-1-A and IT-94-1-A*bis*, Judgment in Sentencing Appeals, 26 Jan 2000 ("*Tadić* Sentencing Appeal"), par 22; *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Appeal"), par 187; *Prosecutor v Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000 ("*Furundžija* Appeal"), par 239; *Prosecutor v Delalić et al*, IT-96-21-A, Judgment 20 Feb 2001 ("*Delalić* Appeal"), pars 712, 725, 780; *Prosecutor v Kupreškić et al*, IT-96-16-A, Appeal Judgment, 23 Oct 2001 ("*Kupreškić* Appeal"), pars 408, 456-457, 460.

whether provisional release should be granted,[11] in relation to the admissibility of some types of evidence,[12] in evaluating evidence,[13] and (more frequently) in deciding points of practice or procedure.[14]

4. Where an appeal is brought from a discretionary decision of a Trial Chamber, the issue in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently. That is fundamental to any discretionary decision. It is only where an error in the exercise of the discretion has been demonstrated that the Appeals Chamber may substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber.

5. It is for the party challenging the exercise of a discretion to identify for the Appeals Chamber a "discernible" error made by the Trial Chamber.[15] It must be demonstrated that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.[16]

6. In relation to the Trial Chamber's findings of fact upon which it based its exercise of discretion, the party challenging any such finding must demonstrate that the particular finding

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[11] *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, par 22 (Leave to appeal denied: *Prosecutor v Brđanin & Talić*, IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 Sept 2000, p 3); *Prosecutor v Krajišnik & Plašvić*, IT-00-39&40-AR73.2, Decision on Interlocutory Appeal by Momčilo Krajišnik, 26 Feb 2002, pars 16, 22.

[12] *Prosecutor v Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 19; *Prosecutor v Kordić & Čerkez*, IT-95-14/2-73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, par 20; *Delalić* Appeal, pars 532-533.

[13] *Aleksovski* Appeal, par 64; *Kupreškić* Appeal, par 32.

[14] For example, granting leave to amend an indictment: *Prosecutor v Galić*, IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 Nov 2001, par 17; determining the limits to be imposed upon the length of time available to the prosecution for presenting evidence: *Prosecutor v Galić*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 Dec 2001, par 7.

[15] *Tadić* Sentencing Appeal, par 22; *Aleksovski* Appeal, par 187; *Furundžija* Appeal, par 239; *Delalić* Appeal, par 725; *Kupreškić* Appeal, par 408.

[16] *Tadić* Sentencing Appeal, par 20; *Furundžija* Appeal, par 239; *Delalić* Appeal, pars 725, 780; *Kupreškić* Appeal, par 408. *See* also *Serushago v Prosecutor*, ICTR-98-39-A, Reasons for Judgment, 6 Apr 2000, par 23.

was one which no reasonable tribunal of fact could have reached,[17] or that it was invalidated by an error of law. Both in determining whether the Trial Chamber incorrectly exercised its discretion and (in the event that it becomes necessary to do so) in the exercise of its own discretion, the Appeals Chamber is in the same position as was the Trial Chamber to decide the correct principle to be applied or any other issue of law which is relevant to the exercise of the discretion. Even if the precise nature of the error made in the exercise of the discretion may not be apparent on the face of the impugned decision, the result may nevertheless be so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[18] Once the Appeals Chamber is satisfied that the error in the exercise of the Trial Chamber's discretion has prejudiced the party which complains of the exercise, it will review the order made and, if appropriate and without fetter, substitute its own exercise of discretion for that of the Trial Chamber.[19]

The basis of the Trial Chamber's decision

7. The prosecution's argument before the Trial Chamber was that, although it had presented three separate indictments against the accused, the crimes charged in all three indictments should nevertheless be tried together because:

(i) they could all have been pleaded in the one indictment, because the acts upon which they are based were committed by the same accused,[20] and they formed part of the same transaction;

(ii) one trial would be the most fair and expeditious way of dealing with all the crimes charged;

(iii) the public interest in the efficient administration of international justice would best be served in having one trial;

(iv) the victims and witnesses would best be protected if they were required to give evidence only once; and

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[17] *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999 ("*Tadić* Conviction Appeal"), par 64; *Aleksovski* Appeal, par 63; *Furundžija* Appeal, par 37; *Delalić* Appeal, pars 434-435, 459, 491, 595; *Kupreškić* Appeal, par 30.

[18] *Aleksovski* Appeal, par 186.

[19] *cf* Tribunal's Statute, Article 25.2.

[20] Although the accused is charged with four other persons in the Kosovo indictment, and alone in the other two indictments, his four co-accused in the Kosovo indictment have not yet been arrested.

(v) inconsistent verdicts and sentences and multiple appeals would be avoided.[21]

8. The principal issue in dispute before the Trial Chamber was whether the events to which all three indictments related formed part of the same transaction. The prosecution's argument that they did so required an acceptance that the allegations made in the three indictments were all part of a common scheme, strategy or plan on the part of the accused to create a "Greater Serbia", a centralised Serbian state encompassing the Serb-populated areas of Croatia and Bosnia and all of Kosovo, and that this plan was to be achieved by forcibly removing non-Serbs from large geographical areas through the commission of the crimes charged in the indictments. Although the events in Kosovo were separated from those in Croatia and Bosnia by more than three years, they were, the prosecution claimed, no more than a continuation of that plan,[22] and they could only be understood completely by reference to what had happened in Croatia and Bosnia.[23] The events in Kosovo, it was said, amounted to a crime waiting to happen but which had been delayed by pressure from the international community.[24] The prosecution also argued that, were the Kosovo indictment to be heard separately, evidence of the accused's role in the events of Croatia and Bosnia would be admissible in that trial.[25]

9. The Trial Chamber described the "essence of the test" to be applied for joinder to be permitted as being –

> [...] to determine whether there were a series of acts committed which together formed the same transaction, *ie* part of a common scheme, strategy or plan. However, the reference to a "series" and the use of the phrase "committed together" in Rule 49 indicates that the acts must be connected in the same way that common law and civil law jurisdictions require. There is no power to join unconnected acts on the ground that they form part of the same plan. As Judge Shahabuddeen explained, the plan must be such that the counts represent interrelated parts of a particular criminal episode.[26] If

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[21] Prosecutor's Motion for Joinder, 27 Nov 2001 ("Motion"), pars 7, 8.

[22] Oral hearing of the Motion, 11 Dec 2001 ("Trial Chamber Hearing"), IT-01-51 Transcript p 77. References throughout this Decision are to the transcript taken in the Bosnia trial.

[23] Trial Chamber Hearing, IT-01-51 Transcript p 77.

[24] *Ibid*, pp 77-78.

[25] This is described in the Motion as similar fact evidence (par 30), but during the Trial Chamber Hearing it was said, more relevantly (but still not very clearly), that the evidence of the actions and thoughts of the accused in relation to Kosovo would be incomplete without the evidence of what happened in Croatia and Bosnia (Transcript, pp 51-52).

[26] Reference is made to *Prosecutor v Kovačević*, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, Separate Opinion of Judge Mohamed Shahabuddeen, pp 2-3: "Joinder of offences is of course possible, within limits. Additional charges must bear a reasonable relationship to the matrix of facts involved in the original charge. [...] the question is whether all the counts, old and new, represent interrelated parts of a particular criminal episode. [...] It is not necessary for all the facts to be identical. It is enough if the new charges cannot be alleged but for the facts which give rise to the old." That was said by Judge Shahabuddeen in an appeal from the refusal of a Trial Chamber to permit the
[footnote continued next page]

> there was no such series of acts and no plan, any application for joinder must fail. Where there is no similarity in time and in place, the conclusion that the counts represent interrelated parts of a particular criminal episode will be more difficult, albeit not impossible, to draw.[27]

10. When the Trial Chamber came to apply that test, it drew attention to the gap of more than three years between the last events in Bosnia and the first events in Kosovo,[28] to the facts that the conflicts in Croatia and Bosnia took place in neighbouring States to the Federal Republic of Yugoslavia ("FRY"), whereas those in Kosovo took place in the FRY itself,[29] and that the accused is alleged to have acted indirectly in relation to Croatia and Bosnia but directly (as the Supreme Commander of the Armed Forces of the FRY) in relation to Kosovo,[30] and to the circumstances that there is no reference to a "Greater Serbia" plan in the Kosovo indictment and the only reference to it in the Croatia and Bosnia indictments is in relation to other individuals.[31] The Trial Chamber concluded that such a nexus was –

> [...] too nebulous to point to the existence of "a common scheme, strategy or plan" required for the "same transaction" under Rule 49. As noted *supra*, there is a distinction in time and place between the Kosovo and the other Indictments and also a distinction in the way in which the accused is alleged to have acted. Consequently, the Trial Chamber does not consider that the acts alleged in the three Indictments form the same transaction for the purposes of Rule 49.[32]

On the other hand, the Trial Chamber concluded, the Croatia and Bosnia indictments "exhibit a close proximity in time, type of conflict and responsibility of the accused", and contained:

> [...] allegations of a series of acts which together formed the same transaction, *ie,* a plan to take over the areas with a substantial Serbian population in two neighbouring States.[33]

The Trial Chamber also relied upon a number of other matters affecting its discretion, to which reference will be made later.

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prosecution to add 14 counts (alleging breaches of the crimes falling within Articles 2, 3 and 5 of the Tribunal's Statute) to the original, sole, count of complicity in genocide (which falls under Article 4). The factual allegations in the original indictment were expanded for this purpose, but it is unclear from either the Decision or the Separate Opinion to what extent they went beyond the specific incidents pleaded in the original indictment. No point had been taken before the Trial Chamber that Rule 49 did not permit the joinder of the additional counts. Nor was any argument addressed to the Appeals Chamber to that effect. The Joint Decision made no reference to Rule 49.

27 Decision, par 36.

28 *Ibid*, par 42.

29 *Ibid*, pars 43-44.

30 *Ibid*, pars 43-44.

31 *Ibid*, par 45.

32 *Ibid*, par 45.

33 *Ibid*, par 46.

11. It is clear from these statements that the Trial Chamber's finding of fact for the purposes of Rule 49 – that the events in Kosovo did not form part of the same transaction as the events in Croatia and Bosnia – depended upon its interpretation of Rule 49 as requiring the acts to be "committed together" [« *commis ensemble* »]. The proper interpretation of Rule 49 was a question of law. If the Trial Chamber erred in relation to that question of law, its finding of fact was necessarily invalidated, and its discretion was wrongly exercised.

12. The issue of law upon which the Trial Chamber's finding of fact depended, therefore, was whether the prosecution had to establish that the events in Kosovo were "committed together" with the events in Croatia and Bosnia. To that issue, the Appeals Chamber now turns.

The relevant Rules, and their proper interpretation

13. Rule 49 ("Joinder of Crimes") has necessarily to be considered in conjunction with Rule 48 ("Joinder of Accused"), as each is based upon events which must form "the same transaction". That phrase is defined in Rule 2. As reference will be made to what could be a discrepancy between the English and French versions of Rule 49, and for convenience, the text of all three rules (Rule 2 so far as here relevant) is set out below in both languages.

Rule 48 **Joinder of Accused**	**Article 48** **Jonction d'instances**
Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.	Des personnes accusées d'une même infraction ou d'infractions différentes commises à l'occasion de la même opération peuvent être mises en accusation et jugées ensemble.
Rule 49 **Joinder of Crimes**	**Article 49** **Jonction de chefs d'accusation**
Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.	Plusieurs infractions peuvent faire l'objet d'un seul et même acte d'accusation si les actes incriminés ont été commis à l'occasion de la même opération et par le même accusé.
Rule 2 **Definitions**	**Article 2** **Définitions**
(A)In the Rules, unless the context otherwise requires, the following terms shall mean: [...] Transaction: A number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan;	A) Sauf incompatibilité tenant au contexte, les expressions suivantes signifient : [...] Opération: un certain nombre d'actions ou d'omissions survenant à l'occasion d'un seul événement ou de plusieurs, en un seul endroit ou en plusieurs, et faisant partie d'un plan, d'une stratégie ou d'un dessein commun ;

14. The English version of Rule 49 does contain the words "committed together" in sequence and, if Rule 49 were to be read in isolation, it is a possible interpretation of that Rule that it requires the prosecution to establish that all of the offences sought to be joined were committed together.[34] Such an interpretation, however, creates an unnecessary dichotomy between the test for the joinder of offences (which would require the indictment to show that they were committed together for the purposes of Rule 49) and the test for the joinder of defendants (where Rule 48 has no such requirement). Such an interpretation may also produce a difficulty of consistency with the definition of "transaction" in Rule 2. That definition clearly contemplates a much less restrictive approach by permitting the common scheme, strategy or plan to include one or a number of events at the same or different locations. There is no logical explanation immediately apparent for a distinction to be drawn between allowing different events at different locations but not allowing different events at different times.

15. More importantly, an interpretation of Rule 49 requiring the offences to have been committed together is not available in relation to the French version of the Rule where – for the words "if the series of acts committed together form the same transaction" – the Rule reads « *si les actes incriminés ont été commis à l'occasion de la même opération* », which translates literally as "if the acts charged have been committed as part of the same transaction". Rule 7 ("Authentic Texts") provides that the English and French texts of the Rules are equally authentic. In the case of a discrepancy, the Rule requires the version which is "more consonant with the spirit of the Statute and the Rules" to prevail, but this provision would normally be applied only where the discrepancy between the two versions is intractable. The Appeals Chamber is satisfied that the apparent discrepancy in the present case is not intractable.

16. Although neither the Tribunal's Statute nor its Rules of Procedure and Evidence are, strictly speaking, treaties, the principles of treaty interpretation have been used by the Appeals Chamber as guidance in the interpretation of the Tribunal's Statute, as reflecting customary rules.[35] Such principles may also be used appropriately as guidance in the interpretation of the

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[34] It is important to emphasise (as did the Trial Chamber) that, in an application under Rule 49, the Tribunal is concerned only with what is alleged in the indictment (or proposed indictment), and not with what may be established by evidence at the trial.

[35] *Tadić* Conviction Appeal, par 282; *Delalić* Appeal, pars 67-70. *See* also *Aleksovski* Appeal, par 98; *Prosecutor v Bagosora*, ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal From the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others, 9 June 1998, par 28.

Tribunal's Rules of Procedure and Evidence. Article 33 of the 1969 Vienna Convention on the Law of Treaties ("Interpretation of treaties authenticated in two or more languages") provides that the terms of a treaty are presumed to have the same meaning in each authentic text and that (except where the treaty provides that, in the case of divergence, a particular text shall prevail), when a comparison of the authentic texts discloses a difference of meaning which the application of the provisions of the Convention does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[36] In its Commentary upon Article 75 of the Draft Convention, which did not relevantly differ in substance from Article 33 of the Convention, the International Law Commission commented that there are few plurilingual treaties containing more than one or two articles without some discrepancy between the texts, if only through "the different genius of the languages".[37] The ILC stressed that, "in law there is only one treaty – one set of terms [...] and one common intention with respect to those terms – even when two authentic texts appear to diverge",[38] and that, because of the presumption that each of the authentic texts are to have the same meaning, "every effort should be made to find a common meaning for the texts before preferring one to another".[39]

17. The words in the English version of Rule 49 already quoted may also reasonably be interpreted as "if the series of acts committed [by the accused] together [in the sense of 'considered together as a whole'] form the same transaction". Such an interpretation would be fully consistent with the French version, and there would be no discrepancy between the two versions, or inconsistency with the definition of "transaction" in Rule 2 or with Rule 48, such as is produced by the interpretation which the Trial Chamber adopted.

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[36] For examples of instances where this principle has been applied, *see*: *Mavrommatis Palestine Concessions* case, 1924, CPIJ, Series A, No 2, pp 9, 18-19; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Dantzig Territory*, 1932, CPIJ, Series A/B, No 44, p 6; *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, *Judgment*, *ICJ Reports* 1988, pp 69, 89, par 45; *Electronica Sicula SpA (ELSI)*, *ICJ Reports* 1989, pp 15, 79, par 132; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Jurisdiction and Admissibility, *Judgment*, *ICJ Reports* 1995, p 6, pars 34-40; *Germany v United States of America*, "LaGrand Case", Judgment, 27 June 2001, par 101. *See* also, *Young Loan* Arbitration (1980), 59 ILR 495, pars 548-550. In the most recent of these, the "LaGrand Case", the International Court of Justice said (at par 101): "In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law. This provision reads 'when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'."

[37] *Yearbook of the International Law Commission*, 1964, Vol II, A/CN.4/SER.A/1964/ADD.1, p 63.

[38] *Ibid*, p 63.

[39] *Ibid*, pp 63-64.

18. The Appeals Chamber is satisfied that, properly interpreted, Rule 49 does *not* require the events in Kosovo to have been "committed together" with the events in Croatia and Bosnia. It is unfortunate that the argument put to the Appeals Chamber and based upon the inconsistency between the English and French versions of the Rule if the former were interpreted in the way suggested by the Trial Chamber was not put to the Trial Chamber for its consideration. As the Trial Chamber has been shown to have erred in relation to the proper interpretation of Rule 49 (a question of law), its finding of fact that the events in Kosovo did not form part of the same transaction as the events in Croatia and Bosnia based upon that interpretation is invalidated, and its discretion must be found to have been wrongly exercised as a result of that error of law.

The same transaction?

19. It therefore becomes necessary now for the Appeals Chamber to determine for itself whether all these events formed part of the same transaction – as being part of a common scheme, strategy or plan. Although this Chamber is not for that purpose bound by the particular matters which led to the Trial Chamber's decision that the events in Kosovo did not form part of the same transaction as the events in Croatia and Bosnia, it is nevertheless appropriate to consider them – particularly in the present case where there is, effectively, no contradictor to the prosecution's appeal. As already indicated,[40] those matters were the gap of more than three years between the last events in Bosnia and the first events in Kosovo, the facts that the conflicts in Croatia and Bosnia took place in neighbouring States to the Federal Republic of Yugoslavia ("FRY"), whereas those in Kosovo took place in the FRY itself, and that the accused is alleged to have acted indirectly in relation to Croatia and Bosnia but directly (as the Supreme Commander of the Armed Forces of the FRY) in relation to Kosovo, and the circumstances that there is no reference to a "Greater Serbia" plan in the Kosovo indictment and the only reference to it in the Croatia and Bosnia indictments is in relation to other individuals.

20. Each of those matters is a relevant consideration, but none is decisive. Nor are they in combination an answer to the prosecution's application when, as the Appeals Chamber has now held, it is unnecessary for the prosecution to establish that the events in Kosovo were "committed

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[40] Paragraph 10, *supra*.

together" with the events in Croatia and Bosnia. The wording of the indictments could certainly have been better expressed to bring out the overall nature of the prosecution case but, when taken as a whole, the three indictments make it sufficiently clear that the purpose behind the events in each of the three areas for which the accused is alleged to be criminally responsible was the forcible removal of the majority of the non-Serb civilian population from areas which the Serb authorities wished to establish or to maintain as Serbian-controlled areas by the commission of the crimes charged.[41] The fact that some events occurred within a province of Serbia and others within neighbouring states does not alter the fact that, in each case, the accused is alleged to have acted in order to establish or maintain Serbian control over areas which were or were once part of the former Yugoslavia. The fact that the accused is alleged to have acted directly in the province but indirectly in the neighbouring states merely reflects the available means by which the accused is alleged to have sought to achieve the same result.

21. On the other hand, the delay of three years between the last events in Bosnia and the first events in Kosovo is emphasised by the allegation in the Kosovo indictment that the joint criminal enterprise is pleaded as having come into existence "no later than October 1998",[42] rather than at a time when the joint criminal enterprise relating to the events in Croatia and Bosnia came into existence. Nevertheless, the Appeals Chamber does not interpret Rule 49 (together with the definition of "transaction" in Rule 2) as requiring the transaction in question to maintain exactly the same parameters at all times. A common scheme, strategy or plan may include the achievement of a long term aim. Here, that long term aim is alleged to have been to establish or to maintain control by the Serb authorities over particular areas which were or were once part of the former Yugoslavia. Each of the stages of the conflict in the Balkans has been marked by conflict breaking out in different places at different times, either as a result of or as requiring

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[41] In relation to the events in *Croatia*, Indictment IT-01-50 pleads (at par 6) that the purpose of the joint criminal enterprise of which the accused is alleged to have been a member was:

> [...] the forcible removal of the majority of the Croat and other non-Serb population from the approximately one-third of the territory of the Republic of Croatia that he planned to become part of a new Serb-dominated state through the commission of crimes in violation of Articles 2, 3, and 5 of the Statute of the Tribunal.

In relation to the events in *Bosnia*, Indictment IT-01-51 pleads (at par 6) that the purpose of the joint criminal enterprise of which the accused is alleged to have been a member was:

> [...] the forcible and permanent removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats, from large areas of the Republic of Bosnia and Herzegovina [...], through the commission of crimes which are in violation of Articles 2, 3, 4 and 5 of the Statute of the Tribunal.

In relation to the events in *Kosovo*, Indictment IT-99-37 pleads (at par 16) that the purpose of the joint criminal enterprise of which the accused is alleged to have been a member was:

> [...] *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province.

[42] Indictment IT-99-37, par 17. This allegation is repeated in the Pre-Trial Brief, par 113.

action by the Serb authorities (so the prosecution case would have it) to ensure their domination of those areas. A joint criminal enterprise to remove forcibly the majority of the non-Serb population from areas which the Serb authorities wished to establish or to maintain as Serbian controlled areas by the commission of the crimes charged remains the same transaction notwithstanding the fact that it is put into effect from time to time and over a long period of time as required. Despite the misleading allegation in the Kosovo indictment, therefore, the Appeals Chamber is satisfied that the events alleged in all three indictments do form part of the same transaction.

Discretionary considerations

22. Having determined that the requirements of Rule 49 have been satisfied by the prosecution, the Appeals Chamber must next determine whether it should nevertheless exercise the discretion given by that Rule to refuse the joinder sought notwithstanding that all the crimes charged in the indictments concern the same transaction. Again, although the Appeals Chamber is not bound by the particular matters which led the Trial Chamber to decide that it would in any event have refused the joinder in the exercise of its discretion,[43] it is nevertheless appropriate for the reason expressed earlier to consider them in the present case.[44] Those matters were (i) the prejudice seen to the accused's rights under Article 21 of the Tribunal's Statute to a fair and speedy trial which would be caused by the lack of readiness on the part of the prosecution to proceed with a trial which included the events in Croatia and Bosnia,[45] (ii) the interests of justice, in that the length of a single trial would make it less manageable than two separate trials,[46] (iii) the onerous nature of such a trial for the accused personally,[47] and (iv) the possible prejudice to him in relation to evidence relevant to Croatia and Bosnia but not relevant to Kosovo.[48]

23. The prosecution gave different estimates to the Appeals Chamber as to when it would be ready for a trial of the Croatia and Bosnia indictments to those which it gave to the Trial

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[43] As the Trial Chamber had determined that the requirements of Rule 49 had not been satisfied by the prosecution, it was unnecessary for it to exercise its discretion under the Rule, but it was not inappropriate for the Trial Chamber to have done so as an alternative to its principal determination.

[44] Paragraph 18, *supra*.

[45] Decision, pars 38, 49, 52.

[46] *Ibid*, pars 39, 47.

[47] *Ibid*, par 50.

[48] *Ibid*, par 50.

Chamber. Even though those shorter estimates given to the Appeals Chamber may prove to be unduly optimistic, the Appeals Chamber nevertheless determined in its formal decision allowing the prosecution's appeal that, unless the Trial Chamber otherwise decided, the trial of the joined three indictments should commence on 12 February 2002, the date fixed by the Trial Chamber for the commencement of the trial of the Kosovo indictment. That order was made subject to the condition that evidence relevant only to the Kosovo events would be adduced until the material relating to the Croatia and Bosnia indictments (including that which must be disclosed pursuant to Rules 66 and 68) has been made available to the accused and until his rights pursuant to Article 21 of the Tribunal's Statute in relation to that material had been complied with.[49]

24. On appeal, the prosecution criticised the finding of the Trial Chamber that the length of a single trial in this case would make it less manageable than two separate trials, upon the basis that it had failed to elaborate in its Decision what those difficulties would be.[50] Such difficulties are obvious. The sheer number of different events which the prosecution has to establish to prove its case in relation to all three indictments, the usual (and understandable) inability of the parties to concentrate the production of their evidence in relation to each event, the time which necessarily elapses between hearing the evidence and the final submissions and writing the judgment, and the likelihood that counsel, too, will (understandably) for the same reasons be less able to assist the Trial Chamber because of the size of the trial are all so obvious that they did not need to be stated. It is important that the Trial Chamber described a single trial as being *less* manageable than two separate trials; it did not state that a single trial would be unmanageable. What the Trial Chamber said was no more than common sense.

25. That a single trial will indeed be long and complex is inevitable once the nature of the overall purpose which the prosecution seeks to establish in a trial of the joined charges is recognised. The prosecution will bear a heavy responsibility to ensure that the single trial which it wanted does not become unmanageable by overloading the Trial Chamber and the Defence with unnecessary material. The prosecution must ensure that only essential evidence to prove its case is presented, and that inessential evidence is discarded. If it sees that evidence which it leads in relation to a particular event is not relevantly and meaningfully challenged in cross-examination, it should not continue to call evidence in relation to that event. Subject to the

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[49] Formal Decision of Appeals Chamber, p 3.
[50] Appellant's Written Submissions, par 70.

rulings of the Trial Chamber, substantial reliance should be placed upon the provisions of Rule 92*bis*, which permits evidence of a witness to be given in the form of a written statement in lieu of oral testimony of matters other than "the acts and conduct of the accused as charged" in the indictments, with the witnesses being called for cross-examination if the Trial Chamber so decides.

26. If the prosecution fails to discharge this responsibility, the Trial Chamber has sufficient powers under the Rules of Procedure and Evidence to order the prosecution to reduce its list of witnesses to ensure that the trial remains as manageable as possible. Finally, if with the benefit of hindsight it becomes apparent to the Trial Chamber that the trial has developed in such a way as to become unmanageable – especially if, for example, the prosecution is either incapable or unwilling to exercise the responsibility which it bears to exercise restraint in relation to the evidence it produces – it will still be open to the Trial Chamber at that stage to order a severance of the charges arising out of one or more of the three areas of the former Yugoslavia. Nothing in the present Decision or in these reasons will prevent it from doing so.

27. The third matter which the Trial Chamber took into account in the exercise of its discretion to refuse the application was the onerous nature of such a trial for the accused personally. That is a relevant matter, but there must be taken into account also the onerous nature of two successive trials which in total would inevitably take even longer than a single trial. As has been shown to be necessary in all long trials before this Tribunal, the Trial Chamber will from time to time have to take a break in the hearing of evidence to enable the parties to marshal their forces and, if need be, for the unrepresented accused to rest from the work involved. The responsibility for the accused's decision not to avail himself of defence counsel, however, cannot be shifted to the Tribunal. When asked his view by the Trial Chamber, the accused merely criticised the prosecution's reliance upon reasons of "judicial economy" by saying that the prosecution "certainly don't care whether I will be fatigued or not".[51] He was similarly asked by the Appeals Chamber to state whether he would prefer to defend himself in a single trial, and he replied:[52]

> [...] how you are going to conduct your proceedings, that's up to you. I will give you no suggestions regarding that.

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[51] Trial Chamber Hearing, IT-01-51 Transcript p 134.

[52] Oral Hearing of the Interlocutory Appeal, 30 Jan 2002 ("Appeals Chamber Hearing"), IT-01-51 Transcript p 352. References throughout this Decision are to the transcript taken in the Bosnia trial.

However, two of the *amici curiae* addressed the Trial Chamber to support the prosecution application for a joinder upon the basis that a single trial would be less burdensome for the accused than multiple trials,[53] a view which was reiterated before the Appeals Chamber.[54]

28. The last of the matters which the Trial Chamber is said to have taken into account in the exercise of its discretion to refuse the application was the possible prejudice to the accused in relation to evidence admissible in relation to Kosovo but not admissible in relation to Croatia and Bosnia. The Trial Chamber said this:[55]

> The Prosecution also argued that the accused would receive a fairer and more expeditious trial in the case of a single trial. However, in the Trial Chamber's view, the fact that the accused would have to defend himself on the contents of three Indictments together would be onerous and prejudicial, particularly in the case of the Kosovo Indictment and its different circumstances. The Trial Chamber, comprised as it is of professional judges, should not to [*sic*] be influenced by prejudicial evidence in one trial affecting another. However, if there is such a risk, the evidence must be excluded.

On appeal, the prosecution has argued that this statement has "raised the spectre of excluding evidence even in separate trials if the Trial Chamber would not be able to keep the matters separate", and that this would unnecessarily prejudice the prosecution.[56]

29. It must be said that the Trial Chamber perhaps did not make its meaning entirely clear in the passage quoted, but the interpretation placed upon it by the prosecution would necessarily create a contradiction between the last two sentences. A far more likely interpretation of the passage quoted – one which creates no such contradiction between the two sentences – is that, if evidence were to be admitted in the Kosovo trial which would be prejudicial to the accused in the Croatia and Bosnia trial, the members of the Trial Chamber as professional judges would be able to exclude that prejudicial evidence from their minds when they came to determine the issues in the Croatia and Bosnia trial. That is a task which is commonplace in domestic jurisdictions when, for example, a judge has to deal with two co-accused who have fought "cut throat" defences of blaming each other. It would be quite wrong to attribute an unreasonable interpretation to the Trial Chamber when such a reasonable one is the more likely. The Appeals Chamber does not accept that the Trial Chamber treated the issue as one which affected its discretion to refuse the joinder sought.

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[53] Mr Kay, purporting to express the views of all three *amici curiae*: Trial Chamber Hearing, IT-01-51 Transcript pp 118-119; Mr Wladimiroff: *Ibid*, p 111.
[54] Mr Tapušković: Appeals Chamber Hearing, IT-01-51 Transcript p 364; Mr Kay: *Ibid*, p 366.
[55] Decision, par 50.
[56] Appellant's Written Submissions, par 57.

30. The Appeals Chamber does not accept that any of these matters compels it to exercise its discretion to refuse the joinder sought. In the view of the Appeals Chamber, any possible prejudice to the accused in facing one trial (and it sees none of any significance) is completely outweighed by the fact that a substantial body of evidence relevant to the issue of the acts and conduct of the accused himself in the Croatia and Bosnia trial is also relevant to that issue in the Kosovo trial. If there were to be two separate trials, there would necessarily be a large amount of evidence which would have to be repeated in each.[57] In order to establish that the accused participated in a joint criminal enterprise (stated in general terms) to remove forcibly the majority of the non-Serb population from areas which the Serb authorities wished to establish or to maintain as Serbian controlled areas by the commission of the crimes charged, the prosecution must establish that he intended that those crimes be committed for that purpose.[58]

31. A person's state of mind is no different to any other fact concerning that person which is not usually visible or audible to others. It may be established by way of inference from other facts in evidence. Where, as here, the state of mind to be established is an essential ingredient of the basis of criminal responsibility charged, the inference must be established beyond reasonable doubt. If there is any other inference reasonably open from the evidence which is consistent with the innocence of the accused, the required inference will not have been established to the necessary standard of proof. Any words of or conduct by the accused which point to or identify a particular state of mind on his part is relevant to the existence of that state of mind. It does not matter whether such words or conduct precede the time of the crime charged, or succeed it. Provided that such evidence has some probative value, the remoteness of those words or conduct to the time of the crime charged goes to the weight to be afforded to the evidence, not its admissibility. The prosecution would therefore be entitled to prove in the Kosovo trial what is in effect its case in the Croatia and Bosnia trial. To have to do so twice would be a grave waste of the scarce resources available, for no discernible benefit.

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[57] This is not directed to the prosecution's complaint that many witnesses would have to give evidence twice (Appellant's Written Submissions, pars 54-55). It is directed to the evidence itself.

[58] *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999, par 196; *Prosecutor v Brđanin & Talić*, IT-99-36-PT, 26 June 2001, par 26.

32. For all these reasons, the Appeals Chamber was satisfied that the joinder sought by the prosecution was justified and should, in the exercise of the Appeals Chamber's own discretion, be granted.

A technical submission

33. The prosecution's interlocutory appeal was heard expeditiously on the basis of the original record of the Trial Chamber, without requiring a formal record of proceedings, and without requiring the *detailed* Briefs from the parties which are otherwise required by Rules 111-113. This was done pursuant to Rule 116*bis*, which is directed to the hearing of interlocutory appeals and which permits such appeals (where appropriate) to be determined entirely on the basis of written briefs. In the present case, of course, there was an oral hearing.

34. It was submitted by Mr Tapušković (an *amicus curiae*) that, as the application for leave to appeal was filed by the prosecution pursuant to Rule 73(D) on 20 December 2001, no such procedure was then available for an expedited hearing.[59] His submission was that such a procedure only became available when Rule 116*bis* was amended to include applications for leave to appeal pursuant to Rule 73(D), the amendment becoming effective as from 28 December 2001.[60] This was, he submitted, untenable and contrary to legal principle.[61] Because of the importance of the issue raised and its delicate nature, he said, in fairness the expedited hearing procedure should not have been applied,[62] and its adoption had denied time for the *amici curiae* to file a Brief of thirty pages or so.[63]

35. These submissions are misconceived. Prior to the amendment of Rule 73 in April 2001, leave to appeal from decisions given on motions other than preliminary motions was sought and granted pursuant to Rule 73(B). At that time, Rule 116*bis* provided that an appeal under Rule 73(B) was to be heard expeditiously on the basis of the original record of the Trial Chamber and might be determined entirely on the basis of written briefs. This was the procedure adopted in most interlocutory appeals once leave had been granted.

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[59] Appeals Chamber Hearing, IT-01-51 Transcript, p 374.
[60] *Ibid*, p 354.
[61] *Ibid*, p 355.
[62] *Ibid*, p 358.
[63] *Ibid*, p 374.

36. In April 2001, Rule 73 was amended to insert new paragraphs (B) and (C), to deal with appeals from decisions rendered during the course of the trial on motions involving evidence and procedure. What had been Rule 73(B), dealing with the grant of leave for interlocutory appeals, became Rule 73(D). Rule 116*bis*, however, was not amended to conform with this change until 12 December 2001, by substituting "Rule 73" for "Rule 73(B)". This was the amendment which came into operation on 28 December 2001. It did no more than repeat the substance of the original rule, and to continue its application to interlocutory appeals from decisions given on motions other than preliminary motions. The submission that interlocutory appeals pursuant to Rule 73(D) could be heard expeditiously for the first time in December 2001, after the prosecution has sought leave to appeal, is therefore plainly wrong.

37. The complaint by Mr Tapušković concerning the denial of time to file a Brief is also misconceived. A party to the proceedings at first instance who wishes to oppose the grant of leave to appeal from an interlocutory decision of a Trial Chamber is permitted to file a response to the motion for leave within ten days of that motion.[64] Once leave has been granted, such a party may file a response to the interlocutory appeal itself within ten days.[65] Such a response may be thirty pages in length.[66] This remains the case whether the appeal is dealt with expeditiously or otherwise. The only difference between the ordinary appeal and an expeditious appeal in the present case is the absence of a formal record of the proceedings. The *amicus curiae* have therefore suffered no prejudice by the adoption of the expeditious appeal procedure.

38. The submission made by Mr Tapušković is unfounded.

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[64] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, 1 Oct 1999 (IT/155), par 5. The position is the same in par 5 of the Revised IT/155, 7 Mar 2002.

[65] *Ibid*, par 8. Again, the position is the same in par 8 of the Revised IT/155, 7 Mar 2002.

[66] Practice Direction on the length of Briefs and Motions, 19 Jan 2001 (IT/184), par 2(b)(2). The position is the same in par 2(b)(2) the Revised IT/185, 5 Mar 2002.

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IT-01-51-AR73 ~~IT-01-50-AR73~~ ~~IT-99-37-AR73~~ 366 366 366

Done in French and English, both texts being equally authoritative.

Dated this 18th day of April 2002,
At The Hague,
The Netherlands.

Judge Claude Jorda
Presiding

[Seal of the Tribunal]

ICTR Case Law and Documents

NTAKIRUTIMANA PRELIMINARY MOTION

DECISION

ICTR-96-10-I
15-7-98
(513 - 512)

545 51

UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda
TRIAL CHAMBER II

OR: ENG

Before: Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Lennart Aspegren

Registry: Mr. John Kiyeyeu

THE PROSECUTOR
versus
GÉRARD NTAKIRUTIMANA, et al.

Case N° ICTR-96-10-T

DECISION ON A PRELIMINARY MOTION FILED BY DEFENCE COUNSEL FOR AN ORDER TO QUASH COUNTS 1, 2, 3, AND 6 OF THE INDICTMENT

Office of the Prosecutor:

Ms. Brenda Sue Thornton

Counsel for the Defence:

Mr. E.N.K. Loomu-Ojare (Counsel for Gérard Ntakirutimana)
Mr. Pascal Besnier (Counsel for Obed Ruzindana)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

SITTING AS Trial Chamber II composed of Judge William H. Sekule, presiding, Judge Yakov A. Ostrovsky, and Judge Lennart Aspegren;

CONSIDERING that the accused, Gérard Ntakirutimana, was arrested in Côte d'Ivoire on 29 October 1996 and transferred to the Tribunal's Detention Unit on 30 November 1996, pursuant to an order initially confirmed by Judge William H. Sekule on 7 September 1996, in accordance with Rule 40*bis*(B) of the Rules of Procedure and Evidence of the Tribunal, adopted on 5 July 1995 ("the Rules");

CONSIDERING that the instant indictment (ICTR-96-10) against the accused was confirmed by Judge Tafazzal H. Khan on 20 June 1996, pursuant to Rule 47 of the Rules;

CONSIDERING that the accused made his initial appearance on 2 December 1996 pursuant to Rule 62 of the Rules and pleaded not guilty to all six counts in the indictment;

CONSIDERING that Defence Counsel filed a preliminary motion on 16 April 1997, pursuant to Rule 72 of the Rules, seeking an order to quash counts 1, 2, 3, and 6 of the said indictment and that Defence Counsel also sought a waiver of the prescribed time limit as set out in Rule 72 of the Rules;

CONSIDERING that the Prosecutor opposed Defence Counsel's motion in her written response of 6 October 1997;

CONSIDERING the Tribunal's previous decision on a similar motion by the accused, with respect to a separate indictment, rendered on 23 March 1998, ("Trial Chamber I decision")

HAVING heard the parties at the audience of 29 May 1998 held to that effect;

AFTER HAVING DELIBERATED

On the waiver of the prescribed time limit:

1. At the hearing of the instant motion, the Defence Counsel requested that the prescribed time limit to file preliminary motions pursuant to Rule 72(A) of the Rules, be waived and the Tribunal condone the late filing of this motion. This Rule, as applicable before 6 June 1997, stated that preliminary motions shall be brought by the accused within sixty days from his initial appearance, as amended.

2. The Tribunal notes that at present all preliminary motions are brought pursuant to Rule 72 of the Rules. This Rule states that preliminary motions shall be brought within sixty days following disclosure by the Prosecutor to the Defence of the all the materials, as envisaged by Rule 66(A).

3. The Defence Counsel submitted that the prescribed time limit for filing preliminary motions should be waived in light of the fact that the present counsel was assigned to the case on 10 March 1997 and the instant motion was filed on 16 April 1997, constituting a period of less than thirty days from when he was served with the necessary disclosing materials. Furthermore, he reminded the Tribunal that the previously assigned Counsel had manifested her intentions to file such motions in

due time. These facts combined, the Defence Counsel argued, should be seen by the Tribunal as the continuing intent of the Defence to file preliminary motions.

4. Although Rule 72(F) clearly provides that failure to comply with the prescribed time limits constitutes a waiver of these rights, it goes on to state that a Trial Chamber may grant relief upon a showing of good cause. In light of the circumstances, the Tribunal waived the time limits and permitted the late filing of this motion. The Tribunal then proceeded to hear the substance of the parties arguments.

On the quashing of counts:

5. Article 17(4) of the Statute of the Tribunal ("the Statute") states "Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of facts and of the crime or crimes with which the accused is charged under the Statute." (emphasis added.) The Tribunal notes that neither the Statute nor the Rules define the term "prima facie" however Rule 47(A) of the Rules provides some guidance in defining the term as applicable to such situations. Rule 47(A) states that if the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime she shall prepare and forward an indictment for confirmation.

6. The Tribunal is of the view that the word "reasonable" is to be associated with fairness, moderation, sensibility and sound judgement. The term "reasonable grounds" can be interpreted as facts and circumstances which could justify a reasonable or ordinarily prudent person in believing that a suspect has committed a crime. There must be facts which raise a clear suspicion that the suspect is guilty of committing the offence, for reasonable grounds to exist. These facts must address the essential elements of the offence with which the suspect is charged.

7. Furthermore, the Tribunal deems that the Prosecutor must possess "sufficient evidence" to legally justify her actions in preparing and forwarding an indictment, to a judge or Trial Chamber, for confirmation. It is clear that the term "sufficient evidence" in Rule 47(A) of the Rules could not be deemed to require conclusive evidence or evidence beyond a reasonable doubt for the presentation of an indictment. A conviction could only result from essential facts, supported by conclusive evidence.

8. Consequently, the Tribunal reaffirms Trial Chamber's interpretation of the term "prima facie" in Article 17(4) of the Statute to signify a sufficient amount of evidence, justifying a reasonable suspicion that the indictee did in fact commit the crime for which he is charged.

9. Article 20(4)(a) of the Statute stipulates that the accused must be informed in detail of the nature and cause of the charge or charges against him. Rule 47(B) of the Rules states that an indictment shall contain the name and particulars of the suspect, a concise statement of the facts of the case and the crime or crimes with which the suspect is charges.

10. This Trial Chamber adopts the view expressed in the Trial Chamber I decision that the indictment, "at the time of confirmation, has two purposes, the first being to ensure that the allegations against the suspect do constitute an offence within the jurisdiction of the Tribunal, and the second being to inform the suspect in a clear and concise manner the nature of the charges against him. At that stage of the proceedings the purpose of the indictment is not to put the accused in a position to prepare his defence, since the Prosecutor's investigation against the accused may not

be complete, but rather to ensure that the accused has full knowledge and understanding of the charges against him and is able to plead to these charges at his initial appearance, in accordance with Rule 62 of the Rules. The accused will have ample opportunity and adequate means to prepare his defence once he has received supporting documentation in accordance with Rule 66(A)(i) and disclosure of witness statements in terms of Rule 66(A)(ii) of the Rules." We also are in accord by the general remarks made in that decision. (*see* paras. 13 and 14).

Count 1

11. Count 1 of the confirmed indictment against Gérard Ntakirutimana alleges that the accused committed genocide, in violation of Article 2(3)(a) of the Statute, in that he ". . . is responsible for the killings or causing serious bodily or mental harm to members of the Tutsi population . . ." (pg. 3 of the indictment).

12. At the hearing, the Defence Counsel reiterated its point that this count is ". . . duplex and irregular . . ." (para. 5 of defence motion) because it charges the accused with the commission of two of the specified acts as set out in Article 2(2) of the Statute (para. 5 of defence motion). In support of his submission, Defence Counsel argued that Article 2(2), under sub-articles (a), (b), (c), (d), and (e) provide for various specific acts by which a perpetrator can commit an offence of genocide and each specific act can only be charged in one count of the indictment.

13. The Prosecutor submitted that count 1 is validly drafted and is not duplex. Additionally, she stated that, the Rule against duplicity is aimed at preventing more than one offence from being charged against an accused in a single count. This rule, according to the Prosecutor, does not prevent different means of committing the same offence from being described in one count.

14. We concur with Trial Chamber I's interpretation of the word "duplex", i.e., that Defence Counsel used the word to mean duplication. Therefore, we reject his submission that count 1 of the indictment is duplicated. The Tribunal could accept the Prosecutor's submission that a description of several means of committing a single act is allowed, but this is not what she has done in count 1 of the indictment.

15. As noted above, count 1 of the indictment the Prosecutor alleges that the accused is ". . . responsible for the killing or causing of serious bodily *or* mental harm to members of the Tutsi population . . ." (pg. 3 of the indictment, emphasis added). The word "or" suggests that the acts alleged in this count are in the alternative. The Tribunal therefore finds that this count is vague and lacks legal precision. Consequently the Prosecutor should be called upon to specify whether the accused is alleged to have committed acts of genocide under Articles 2(2)(a) or 2(2)(b) or whether she is alleging that the accused committed acts of genocide under both articles.

Count 2

16. With respect to count 2 the Defence Counsel's submissions and the Prosecutor's responses were identical to those concerning count 1.

17. As a result, the Tribunal should reject the Defence Counsel's submission that count 2 of the indictment is duplicated. However, the Tribunal is of the opinion that the Prosecutor should specify, under count 2, which of the acts enumerated under Article 2(2) of the Statute, the accused is alleged to have committed that constitute genocide.

Count 3

18. In respect of count 3 the Defence Counsel's submission and the Prosecutor's responses were again identical to those concerning counts 1 and 2.

19. The Tribunal consequently rejects Defence Counsel's submission that count 3 of the indictment is duplicated. However the Tribunal is of the opinion that the Prosecutor should specify under count 3 which of the acts enumerated under Article 2(2) of the Statute the accused is alleged to have committed that constitute conspiracy to commit genocide.

20. The Prosecutor asserts in count 3, that the accused conspired ". . . with others. . ." to commit genocide ". . . during the months of April through June 1994. . . ." (pg. 4 of the indictment).

21. Again, we find ourselves in agreement with Trial Chamber I's decision in its pronouncement that "The Tribunal estimates that a charge is not an accusation in the abstract but a concrete accusation of an offence alleged to have been committed by the accused. This accusation must have arisen as a result of certain facts that the Prosecutor has in her possession. The Prosecutor must be precise when formulating the counts in the indictment. It is therefore necessary that the Prosecutor, under Article 3, mentions the names or other identifying information of the person or persons the accused is alleged to have conspired with, to commit genocide." (para. 26).

Count 6

22. During the hearing of this motion, the Defence Counsel submitted that count 6 of the indictment was imprecise, dangerously speculative and did not disclose an offence. In support of this submission, Defence Counsel argued that there is no offence known as " . . . other inhumane acts . . ." (para. 7) and the Prosecutor must mention what these other inhumane acts are in order for this count to constitute an offence.

23. The Prosecutor responded that count 6 was not vague and that the accused was provided with sufficient information to enable him to understand this count. She also referred the Tribunal to consider the indictment in its entirety, including the counts and the statement of facts, which should ostensibly lead the accused to know the charges against him. The accused has had the benefit of disclosure as required under Rule 66(A)(i) and (ii) of the Rules, in redacted form and he will have the benefit of full disclosure before trial. The accused therefore, according to the Prosecutor, will have full knowledge of the case he is to meet. The Prosecutor further submitted that whether or not an act falls within the category of other inhumane acts, under Article 3(i) of the Statute, ". . . is a matter for the evaluation of the Trial Chamber . . . ." (para. 19 of Prosecutor's response).

24. The Tribunal finds good grounds to reject the Prosecutor's submissions in respect of count 6 and for requesting her to specify the act or acts which the accused is alleged to be responsible for, constituting inhumane acts under Article 3(i) of the Statute.

FOR THESE REASONS THE TRIBUNAL :

(A) **DISMISSES** the defence motion to quash counts one, two, three, and six of the indictment;

(B) **ORDERS** the Prosecutor to either withdraw or amend the respective counts in the indictment in the following manner :

(i) by specifying in counts one, two, and three which one of the two acts the accused is alleged to have committed, or alternatively whether the accused is alleged to have committed both acts;

(ii) by specifying in count three, the names or other identifying information of the person or persons with whom the accused is alleged to have conspired;

(iii) by further specifying in count six, the inhumane act or acts, the accused is alleged to have committed;

(C) **INVITES** the Prosecutor to amend the respective counts as ordered, within 30 days from the signing of this order.

Arusha, 30 June 1998

William H. Sekule
Presiding Judge

Yakov A. Ostrovsky
Judge

Lennart Aspegren
Judge

(Seal of the Tribunal)

NATIONAL CASES

B(G) CASE

R. v. B. (G.), 1990 CanLII 115 (S.C.C.)

PDF Format
Date: 1990-06-07
Docket: 20932 • 20933 • 20905 • 20919 • 20931
Parallel citations: [1990] 2 S.C.R. 57 • [1990] 4 W.W.R. 577 • (1990), 56 C.C.C. (3d) 161 • (1990), 56 C.C.C. (3d) 181 • (1990), 56 C.C.C. (3d) 200 • (1990), 77 C.R. (3d) 327 • (1990), 77 C.R. (3d) 347 • (1990), 77 C.R. (3d) 370 • (1990), 86 Sask. R. 111 • (1990), 86 Sask. R. 142 • (1990), 86 Sask. R. 81
URL: http://www.canlii.org/en/ca/scc/doc/1990/1990canlii115/1990canlii115.html

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R. *v.* B. (G.), [1990] 2 S.C.R. 57

G.B., C.S., H.H., S.S. and A.B. *Appellants*

v.

Her Majesty The Queen *Respondent*

indexed as: r. *v.* b. (g.)

File Nos.: 20905, 20931, 20933, 20932, 20919.

1989: November 29; 1990: June 7.

Present: Wilson, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

on appeal from the court of appeal for saskatchewan

Criminal law -- Appeals -- Powers of court of appeal -- Crown appeal against acquittal -- Criminal Code providing that Crown may appeal an acquittal on a question of law alone -- Whether Court of Appeal exceeded its jurisdiction in overturning acquittals and ordering a new trial -- Criminal Code, R.S.C. 1970, c. C-34, ss. 605(1), 613(4).

Appellants, who were elementary school students, were acquitted at trial of sexually assaulting a fellow student. The trial judge had a reasonable doubt as to their involvement in the alleged assault. He also found that the date of the offence was an essential element and that it had not been proved.

The complainant was eight years old at the time of the alleged offence and nine at the time of the trial. The Crown's other key witness, Z, a co-accused and accomplice who had pleaded guilty to the same charge, was fourteen at the time of trial. Both were sworn. The complainant's evidence, however, was found to be unreliable. Z's evidence was not accepted either.

The Court of Appeal allowed the appeal and ordered a new trial. The appeal had been lodged under s. 605(1)(*a*) of the *Criminal Code*, which provides for a Crown appeal on a question of law

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alone. The court justified its intervention in that the trial judge had erred in considering the evidence of the complainant and of Z in isolation from each other instead of considering the potential for corroboration. It also found that the father's testimony corroborated that of the complainant.

At issue here is whether the Court of Appeal exceeded its jurisdiction when it overturned the appellants' acquittals and ordered a new trial.

Held: The appeal should be dismissed.

Per Wilson, L'Heureux-Dubé and Cory JJ.: The Crown may appeal an acquittal on a question of law alone under s. 605(1)(*a*) of the *Criminal Code*. The reasonableness of a verdict or the sufficiency of the evidence does not raise a question of law alone. The narrower ground for appeal from an acquittal as opposed to appeal from a conviction reflects the fundamental principle that an accused is presumed innocent until proved guilty by proof beyond a reasonable doubt. In *Harper v. The Queen*, this Court held that an appellate tribunal has jurisdiction to review the record below to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues. A misapprehension of relevant evidence will amount to an error of law alone pursuant to s. 605(1)(*a*) only if it is the result of misdirection. As this was the case here, the matter fell within the jurisdiction of the Court of Appeal.

The approach the trial judge takes to the evidence must be correct in law to ensure that the final step in the process, the weighing of the evidence, is not flawed. Individual pieces of evidence must not be examined in isolation, but must be considered in the context of all the evidence. In this case, the trial judge considered the evidence of the two key Crown witnesses separately, and failed to consider the evidence as a whole. He first considered the complainant's evidence in isolation, and rejected it as unreliable. He then moved on to Z's evidence, stating that it was all he had left. He also failed to consider the corroborative aspects of Z's testimony and of the evidence relating to the complainant's broken glasses. This viewing of the evidence without the support of other evidence amounted to serious misdirection according to this Court's decision in *R. v. Morin*. Finally, the trial judge erred in concluding that it was necessary for the Crown to establish with precision the date on which the alleged offence occurred, and this error heavily influenced his finding of a reasonable doubt.

Per Gonthier and McLachlin JJ.: The appeal should be dismissed and a new trial ordered in view of the trial judge's erroneous conclusion that the Crown was obliged to establish the precise time when the offence occurred. While it is an error of law for the trial judge to direct that the reasonable doubt standard must be applied to individual pieces of evidence, it is far from certain that he committed this error. He never stated that any piece of evidence was to be considered with respect to reasonable doubt in isolation from the rest of the evidence, nor did he suggest that any piece of evidence should be completely disregarded for failing to meet such a standard. With respect to the corroborative value of Z's testimony, where a trial judge is sitting as a trier of fact, it is open to him to reject the evidence of a witness as lacking credibility and hence not being capable of constituting corroboration.

Cases Cited

By Wilson J.

Referred to: *Kendall v. The Queen*, [1962] S.C.R. 469; *R. v. Hamilton-Middleton* reflex, (1986), 53 Sask. R. 80; *Harper v. The Queen*, 1982 CanLII 11 (S.C.C.), [1982] 1 S.C.R. 2; *Sunbeam Corporation (Canada) Ltd. v. The Queen*, [1969] S.C.R. 221; *Lampard v. The Queen*, [1969] S.C.R. 373; *Schuldt v. The Queen*, 1985 CanLII 20 (S.C.C.), [1985] 2 S.C.R. 592; *Wild v. The Queen*, [1971] S.C.R. 101; *R. v. Dixon* reflex, (1988), 26 B.C.L.R. (2d) 251; *Belyea v.*

The King, 1932 CanLII 1 (S.C.C.), [1932] S.C.R. 279; *R. v. Roman* 1987 CanLII 119 (NL C.A.), (1987), 38 C.C.C. (3d) 385; *R. v. Morin*, 1988 CanLII 8 (S.C.C.), [1988] 2 S.C.R. 345; *Chamberlain v. The Queen* (1984), 58 A.L.J.R. 133.

By McLachlin J.

Referred to: *R. v. Morin*, 1988 CanLII 8 (S.C.C.), [1988] 2 S.C.R. 345.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, ss. 605(1), 613(4) [am. 1974-75-76, c. 93, s. 75].

Authors Cited

Ewaschuk, Eugene G. *Criminal Pleadings and Practice in Canada*, 2nd ed. Aurora, Ontario: Canada Law Book, 1987.

APPEAL from a judgment of the Saskatchewan Court of Appeal 1988 CanLII 208 (SK C.A.), (1988), 65 Sask R. 134, allowing the Crown's appeal from appellants' acquittals on charges of sexual assault. Appeal dismissed.

Donna Taylor, *Mervin Ozirny* and *Wayne Rusnak*, for the appellants.

Kenneth W. MacKay, *Q.C.*, for the respondent.

//Wilson J.//

The judgment of Wilson, L'Heureux-Dubé and Cory JJ. was delivered by

Wilson J. -- The appellants are young offenders who were acquitted of sexual assault at trial. The Crown's appeal to the Saskatchewan Court of Appeal was allowed and the appellants now appeal to this Court as of right. This judgment is the third in a trilogy dealing with the sexual assaults that allegedly occurred at Sheho Elementary School in Saskatchewan between September 1985 and May 1986. This appeal was heard together with *R. v. B. (G.)*, [1990] 2 S.C.R. 000, and *R. v. B. (G.)*, [1990] 2 S.C.R. 000, (hereinafter *R. v. G.B., A.B. and C.S.*), which are dealt with in two related judgments. The issue in this appeal is whether the Court of Appeal exceeded its jurisdiction in overturning the appellants' acquittals and ordering a new trial.

1. The Facts

Each of the appellants was separately charged in informations alleging that:

> On or between the 3rd day of September A.D. 1985 and the 30th day of September A.D. 1985 at Sheho in the Province of Saskatchewan being a young person within the meaning of the Young Offenders Act did commit a sexual assault on S.M. contrary to Section 246.1(1)(a) of the Criminal Code.

The two key witnesses for the Crown were S.M., the complainant, and C.Z., a co-accused and accomplice who had previously entered a plea of guilty to the same charge prior to trial. S.M. was eight years old at the time of the alleged offence and nine years old at the time of the trial. C.Z. was fourteen years old at the time of trial. Both witnesses were duly sworn by the trial

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judge.

The complainant identified C.Z. and each of the appellants as participants in the alleged assault. He testified that he thought the offence occurred in September of 1985. When cross-examined, however, he was uncertain when the incident occurred and agreed with defence counsel's suggestion that it may have been after Easter and thus in the spring of 1986. The trial judge summarized S.M.'s testimony as follows:

> I was coming out of the bathroom, G.B. kicked the door open and pushed me back, and they sweared at me -- pulled my pants down and shoved a pencil in my bum and there was blood running out of my bum, and there was blood on the pencil. They pulled my penis and they pulled down their pants, and they forced me to pull their penis -- and banged my head against the wall and broke my glasses.

C.Z. gave similar evidence. He testified that he and the appellants came across the complainant in the school washroom just before recess, each kicked the complainant, put a pencil in the complainant's bum, and touched his penis. He testified that he did not recall seeing the appellants' penises at any time. With respect to the time of the offence C.Z. testified that the incident occurred between September 1 and September 30 of 1985 but could not remember if it was the beginning, middle, or end of September. During cross-examination C.Z. agreed with defence counsel that the alleged assault could have happened the last week of September or the beginning of October but stated that it could not have occurred at the end of October or in November.

The complainant's father and stepmother gave the only other evidence for the Crown. Neither had been told of the incident and had suspected nothing. The father testified that he had had the complainant's glasses repaired in September of 1985. The only other clear evidence of S.M. breaking his glasses was an incident later in the winter when the lens popped out during gym class after an incident with another student.

The appellants all testified and denied that they had sexually assaulted the complainant at any time. The defence also called a number of teachers who testified that there was constant supervision by teachers at the school and they were not aware of, nor advised of, anything untoward happening. One of the teachers, Shaunda Halldorson, testified that there had been a problem in the gym with S.M.'s glasses. All of the appellants were acquitted by the trial judge.

2. Issues

The sole issue for determination in this appeal is whether the Court of Appeal exceeded its jurisdiction in overturning the acquittals and ordering a new trial.

Section 605(1) of the *Criminal Code*, R.S.C. 1970, c. C-34 (now R.S.C., 1985, c. C-46, s. 676(1)) authorizes the Attorney General to appeal an acquittal to the Court of Appeal. It reads:

> **605.** (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> (*a*) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone, . . .

Section 613(4) (now s. 686(4)) sets out the options available to the Court of Appeal on a Crown appeal of an acquittal:

> **613.** . . .

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(4) Where an appeal is from an acquittal the court of appeal may

(*a*) dismiss the appeal; or

(*b*) allow the appeal, set aside the verdict and

(i) order a new trial, or

(ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law.

2. The Courts Below

Saskatchewan Provincial Court (Chorneyko Prov. Ct. J., unreported)

The trial judge first explained that his approach to the case would be to review the salient parts of the evidence without comment and then comment on that evidence in light of the legal principles. He proceeded to outline the evidence of the complainant and the participant C.Z. Commenting first on the evidence relating to the complainant's glasses, he expressed the view that the evidence of the parties on this aspect was completely neutral. It neither helped the Crown's case nor assisted the defence. As to the balance of the evidence, the trial judge reminded himself of Judson J.'s comment as to the inherent frailties of children's evidence in *Kendall v. The Queen*, [1962] S.C.R. 469, at p. 473. He then concluded that the complainant's evidence was unreliable since it had become clear during his examination and cross-examination that with the proper approach one could get him to admit almost anything. He was also of the view that the complainant's testimony had been rehearsed. This therefore "leaves the evidence of C.Z."

The trial judge noted that C.Z. had given an earlier statement which was different from his testimony in court. C.Z. admitted that the first part of his testimony was lies and, when pressed, he could not indicate with any degree of certainty when the truth began. The trial judge referred to the fact that C.Z. testified that each of the boys hit S.M., pulled his penis, and stuck a pencil up his bum. The complainant was said to be crying and yelling at the time. The trial judge stated that, if this had really occurred, it would have taken longer than a couple of minutes and there would have been bleeding and discomfort displayed by the boy such as a difference in his walk. Common sense would also indicate that the crying and shouting would have been heard by others. There was absolutely no evidence to corroborate the bleeding, bruising, or crying. After discussing the logistical difficulties implied by the testimony of C.Z. the trial judge stated he could not accept his version of the alleged assault. There were just too many unresolved questions and too many doubts as to what actually happened.

Chorneyko Prov. Ct. J. next addressed the question of time. He said that after hearing all the evidence he could not form a view with any reasonable degree of certainty when the alleged offence took place. He referred to *R. v. Hamilton-Middleton* reflex, (1986), 53 Sask. R. 80, as authority for the proposition that the date of an offence is an essential element and must be proven. He therefore refused the Crown's request to amend the information to conform with the evidence led. He said that C.Z., being fourteen years of age, should have been able to reconstruct when the alleged event took place with greater precision. He was left with a reasonable doubt that each of the appellants was involved in the alleged assault and therefore had to find each of them not guilty.

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Saskatchewan Court of Appeal (1988 CanLII 208 (SK C.A.), (1988), 65 Sask. R. 134)

The Court of Appeal (Vancise, Wakeling and Gerwing JJ.A.) unanimously allowed the Crown's appeal and ordered a new trial. Vancise J.A., for the court, acknowledged that it was not open to an appellate court on an appeal under s. 605 of the *Criminal Code* to consider the reasonableness of the trial judge's findings of fact but stated that it could review the record to determine whether the trial judge had properly directed himself to all the relevant evidence bearing on the relevant issues. He cited this Court's decision in *Harper v. The Queen*, 1982 CanLII 11 (S.C.C.), [1982] 1 S.C.R. 2, as authority.

In the opinion of the court an examination of the reasons for judgment of the trial judge revealed that he had examined the evidence of the complainant and of C.Z. in isolation from each other thereby failing to appreciate that the evidence of C.Z. was capable of corroborating the evidence of the complainant. Vancise J.A. stated that while there were discrepancies between the evidence of S.M and C.Z., they were relatively insignificant. It would be surprising, moreover, if there were no such discrepancies.

After reviewing the part of the judgment dealing with the testimony of C.Z., the court concluded that the trial judge must have ignored his evidence when he found that the event had not occurred. Accordingly the court was justified in interfering with his decision and ordering a new trial. Vancise J.A. stated at p. 146:

> He did not take into account the evidence of C.Z. which was corroborative of the story of S.M., that is: (1) that it occurred in the boys' washroom; (2) that it occurred at the end of recess; (3) that six persons other than C.Z. were involved; (4) that G.B. initiated the assault; (5) that S.M. was kicked and pushed to the floor; (6) that his penis was pulled and that he was assaulted anally. All of that evidence was capable of confirming the story of S.M. which implicated all the accused. The trial judge ignored that evidence or failed to mention it and instead concentrated on evidence which he stated should have been led. In so doing he displayed a lack of appreciation of relevant evidence which could have had a bearing on the result which justifies this court interfering.

Vancise J.A. next addressed the evidence as it related to the breakage of the complainant's glasses, stating that the trial judge had also misapprehended that evidence. The complainant had testified that his glasses were broken during the alleged assault and his father had testified that his son's glasses were broken in September of 1985 and that he had had them repaired. Vancise J.A. noted that the glasses had been broken at other times but was of the view that the father's evidence corroborated the complainant's evidence of this particular breakage. Vancise J.A. also reviewed the evidence relating to the time of the offence and held that the trial judge should have amended the information as requested by the Crown.

Wakeling J.A. wrote additional reasons (Gerwing J.A. concurring) in which he commented on the trial judge's treatment of the evidence of child witnesses and the expert witness. However, since the appellants raised his comments directly in the related appeal of *R. v. G.B., A.B. and C.S.*, I have dealt with them in that judgment.

4. Analysis

The major submission of the appellants to this Court is that the Court of Appeal exceeded its jurisdiction in substituting its own views of the evidence for that of the trial judge. The appellants point out that the trial judge reached his conclusion that the event as described did not

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occur after noting that common sense would dictate discomfort by the child, bleeding, a different walk, bruising, and that the entire episode would take more than two minutes. The appellants claim that these were findings of fact which should not have been interfered with. The appellants further submit that the argument that a trial judge has failed to appreciate the relevant evidence makes sense in the context of an appeal from conviction but not in the case of an appeal against an acquittal. When a trial judge acquits he or she need only find a reasonable doubt; the rest of the decision is superfluous. However, if need be, the appellants submit that the trial judge did not disregard the relevant evidence.

In support of their argument the appellants cite *Sunbeam Corporation (Canada) Ltd. v. The Queen*, [1969] S.C.R. 221, which dealt with the recurring problem of whether it is a question of law alone when the Crown establishes all the essential elements of the offence but the trial judge still acquits on the basis of a reasonable doubt. This question is, of course, very important in the case of an appeal by the Crown against an acquittal pursuant to s. 605(1)(*a*) since the Crown is confined under that subsection to an appeal on a question of law alone. The narrower ground for appeal from an acquittal as opposed to appeal from a conviction reflects the fundamental principle that an accused is presumed to be innocent until proved guilty by proof beyond a reasonable doubt.

In *Sunbeam* the corporation was charged with four counts of attempting to require or induce the maintenance of a resale price contrary to the *Combines Investigation Act*, R.S.C. 1952, c. 314. The corporation was convicted on two of the counts and acquitted on the other two on the ground that there was insufficient evidence of inducement. The Crown appealed the acquittals and a majority of the Ontario Court of Appeal (Laskin J.A. dissenting) allowed the appeal and entered convictions on both counts. Schroeder J.A., for the majority, was of the view that no person acting judicially and properly instructed as to the relevant principles of law could have reached the decision of the trial judge. He concluded that the court was therefore entitled to assume that some misconception of law was responsible for the decision.

On appeal to this Court the corporation submitted that the Court of Appeal had no jurisdiction to deal with the Crown's appeal because it was not on a question of law alone. Ritchie J., for the majority (Judson, Spence and Pigeon JJ. dissenting), agreed and reversed the Court of Appeal. He found that the trial judge had simply concluded that the evidence was not sufficient to satisfy him beyond a reasonable doubt that the accused was guilty. He stated at pp. 234-35:

> In the present case the trial judge accepted the evidence as contained in the letters above referred to and thus gave full effect to s. 41(2) of the *Combines Investigation Act*, but he concluded that this evidence was not sufficient to satisfy him beyond a reasonable doubt that the accused were guilty on the 3rd and 4th counts. However wrong the Court of Appeal or this Court may think that he was in reaching this conclusion, I am of opinion, with all respect for those who hold a different view, that his error cannot be determined without passing judgment on the reasonableness of the verdict or the sufficiency of the evidence, and in my view these are not matters over which the Court of Appeal has jurisdiction under s. [605(1)(*a*)] of the *Criminal Code*. [Emphasis added.]

In reaching this conclusion Ritchie J. referred to the different standards set for appeals from acquittals and appeals from convictions under the *Criminal Code* and found that the different words used by Parliament in the different sections of the *Code* supported his conclusion. He stated at pp. 237-38:

> Parliament has thus conferred jurisdiction on the Court of Appeal to allow an appeal against a conviction on three separate grounds, one of which is the very ground upon which

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the Court of Appeal allowed the present appeal, i.e., that "the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence". The fact that s. [613(1)(*a*)] recognizes this ground as being separate and distinct from "the ground of a wrong decision on a question of law" appears to me to be the best kind of evidence of the fact that Parliament did not intend the phrase "a question of law" as it is used in the Code to include the question of whether the verdict at trial was unreasonable or could not be supported by the evidence. It is noteworthy that having accorded the Court of Appeal jurisdiction to hear appeals against conviction on the ground that the verdict was unreasonable, Parliament did not confer the same jurisdiction on that Court in appeals by the Crown. No authority is needed for the proposition that appellate jurisdiction must be expressly conferred and with all respect for those who may hold a different view, I am of opinion that the Court of Appeal has exceeded its jurisdiction by allowing this appeal on a ground reserved for appeals against conviction which does not extend to appeals by the Attorney General. [Emphasis added.]

A few months after *Sunbeam* this Court considered the issue again in *Lampard v. The Queen*, [1969] S.C.R. 373, in which the accused had been acquitted on charges of fraudulent manipulation of stock exchange transactions. The key issue in the case was the intent of the accused. McLennan J.A., for the Ontario Court of Appeal, reversed the trial judge's decision on the basis that there was only one reasonable inference that could be drawn from the evidence on the record, indeed an irresistible one, namely, that a guilty intention existed in the mind of the accused. In allowing the accused's appeal to this Court, Cartwright C.J. held that a person's intention is a question of fact and that in criminal cases there will always be some evidence upon which to rest an acquittal. He stated at pp. 380-81:

When the onus of establishing a certain fact lies upon a party it may be a question of law whether there is any evidence (as distinguished from sufficient evidence) to prove that fact. In the case at bar the onus was, of course, upon the Crown to prove that the appellant did the acts complained of with the guilty intention specified in the section. If the learned trial Judge erred in finding that that onus had not been satisfied, his error was one of fact, certainly not one of law in the strict sense. The applicable principles are clearly set out in the reasons of my brother Ritchie giving the judgment of the majority of this Court in the *Sunbeam* case, *supra*, and it is not necessary to repeat them.

In a criminal case (except in the rare cases in which a statutory provision places an onus upon the accused) it can sometimes be said as a matter of law that there is no evidence on which the Court can convict but never that there is no evidence on which it can acquit; there is always the rebuttable presumption of innocence. [Emphasis added.]

The correctness of these two cases was recently affirmed by this Court in *Schuldt v. The Queen*, 1985 CanLII 20 (S.C.C.), [1985] 2 S.C.R. 592, which is also relied on by the appellants in support of their position. Lamer J., for the Court, expanded upon the reasoning in *Sunbeam* and dealt with the confusion that had arisen with respect to *Wild v. The Queen*, [1971] S.C.R. 101. In *Wild* Martland J., for a majority of this Court (Cartwright C.J. and Hall and Spence JJ. dissenting), held that where a trial judge has acquitted an accused on a charge of criminal negligence on the basis that the evidence raised a reasonable doubt that the accused was driving and where, on a proper view of the law, that evidence was not capable of creating such a doubt, a question of law is raised. Cartwright C.J. and Hall and Spence JJ., however, dissented on the ground that no question of law was raised. They relied on *Sunbeam* and *Lampard* as authority.

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Lamer J. concluded that *Wild* had been correctly decided because the trial judge had speculated on the possibility that one of the other occupants might have been the driver of the car thus coming to a conjectural conclusion which he considered might be inconsistent with guilt. Lamer J. confirmed that this would indeed constitute an error of law. He further held, however, that while he agreed with Martland J. that a finding of fact made in the absence of any supportive evidence is an error of law, this will only happen in the case of an acquittal on the basis of a reasonable doubt if there has been a transfer to the accused by law of the burden of proof of a given fact. Lamer J. added that the majority decision in *Wild* should not be taken as detracting from this statement of the law.

In *Schuldt* the accused was charged with having attempted to break and enter a gun shop with the intent to commit an indictable offence. The accused had been acquitted at trial as the trial judge found that there was no proof that the accused had the requisite intention. The acquittal was set aside by the majority of the Manitoba Court of Appeal on the basis that the trial judge's finding of fact was not reasonable but fanciful and quite out of touch with the reality of the case. The Court of Appeal therefore found that there was no factual basis upon which to have a reasonable doubt and that this constituted an error of law. Relying on *Sunbeam* and *Lampard* Lamer J. concluded that the Court of Appeal had exceeded its jurisdiction. He explained why at p. 610:

> In other words, absent a shifting of the burden of proof upon the accused there is always some evidence upon which to make a finding of fact favourable to the accused, and such a finding, if in error, is an error of fact. But when the burden of proof has been shifted (as is the case for proof of intent when a person is found in a place which he or she has broken into), it can be said, absent any evidence to the contrary, that there is no evidence upon which a reasonable doubt could exist as regards the intent of the accused, and an appeal against the ensuing acquittal raises a question of law alone.

In light of these authorities it was, in my view, clearly not open to the Court of Appeal to overturn the acquittal because it found it to be unreasonable or unsupported by the evidence. On an appeal from an acquittal as opposed to an appeal from a conviction an appellate tribunal exceeds its jurisdiction if it attempts to reassess the facts in order to determine whether the trial judge's findings were reasonable. However, even if *Schuldt* had the effect of narrowing the scope of a question of law for purposes of an appeal from an acquittal pursuant to s. 605(1)(*a*), as was suggested by the British Columbia Court of Appeal in *R. v. Dixon* reflex, (1988), 26 B.C.L.R. (2d) 251, it only did so for cases in which the issue before the court is when, if ever, a finding of fact becomes a question of law.

It is my opinion, therefore, that this line of authority, while correctly stating the law, does not support the appellants' argument that the Court of Appeal exceeded its jurisdiction in this case. Indeed, both the Crown and the Court of Appeal acknowledge that it is not open to an appellate court to overturn an acquittal on the ground that it was unreasonable. There are, however, other questions of law arising in a case which will confer jurisdiction on an appellate tribunal. Aside from clearly established questions of law such as the admissibility of evidence, the interpretation of a statute, or whether evidence is capable of being corroborative, this Court has recognized appellate jurisdiction where the question of law originates from the trial judge's conclusion that he or she is not convinced of the guilt of the accused beyond a reasonable doubt because of an erroneous approach to, or treatment of, the evidence adduced at trial. The *Wild* case is an example of this. A question of law was raised in that case because the trial judge's "reasonable" doubt was based on pure conjecture.

An acquittal based on an erroneous conclusion of reasonable doubt constitutes a question of law where the trial judge has erred as to the legal effect of undisputed or found facts rather than

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the inferences to be drawn from such facts. Authority for this proposition is to be found in *Belyea v. The King*, 1932 CanLII 1 (S.C.C.), [1932] S.C.R. 279, the first appeal to come before this Court following the introduction of s. 605 into the *Code*. The accused had been acquitted of conspiracy charges at trial. Anglin C.J., for the Court, holding that the error of the trial judge raised a question of law, affirmed the judgment of the Ontario Court of Appeal which reversed the acquittal on the basis that the trial judge misdirected himself in finding that the Crown had not proved that the accused took part in the overt acts. Anglin C.J. noted that it was not essential to a finding of guilt of conspiracy to establish that the accused actually participated in the overt acts. He stated at p. 296:

> The right of appeal by the Attorney-General, conferred by s. [605(1)(a)], *Cr. C.* . . . is, no doubt, confined to "questions of law". That implies, if it means anything at all, that there can be no attack by him in the Appellate Divisional Court on the correctness of any of the findings of fact. But we cannot regard that provision as excluding the right of the Appellate Divisional Court, where a conclusion of mixed law and fact, such as is the guilt or innocence of the accused, depends, as it does here, upon the legal effect of certain findings of fact made by the judge or the jury, as the case may be, to enquire into the soundness of that conclusion, since we cannot regard it as anything else but a question of law, -- especially where, as here, it is a clear result of misdirection of himself in law by the learned trial judge. [Emphasis added.]

Belyea was distinguished by Lamer J. in *Schuldt* but its correctness was not questioned. For a comprehensive list of the case law in this area see Ewaschuk J., *Criminal Pleadings and Practice in Canada* (2nd ed. 1987), at paras. 23:1010 and 23:1025.

A question of law may also arise, it seems to me, when the trial judge misdirects himself or herself with respect to the relevant evidence. Indeed, the Court of Appeal in this case reversed the acquittals after concluding that an error of law had arisen due to the trial judge's failure to properly direct himself to all the evidence bearing on the relevant issues. In its oral argument to this Court the Crown conceded that, if the trial judge's error was not the result of misdirection, then the Court of Appeal was without jurisdiction.

In support of its position the Crown relies on *Harper v. The Queen*, *supra*, as did the Court of Appeal. The accused in that case, a police officer, had been charged with assault but contended that all the complainant's injuries were sustained when he resisted arrest. The complainant and one witness testified that the accused had punched the victim in the face but the defence called four witnesses who testified that they had not seen the accused hit the complainant. In his reasons for judgment the trial judge stated that only the complainant and the other Crown witness had observed the events. The evidence of the defence witnesses was expressly not taken into account by the trial judge because he concluded they were not present at the crucial time but no finding was made as to their credibility. The accused was convicted at trial and his appeal to the British Columbia Court of Appeal was dismissed.

On appeal to this Court the issue was whether the trial judge's failure to consider the defence evidence constituted an error of law. Estey J., for the majority (Ritchie J. dissenting) concluded that rejecting the evidence of the defence witnesses was an error of law and a new trial was ordered. With respect to the jurisdiction of an appellate court generally Estey J. stated the following at p. 14:

> An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant

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issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede. This problem was before this Court in *MacDonald v. The Queen*, 1976 CanLII 9 (S.C.C.), [1977] 2 S.C.R. 665, when Laskin C.J. stated, at p. 673:

> It does not follow, however, that failure of a trial judge to give reasons, not challengeable *per se* as an error of law, will be equally unchallengeable if, having regard to the record, there is a rational basis for concluding that the trial judge erred in appreciation of a relevant issue or in appreciation of evidence that would affect the propriety of his verdict. Where some reasons are given and there is an omission to deal with a relevant issue or to indicate an awareness of evidence that could affect the verdict, it may be easier for an appellate Court or for this Court to conclude that reversible error was committed. [Emphasis added.]

In dissent, Ritchie J. noted that an accused's appeal to this Court was limited to a question of law in the strict sense and expressed the view that the appeal did not raise a question of law alone because it concerned a difference of opinion as to the sufficiency of the evidence.

This Court has not yet applied *Harper* to an appeal from an acquittal. It was, however, applied to an appeal from an acquittal by the Newfoundland Court of Appeal in *R. v. Roman* 1987 CanLII 119 (NL C.A.), (1987), 38 C.C.C. (3d) 385. The accused in that case were charged with illegal entry into Canadian fisheries waters contrary to the *Coastal Fisheries Protection Act*, R.S.C. 1970, c. C-21. The trial judge acquitted the accused on the basis that their equipment may not have been working properly. The Crown appealed the acquittals but the accused claimed that the appeal was not maintainable because no question of law was raised. In response the Court of Appeal, *per* Marshall J.A., said at p. 391:

> There is a distinction between reassessment by an appeal court of evidence for the purpose of weighing its credibility to determine culpability on the one hand and, on the other, reviewing the record to ascertain if there has been an absence of appreciation of relevant evidence. The former requires addressing questions of fact and is placed outside the purview of an appellate tribunal by s. 605(1)(*a*) of the *Code*. The latter inquiry is one of law because if the proceedings indicate a lack of appreciation of relevant evidence, it becomes a reviewable question of law as to whether this lack precluded the trial judge from effectively interpreting and applying the law.

He cited *Harper* in support. He then reviewed the trial judge's treatment of the evidence which included testimony to the effect that the ship was in good working condition on the day in question. From this evidence the trial judge inferred that it could at times be in bad working condition and founded his reasonable doubt on that basis. The Court of Appeal held that the trial judge's inference in this regard constituted a misapprehension of the evidence given by the witnesses, which was evidence bearing on the central issue before him, and the conclusion drawn therefrom was a reversible error of law within the meaning of *Harper*. Relying on *Wild* the Court also found that the trial judge was in error in basing the acquittal upon an inference drawn from a conjectural possibility.

Assuming that Marshall J.A. was correct in finding that the trial judge's misapprehension of the relevant evidence amounted to an error of law within the meaning of *Harper*, it is my opinion that such an error will only amount to an error of law alone pursuant to s. 605(1)(*a*) of the *Code* if it is the result of misdirection. Thus while I do not think it is necessary to restrict *Harper* to appeals from convictions *per se*, I would add the essential caveat that the "misapprehension" or

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"lack of appreciation" of the relevant evidence must have been the result of the trial judge's misdirection of himself or herself as to the applicable law, which in my view, was the case in the present appeal. Of necessity it will be more difficult in an appeal from an acquittal to establish with certainty that the error committed by the trial judge raised a question of law alone because of the burden of proof on the Crown in all criminal prosecutions and the increased importance of examining critically all evidence that may raise a reasonable doubt.

I find support for my conclusion that the trial judge's errors of law in this case were the result of misdirection in *R. v. Morin*, 1988 CanLII 8 (S.C.C.), [1988] 2 S.C.R. 345. In *Morin* this Court had occasion to consider whether individual pieces of evidence should be examined in isolation and what the appropriate approach to weighing the evidence should be in the context of a Crown appeal from a jury acquittal on a charge of first degree murder. The Ontario Court of Appeal allowed the Crown's appeal and ordered a new trial on the basis that the trial judge had misdirected the jury when he invited them to apply the criminal burden of proof beyond a reasonable doubt to individual pieces of evidence. This Court unanimously upheld the decision of the Court of Appeal with respect to this ground of appeal, finding that the individual pieces of evidence should be examined in the context of all the evidence.

Sopinka J., writing for the majority (Lamer and Wilson JJ. concurring), first noted that there was ample authority for the proposition that it is misdirection to instruct the jury to apply the standard of reasonable doubt to individual pieces of evidence. The accused did not dispute this but argued that the charge did not invite a piecemeal examination of the evidence. However, on this Court's view of the jury charge, the trial judge had indeed made a serious error. Sopinka J. concluded at p. 358:

> The effect of the misdirections referred to above may very well have been that the jury examined evidence that was crucial to the Crown's case in bits and pieces. Standing alone or pitted against the evidence of the accused without the support of other evidence, much of this evidence might have been discarded as not measuring up to the test. When the jury came to consider the Crown's case as a whole there may not have been very much left of it. We cannot know for certain, but this scenario is a very likely one and the charge therefore constituted a serious misdirection. [Emphasis added.]

The point of departure in the majority and minority decisions related to the accused's submission that while a piece of evidence must be examined in relation to the other evidence, it must nonetheless individually meet the test of proof beyond a reasonable doubt, calling therefore for a two-stage process of deliberation each attracting the application of the doctrine of reasonable doubt. My colleague, Lamer J., and I agreed with this submission. The majority rejected it. The whole Court agreed, however, that the evidence must be looked at as a whole.

I believe that *Morin* highlights the fact that the approach taken by the trial judge to the evidence must be correct in law so as to ensure that the final step in the process, the weighing of the evidence, is not flawed. In this case, even although the trial judge was sitting alone, he was wearing two "hats" at different stages. He was both the trier of law and had to direct himself as to the proper approach to the evidence and then, having done so, he became the trier of fact in weighing it.

A review of the trial judge's decision in this case makes it clear that he failed to consider the evidence in its totality. This was the result of misdirection and brought the matter within the jurisdiction of the Court of Appeal.

While Chorneyko Prov. Ct. J. did outline the evidence of both key Crown witnesses, he considered their evidence separately and failed to consider their evidence as a whole. He first

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considered the evidence of the complainant in isolation and rejected it as unreliable. He then moved on to the evidence of the accomplice, stating that, having found the evidence of the complainant unreliable, all he had left was the evidence of C.Z. Further, he looked only for discrepancies as to details in the evidence presented and did not consider the corroborative aspects of the evidence and the numerous elements of the alleged offence which were testified to by both witnesses capable of substantiating each other's story. The trial judge also did not consider the corroborative aspects of the evidence relating to the complainant's broken glasses. There was evidence of a breakage at the time of the alleged assault and this evidence would have been capable of corroborating the child's testimony so as to enhance its reliability and should have been viewed together with the rest of the Crown's evidence. I do not believe that the trial judge considered the individual pieces of evidence "in the context of all of the evidence". Rather, the evidence was viewed "without the support of other evidence". According to *Morin* this amounts to serious misdirection.

I find the words of the High Court of Australia in *Chamberlain v. The Queen* (1984), 58 A.L.J.R. 133, which was referred to in *Morin*, very much on point. Chief Justice Gibbs and Justice Mason stated at p. 139:

> We have no doubt that the position is correctly stated in the following passage in *R. v. Beble* [1979] Qd. R. 278 at 289, that "It is not the law that a jury should examine separately each item of evidence adduced by the prosecution, apply the onus of proof beyond reasonable doubt as to that evidence and reject it if they are not so satisfied." At the end of the trial the jury must consider all the evidence, and in doing so they may find that one piece of evidence resolves their doubts as to another. For example, the jury, considering the evidence of one witness by itself, may doubt whether it is truthful, but other evidence may provide corroboration, and when the jury considers the evidence as a whole they may decide that the witness should be believed. Again, the quality of evidence of identification may be poor, but other evidence may support its correctness; in such a case the jury should not be told to look at the evidence of each witness "separately in, so to speak, a hermetically sealed compartment"; they should consider the accumulation of the evidence . . . . [Emphasis added.]

A final difficulty I have with the trial judge's reasons relates to the statements he made regarding the time of the offence. As was clearly established in the related appeal of *R. v. G.B., A.B. and C.S.*, it is not necessary for the Crown to establish with precision when the alleged offence occurred. In view of the trial judge's reasoning in *R. v. G.B., A.B. and C.S.*, I believe one can conclude with reasonable certainty that the trial judge's finding of a reasonable doubt was heavily influenced by his error with respect to the legal requirements regarding the time of the offence.

5. Disposition

For all of these reasons I would dismiss the appeal. In my view, the Crown has established that the verdict would not necessarily have been the same absent the trial judge's misdirection. However, I am not confident that, absent the error of law, the appellants would have been found guilty and accordingly I agree with the Court of Appeal that a new trial is appropriate.

//McLachlin J.//

The reasons of Gonthier and McLachlin JJ. were delivered by

McLachlin J. -- I agree with my colleague, Wilson J., that the appeal should be dismissed and a

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new trial ordered.

I base this conclusion on the third error of the trial judge to which Wilson J. refers -- his view that the Crown was obliged to establish the precise time when the offence occurred.

In my opinion, it is not clear that the trial judge misdirected himself with respect to the relevant evidence in the manner referred to by Wilson J. In the absence of such misdirection the law is clear that doubts about the reasonableness of the trial judge's assessment of the evidence do not constitute questions of law alone, and hence cannot support an appeal from acquittal.

The first misdirection Wilson J. suggests is that the trial judge directed himself that the evidence of the complainant and C.Z. must be independently considered. *R. v. Morin*, 1988 CanLII 8 (S.C.C.), [1988] 2 S.C.R. 345, establishes that it is an error of law for the trial judge to direct that the reasonable doubt standard must be applied to individual pieces of evidence. On re-reading the trial judge's reasons I am far from certain that he committed this error. He reviewed the evidence of the complainant and C.Z. in separate paragraphs, expressing doubts about the evidence of each. After stating that there were just too many unresolved questions and too many doubts as to what actually happened for him to accept the Crown's version, and after discussing the question of time, he concluded:

> Taking these factors into account, I have a reasonable doubt that each of the accused was involved in the act, and therefore have to find each of the accused not guilty.

It is reasonable to conclude that the phrase "these factors" was intended to include all the evidence, the findings of credibility of particular witnesses referred to earlier, as well as the erroneous statement of law with respect to the issue of proof of time of the offence (which I agree is an error of law). The trial judge never stated that any piece of evidence was to be considered with respect to reasonable doubt in isolation from the rest of the evidence, nor did he suggest that any piece of evidence should be completely disregarded for failing to meet such a standard. Nor did his statements concerning the credibility of the witnesses' stories amount to an error in law, in my view. While the trial judge's statement may not be as clear as one might wish, it is not clearly in error and does not establish misdirection.

The second misdirection Wilson J. suggests is that the trial judge failed to instruct himself that the evidence of C.Z. should be looked at to see if it was capable of corroborating the evidence of the complainant. This might be valid if one were instructing a jury serving as the trier of fact. But where a trial judge is sitting as a trier of fact, it is open to him to reject the evidence of a witness as lacking credibility and hence not being capable of constituting corroboration. In those circumstances it would be wrong for a trial judge to instruct himself or herself that the evidence of the witness should be considered to see if it was capable of corroborating the other evidence. Again, this leaves me unable to conclude that there was error of law or misdirection.

For these reasons, I find myself unable to conclude that the trial judge's reasons disclose misdirection within the test in *Morin* or otherwise with respect to the first two errors referred to by Wilson J.

I would dismiss the appeal and order a new trial.

Appeal dismissed.

Solicitors for the appellant G.B.: Rusnak, Balacko, Kachur & Rusnak, Yorkton, Saskatchewan.

Solicitors for the appellants C.S., H.H. and S.S.: Ozirny, Fisher & Bell, Melville,

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Solicitors for the appellant A.B.: Kyba, Yaholnitsky & Taylor, Yorkton, Saskatchewan.

Solicitor for the respondent: The Attorney General for Saskatchewan, Regina.

BOWEN CASE

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REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 26 of 2004

BETWEEN

JOMAINE BOWEN **APPELLANT**

AND

THE STATE **RESPONDENT**

PANEL:

R. Hamel-Smith, J.A.
L. Jones, J.A.
S. John, J.A.

APPEARANCES:

Mr. Ian Stuart Brook for the Appellant
Mr. Trevor M. Ward for the Respondent

DATE OF DELIVERY: 12th January, 2005

JUDGMENT

Delivered by S. John, J.A.

1. On February 18, 2004 before a jury the appellant was found guilty of four counts of unlawful sexual intercourse and four counts of serious indecency. On March 24, 2004 he was sentenced to seven years imprisonment on each count of unlawful sexual intercourse and five years imprisonment on each count of serious indecency. All the sentences were to run concurrently.

2. In this case the appellant and the victim are cousins. At the time of the alleged offences the victim who we shall refer to as 'K'was three years old. The appellant was sixteen years of age. The offences to which the eight counts in the indictment related were alleged to have been committed during the period August 31, 1997 and May 01, 1998. The prosecution case against the appellant at trial depended effectively on the uncorroborated evidence of 'K' who was then nine years old.

3. A number of grounds of appeal were filed but the one ground upon which heavy reliance was placed was that the trial judge erred in law when she rejected the submission of no case to answer.

4. Several witnesses testified on behalf of the prosecution, however, only two of them really gave evidence material to the counts on the indictment, namely 'K' and Cheryl Pierre-Brooks a medical practitioner. For the purpose of the judgment it is necessary to allude to the evidence of those two witnesses.

The evidence of 'K'

5. After stating her name, address and the school she attended and acknowledging that the appellant was her cousin, she said:

> *"Jomaine put his penis in my vagina and my mouth. He did that eight times to me. He put his penis in my vagina four times and in my mouth four times. He did that in his bedroom on top the bed and on the ground on the carpet. He did this on several days at different times."*

6. Under cross-examination by attorney for the appellant she said that her aunt Charmaine (her mother's sister) had taken her to Dr. Michael Telemaque on one occasion because she was itching inside and outside of her vagina. She further said that her mother had taken her on two occasions to another doctor in St. James but she could not then recall the name of the doctor. That doctor never testified either at the preliminary inquiry or the trial. In answer to a question from attorney for the appellant 'K' agreed that in her evidence-in-chief she said that the appellant had done something to her eight times. She then said:

> *"I recall telling the Woman Police Constable three times. She read back what I said before I signed it. I did not tell her it was true. I remember the lady police writing what I told her and I wrote my name to it. She read it to me for me to hear what I said. She asked me if that was true and I did say that was true. I can't remember what I told her. I saw where I signed my name. Yesterday, someone read it over for me. My mummy when she read it over I heard her say three times. I talked about that three times with mummy. After talking with mummy I realized it supposed to be eight times. When I spoke to the lady police, mummy and daddy were present."*

SH

In response to a question, no doubt with reference to her evidence given at the preliminary inquiry, she said:

> *"I remember going to the police station. I remember telling the lawyer that I did not tell the police anything about Jomaine before I signed the paper. I was not speaking the truth."*

Testimony of Dr. Brooks

7. She said that on January 04, 1999, some eight (8) months after the event she examined 'K' and made notes contemporaneous with the examination. She sought and was granted leave of the court to refresh her memory from her notes. Her testimony then continued:

> *"My findings were: hymen not intact, probably inflicted by sexual interference. I came to findings by examining vaginal area of K.C. By sexual interference, I mean having made a differential diagnosis. I came to conclusion more probable because of what I saw was due to sexual act. In making my conclusion I would have examined the vaginal area thoroughly. On examination of vaginal area I examined the anterior and posterior areas especially looking for tear. There were none – There were no abrasions. I examined the vaginal orifice looking for elasticity – absence or presence of hymen. The elasticity of vaginal orifice at that tender age, I did not insert my hand. I inserted my little finger around the orifice to make sure that hymen was not in tact. I noted that the orifice was not irregular. It was smooth and pliable in texture. It should be noted that a four-year-old child would not have pliable orifice. It would be tightened. Because of all circumstances noted I put down sexual interference as opposed to blunt instrument which I would put sometimes."*

8. During Dr. Pierre-Brooks' cross-examination, Mr. Peterson for the appellant made an application to inspect her notes. Dr. Pierre-Brooks had no notes. In fact, she said that all the details she had given about elasticity, orifice and other details were from memory. The document from which Dr. Pierre-Brooks had refreshed her memory was the medical certificate, which she had issued upon her examination of 'K' on January 04, 1999. All that was written on that medical was – hymen not intact – probably inflicted by sexual interference.

Submission of No-Case

9. At the end of the prosecution case it was submitted for the appellant that there was no case to answer. It was put on two bases. First, that the evidence of the prosecution was so discredited as a result of cross-examination that it was unsafe for the case to go to the jury. The second basis of the submission was that having regard to the wide span in the indictment it was difficult for the appellant to properly answer the charges.

10. The judge in rejecting the submission acknowledged that there were inconsistencies in the evidence but said that it was the function of the jury to decide what they made of the inconsistencies. *"It was not the court's function,"* she said *"to weigh the evidence and to find where the truth lay, to do so she said would amount to a usurpation by the court of the function of the jury."* As to the indictment she said that it clearly outlined the conduct complained about, the place where it was alleged to have taken place and the period during which it took place. That, she said was sufficient.

11. Following the rejection of the submission the appellant gave evidence and called his uncle, his mother and Dr. Michael Telemaque, a General Practitioner to give evidence on his behalf. The appellant denied the allegations. He admitted that during the period ***August 1997 – May 1998 he had seen the victim 'off and on' at his home and had taken care of her***. He said she was his favourite cousin. He also gave evidence of his previous good character.

12. Dr. Telemaque testified that he had seen 'K' on three occasions at his office on Long Circular Road, St. James. He made notes on each occasion and with the leave of the court he was allowed to refresh his memory. According to his notes, the first visit was July 04, 1997 when 'K' was brought in with a complaint of high fever and vomiting. His diagnosis then was Acute Bacterial Tonsillitis. The second visit was on November 22, 1997, with a complaint of fever and an external vaginal itch that was present for three months. He said that he formed the opinion that the itch was due to fungal infection in the vagina. He examined her by looking at the external genitalia. On the final visit on December 08, 1997 he was told that things had very much improved. Apart from giving her some more medication he said that he did not examine her. He said that during his examination of the victim in November he saw no break of the hymen.

The Grounds of Appeal

13. In submitting that the judge erred in rejecting the no-case submission Mr. Stuart Brook for the appellant referred to several authorities but placed strong reliance on ***Sangit Chaitlal v The State (1985) 39WIR at 295.***

The Law

14. The current view in the United Kingdom today is stated in ***R v Galbraith (1981) 1 WLR 1039 124*** in these terms:

> *" (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or*

other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

15. As Lord Lane pointed out the first limb of the ***Galbraith*** test does not cause any conceptual problems. The second limb of the test must be understood, he said, in the context of a practice that developed after the passing of the Criminal Appeal Act 1966 and s. 2 (1) of the Criminal Appeal Act 1968, (which has since been repealed and replaced with some modification by the Criminal Appeal Act 1995), of inviting the judge to hold that there was no case to answer because a conviction on the prosecution evidence would be unsafe. The principles stated in ***Galbraith*** have been consistently applied in Jamaica although the 1968 Act is not part of the law in Jamaica. (See ***Daley v R [1993] 4 All E.R. 87.***

16. In ***R v Barker, (1977) 65 Crim. Rep.*** a case decided before ***Galbraith***, and which involved a conviction for driving a motor vehicle with a blood alcohol concentration above the prescribed limit the appellant was convicted and sentenced to six months imprisonment and suspended for two years. A submission of no-case to answer was made and it was rejected. The matter went to the Court of Appeal where counsel asked the court to find that the conviction was unsafe or unsatisfactory. He based his argument principally on the fact that at one point in his summing-up the judge seemed to be telling the jury that the inconsistencies were such that they could not convict. That was one possible conclusion to apply to one passage of the summing-up. The court went on to say:

"But even if he is right and even if the judge has taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury and would have been quite wrong in the present case. The judge, whatever his personal views, must put the issue before the jury fairly."

17. In the Belize case of ***Taibo v R [1996] 48 W.I.R. 74*** the Privy Council stated that the criterion to be applied by a trial judge in dealing with a submission of no-case to answer is whether there is material on which a reasonable jury could be satisfied of the guilt of the defendant. There, the Board applied ***Galbraith*** in maintaining that once there is credible material, even if the prosecution case was 'very thin' the trial should proceed.

18. On the other hand in ***R v Colin Shippey and others, [1988] Crim. L.R. 767*** Turner J considered the scope of ***R v Galbraith***. 'S' was charged alone with rape and with two other defendants with a further rape on a different day of the same girl. The prosecution case depended entirely upon the evidence of the complainant and there was effectively little or no corroboration. After the close of the prosecution case submissions of no case to answer were made on behalf of all three accused on the basis of ***Galbraith*** *(supra)* namely that the evidence was so inherently weak and inconsistent that no jury properly directed could properly convict. The prosecution opposed the application. After reviewing ***Galbraith*** in great detail the judge said that he did not interpret the judgment in either ***Galbraith*** or ***Barker*** as intending to say that if there are parts of the evidence which go to support the charge then no matter what the state of the rest of the evidence that is enough to leave the matter to the jury. He felt it was the duty of the court to make an assessment of the evidence as a whole.

19. He said that it was not simply a matter of the credibility of individual witnesses or simply a matter of evidential inconsistencies between witnesses, although those matters may play a subordinate role. He found that there were within the complainant's own evidence inconsistencies of such a substantial kind that he would have to point out to the jury their effect and to indicate to the jury how difficult and dangerous it would be to act upon the plums and not the duff. (Emphasis mine). He accordingly upheld the submission.

20. In Australia the law has been settled since ***Doney v R [1990] 171 Crim. Law Rep. 214*** a decision of a five-member court. There, the court expressed the principle thus:

> *"If there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."*

The High Court went on to point out that the power reserved to a court of criminal appeal to set aside a verdict on the grounds that it is unsafe or unsatisfactory, does not involve an interference with the traditional division of functions between judge and jury in a criminal trial; and that there are no grounds for adding that power to the armoury of a trial judge.

21. In ***Sangit Chaitlal v State*** Bernard J.A. (as he then was) in delivering the judgment of the court expressed the view that the test as laid down in ***Galbraith*** was too restricted a view for while it may cover the case where the verdict is unsafe or unsatisfactory, it did not seem to meet the situation where the verdict was unreasonable or could not be supported having regard to the evidence (which is the language used by our statute giving a judge a somewhat wider discretion.) He opined, that in the ultimate the matter should be left to the good sense of the trial judge who must be depended upon to see that there has been no miscarriage of justice.

22. More recently in the case of ***Bethel v The State (No. 2) [2000] 59 W.I.R. 456*** de la Bastide, C.J. referred to the approach taken by the English Court of Appeal in ***R v Clinton [1993] 1 All E.R. 998*** which was based on section 2(1)(a) of the Criminal Appeal Act 1968 (which has since been repealed and replaced with some modification by the Criminal Appeal Act, 1999). The English sub-section, he said, provided that an appeal against conviction should be allowed if the conviction was considered unsafe and unsatisfactory. The corresponding provision in the Trinidad and Tobago Judicature Act is section 44(1) which prescribes that an appeal should succeed if the Court of Appeal thinks that on any ground there was a miscarriage of justice. The matter he said was considered previously in ***Solomon v The State [1999] 57 WIR 324***, where the court considered the difference in the language of the English provision as compared with ours and came to the conclusion that there was no substantial difference in the effect of both provisions.

23. In the instant case whilst there were several inconsistencies and weaknesses in the evidence of 'K' they were not necessarily fatal. It must be remembered that the unfortunate incident occurred when 'K' was three years old. We agree that at the time of the trial she was nine years of age but it was important for the jury not to lose track of those important aspects of the case. Furthermore, within recent times there seems to be a practice where some judges have come to think it right that when their own assessment of the credibility and consistency of the evidence led by the prosecution is such that a conviction on the evidence would be unsafe, they should withdraw the case from the jury so as to make sure that the accused is not the victim of a miscarriage of justice. The court deprecates that practice. As Lord Widgery C.J. said in ***R v Barker*** (supra) "*.....It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying.*" See too the dicta of Ibrahim J.A. in the ***State v Rick Gomes*** and ***Luis Blanco Gomez Cr. A 98/99 (unreported) at page 17*** where he said:

> *"A judge sitting with a jury, however, must be careful not to be too anxious to save a jury from themselves by relieving them of the responsibility and the right to make their own assessment of the perceived weaknesses in the prosecution's case."*

24. We are therefore of the opinion that the judge was correct in rejecting the submission of no case to answer.

25. Another very important feature of the prosecution case was the failure of 'K' to give any evidence that would link the appellant with the dates in the indictment, that is to say, August 31st 1997 – May 01,1998.

26. In the case of ***R v Dossi (1919) 13 Cr. App. R. 158*** the indictment on which the appellant was convicted charged him with indecently assaulting a child, Nora Elizabeth White, aged 11, *"on March 19th 1918,"* and with indecently assaulting another child, Rebecca Barnett, aged 14, between September 12th and 30th, 1917. White gave evidence of no specific date, but referred to constant acts of indecency over a considerable period ending at some date in March, 1918. A witness called for the defence swore that he was with the appellant on March 19th during the material time and that no indecency with a child took place. At the conclusion of the Deputy Chairman's summing up the jury retired, and on their return said that they found the appellant *"with regard to the date March 19th, Not Guilty. If the indictment covers other dates, Guilty."* They also found him Not Guilty of indecently assaulting Rebecca Barnett. On the application of the prosecution the Deputy Chairman amended the indictment by substituting *"on some day in March"* for the words *"On March 19th, 1918,"* and the jury then found the appellant Guilty on the amended indictment.

27. It was submitted on behalf of the appellant that if a man is put on trial on an indictment which charged him with committing an offence on a specific date and no amendment was made before or during the trial and the jury found that he did not commit the offence on that date they should return a verdict of Not guilty. That, it was further submitted, was especially so where the defence was one of alibi. The judgment of the Court of Criminal Appeal was delivered by Atkin J who, in relation to the submission that there was no power in the court to amend the indictment and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days, they ought to have found him Not Guilty. He then stated:

> *"It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence."*

28. Later on in the same judgment he said at page 160:

> *"Though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment."*

29. In the instant case two situations arose:

i *Time was not an essential part of the alleged offence; and*
ii. *Whilst there was no evidence on the prosecution case to link the appellant with the dates in the indictment when the appellant gave*

evidence he provided the necessary evidence thereby filling the lacuna in the state's case. He said:

> *"When mother operated these bars in functions and fetes – when she come she would bring 'K' and I used to take care of 'K' during the period.....That period included August 31 1997 – May 01 1998.*

30. Other grounds of appeal were filed but as we indicated at the beginning of this judgment counsel relied on the no-case submission. Out of deference to Counsel we have considered the other grounds but have found no merit in any of them.

31. Having regard to all these reasons we would dismiss the appeal. The question of sentence has been adjourned to January 25, 2005 for consideration.

R. Hamel-Smith
Justice of Appeal

L. Jones
Justice of Appeal

S. John
Justice of Appeal

SUPPLEMENTAL

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 26 of 2004

BETWEEN

JOMAINE BOWEN **APPELLANT**

AND

THE STATE **RESPONDENT**

PANEL:

R. Hamel-Smith, J.A.

L. Jones, J.A.

S. John, J.A.

APPEARANCES:

Mr. Ian Stuart Brook for the Appellant

Mr. Trevor M. Ward for the Respondent

DATE OF DELIVERY: 28th January 2005

SENTENCE

Delivered by S. John, J.A.

This judgment is a supplemental to the judgment delivered on January 12, 2005.

2. On January 12, 2005 we dismissed this appeal and deferred the question of sentence. On January 25, 2005 we heard submissions from both Counsel on the issue and reserved our decision.

3. Mr. Stuart Brook for the appellant submitted to the court that he was relying on the mitigation plea made by senior counsel for the appellant at the trial. In addition, he submitted, he was relying on the following documents also submitted at the trial namely:

(i) The probation officer's report;
(ii) A petition signed by more than 250 persons who all spoke about the appellant's glowing performance at his workplace; and
(iii) A letter written by a minor cousin living abroad who spoke of the love she had for the appellant and the high esteem in which she held him.

4. The appellant was fifteen years of age at the time of the commission of the offences. They were committed during the period August 31 1997 to March 1998. At the conclusion of the preliminary inquiry on November 23 1999 he was committed to stand trial, which did not begin until February 04 2004. The trial judge no doubt took into account the fact that he was fifteen years of age at the time of the commission of the offences but in a general way. We say general because she then proceeded to relate that a certain degree of trust had been reposed in him and that he had breached that trust. In the course of passing sentence she commented: *"You were about 3 times older than Crystal. She was entrusted in your care, and you betrayed that trust by committing these acts upon her."*

5. We have some difficulty in such a proposition. One can readily understand the reposing of trust in a male adult to baby-sit a young girl child but we do not think that the same can be said of a fifteen year old male. It may be leaving things to chance when one entrusts a fifteen year-old male with a young girl. This is not to countenance the commission of the offence in any way but in today's world to repose such a high degree of trust in such a young person may be placing the bar somewhat on the high side.

6. In Cr App 62/2000 ***Latchman v The State***, Lucky JA stated that a court is always concerned about sending young first offenders to an extended term of imprisonment. Of

course, it all depends on the circumstances of the case but nonetheless we share that reluctance if only because of the adverse consequences on the accused in such an environment.

7. It cannot be doubted that in the instant appeal the question of sentence must have been a difficult one for the trial judge, given that she had standing before her a 21-22 year old young man and was attempting to go back in time to the date of commission of the crime. Nevertheless, we express concern whether the judge took all that was required into consideration.

8. In ***R v Secretary of State ex parte Uttley*** [2004] UKHL 38 the House of Lords recognized that in circumstances such as these where the accused at the time of the offence would have been liable to a certain term of imprisonment as a young offender had he been tried within a reasonable time, that term must be taken into account when determining the sentence after a delay of a number of years. Regrettably, this was a recent decision so it could not have been brought to the attention of the trial judge.

9. In this case, the delay between committal and trial was in no way attributable to the appellant. The maximum term which could have been imposed upon him was not less than three years nor more than four years had he been sentenced pursuant to the provisions of the Young Offenders Detention Act Chap13:05. The trial judge did not take into account the maximum sentence available under the Young Offenders Detention Act at the time of sentencing. Section 7 of that Act provides as follows:

> *(1) Where a person is convicted before the High Court on indictment of any offence other than murder, or before a Court of Summary Jurisdiction of any offence for which he is liable to be sentenced to imprisonment, and it appears to such Court-*
>
> *(a) that the person is not less than sixteen nor more than eighteen years of age, and*

(b) *that by reason of his antecedents or mode of life it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime,*

the Court may, in lieu of sentencing him to the punishment provided by law for the offence for which he was convicted, pass a sentence of detention under penal discipline in the Institution for a term not less than three years nor more than four years.

(2) *Before passing such a sentence the Court shall be satisfied that the character, state of health, and mental condition of the offender, and the other circumstances of the case, are such that the offender is likely to profit by such instruction and discipline as aforesaid.*

10. It is therefore quite clear that had he been convicted at a time when he was not less than sixteen nor more than eighteen, he could not have received a sentence of more than four years. Through no fault of his own he was deprived of that sentencing option and also deprived of the opportunity to receive such instruction and discipline afforded young offenders at the institution.

11. We have carefully read the probationer officer's report and the many recommendations that counsel has provided. They all demonstrate that the appellant is a young man of good character with many good qualities and who has never had a brush with the law. In fact, the final sentence of the probation officer's report states: "*Jomaine's personality stands in sharp contrast to the deviant acts committed.*" The judge in passing sentence acknowledged that the appellant was not a person in need of rehabilitation.

12. We, in no way wish to diminish the seriousness of the offences and do not for a moment lose sight of the fact that the victim was just three years old. However, there

must be a balancing exercise that takes into account on the one side the harm done to the victim and the need for retribution and the need to protect society from persons who commit such crimes on the other.

13. In the circumstances of this case, primarily because of the age of the appellant at the time of the offence and the fact that the trial judge, through no fault of her own, did not have the benefit of the authority referred to earlier, we think that the sentences were unduly severe.

14. Accordingly, we reduce it to a term of three years imprisonment. The sentence on each count will run concurrently from the date of his conviction.

R. Hamel-Smith
Justice of Appeal

L. Jones
Justice of Appeal

S. John
Justice of Appeal

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SAULT STE MARIE CASE

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R. v. Sault Ste. Marie (City) 3 C.R. (3d) 30, [1978] 2 S.C.R. 1299, 21 N.R. 295, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161

1978 CarswellOnt 24

Supreme Court of Canada, 1978

Laskin C.J.C., Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and

Pratte JJ.

Heard: October 13 and 14, 1977

Judgment: May 1, 1978

Counsel: R.M. McLeod and J.N. Mulvaney, Q.C., for the Crown.

R.J. Rolls, Q.C., and R.S. Harrison, for respondent.

Criminal Law --- General principles involving criminal law -- Regulatory offences -- Strict liability -- Defence of due diligence.

Criminal Law --- Compelling appearance of accused -- Information -- Substance of information -- Statement of offence.

Criminal Law --- Appeals -- Appeal of summary conviction offence -- Appeal of conviction or acquittal -- Procedure on appeal -- Amendment of information.

Environmental Law --- Statutory protection of the environment -- Availability of defences -- Due diligence.

Environmental Law --- Statutory protection of the environment -- Practice and procedure -- Evidence -- Burden of proof -- Mens rea.

Strict liability -- Definition -- Distinction between strict and absolute liability offences -- Three categories of offences -- Distinction between public welfare offences and true criminal offences -- Polluting and defence of due diligence or reasonable mistake of fact -- Burden of proof in relation to due diligence -- Effect of "wilfully", "with intent", "knowingly", "intentionally", "cause", or "permit" in definition of offence -- Whether city liable for pollution caused by independent contractor collecting garbage for municipality -- Whether doctrine of respondeat superior applies.

Indictments -- Duplicity and multiplicity -- Proper test -- Distinction in regard to offences that can be committed in any one of several modes -- Pollution charge specifying alternative methods of committing offence -- Effect of words of section used in charge.

The city of Sault Ste. Marie was charged under s. 32(1) of the Ontario Water Resources Act that it did discharge or cause to be discharged or permitted to be discharged or deposited materials that might impair the quality of the water in Cannon Creek and the Root River. It had an agreement with a company for the disposal of all refuse originating in the city. The company was convicted under s. 32(1). The question before the court was whether the city was also guilty of such offence. In the first instance the charge was dismissed on the finding that the city had nothing to do with the actual disposal operations, that the company was an independent contractor and that its employees were not employees of the city. On the appeal de novo the offence was found to be one of strict liability and a conviction was registered. The Divisional Court in setting aside the judgment found that the charge was duplicitous and that the charge required mens rea with respect to causing or permitting a discharge. The Ontario Court of Appeal

agreed that the charge was one requiring proof of mens rea. A Majority held that there was not sufficient evidence to establish mens rea and ordered a new trial.

Held:

Appeal dismissed; new trial directed; cross-appeal dismissed.

Each of the existing tests of duplicity is helpful as far as it goes, but each is too general to provide a clear demarcation in concrete instances. The primary test should be a practical one, based on the only valid justification for the rule against duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge? The charge in the present case was not duplicitous. There was nothing ambiguous or uncertain in the charge. The city knew the case it had to meet. Only one generic offence was charged, the essence of which was "polluting", and that offence could be committed in one or more of several modes. There was nothing wrong in specifying alternative methods of committing an offence, or in embellishing the periphery, provided only one offence is to be found at the focal point of the charge. Furthermore, although not determinative, it is not irrelevant that the information has been laid in the precise words of s. 32(1). The legislature did not intend to create different offences for polluting, dependent upon whether one deposited or caused to be deposited or permitted to be deposited. The legislation is aimed at one class of offender only, those who polluted (p. 39).

The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element -- that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such inquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law. In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such (p. 40).

Once the defence of reasonable mistake of fact is accepted, there is no barrier to acceptance of the other constituent part of a defence of due diligence. There is nothing in Woolmington v. D.P.P. which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence on the balance of probabilities (p. 45).

The correct approach is to relieve the Crown of the burden of proving mens rea. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care. In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

There are compelling grounds for the recognition of three categories of offences rather than the traditional two: (1) offences in which mens rea must be proved by the prosecution; (2) offences of strict liability in which there is no necessity for the prosecution to prove mens rea -- the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care; the defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event; (3) offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault. Offences which are criminal in the true sense fall in the first category. Public welfare offences would prima facie be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if

such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category (pp. 53-54).

The conflict in the authorities shows that in themselves the words "cause" and "permit" fit much better into an offence of strict liability than either full mens rea or absolute liability. Since s. 32(1) creates a public welfare offence, without a clear indication that liability is absolute and without any words such as "knowingly" or "wilfully" expressly to import mens rea, application of the criteria outlined above undoubtedly places the offence in the category of strict liability (p. 56).

The prohibited act would be committed by those who undertake the collection and disposal of garbage who are in a position to exercise continued control of this activity and prevent the pollution from occurring but fail to do so. The "discharging" aspect of the offence centres on direct acts of pollution. The "causing" aspect centres on the defendant's active undertaking of something which it is in position to control and which results in pollution. The "permitting " aspect of the offence centres on the defendant's passive act of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen. The close interweaving of the meaning of these terms emphasizes again that s. 32(1) deals with only one generic offence (p. 56).

A municipality cannot slough off responsibility by contracting out the work. It is in a position to control those whom it hires to carry out garbage disposal operations and to supervise the activity, either through the provisions of the contract or by municipal by-laws. It fails to do so at its peril. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. (pp. 57-58).

Cases considered:

Woolmington v. D.P.P., [1935] A.C. 462, 25 Cr. App. R. 72 (C.A.A.) – distinguished

R. v. Prince (1875) L.R. 2 C.R.R. 154 (C.R.R.) – considered

Sherras v. De Rutzen, [1895] 1 Q.B. 918 (D.C.) – considered

R. v. Ewart, [1906] N.Z.L.R. 709 – considered

R. v. Regina Cold Storage & Forwarding Co., 17 Sask. L.R. 507, [1923] 3 W.W.R. 1387, 41 C.C.C. 21, [1924] 2 D.L.R. 286 – considered

Proudman v. Dayman (1941), 67 C.L.R. 536 – considered

R. v. Pee-Kay Smallwares Ltd., [1947] O.R. 1019, 6 C.R. 28, 90 C.C.C. 129, [1948] 1 D.L.R. 235 – considered

R. v. Rees, [1956] S.C.R. 640, 24 C.R. 1, 115 C.C.C. 1, 4 D.L.R. (2d) 406 – considered

Beaver v. R., [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129 – considered

Rv. Larocque (1958), 28 C.R. 331, 25 W.W.R. 434, 120 C.C.C. 246 (B.C. C.A.) – considered

R. v. King, [1962] S.C.R. 746, 38 C.R. 52, 133 C.C.C. 1, 35 D.L.R. (2d) 386 – considered

R. v. McIver, [1965] 2 O.R. 475, 45 C.R. 401, [1945] 4 C.C.C. 182 (C.A.) – considered

R. v. Indust. Tankers Ltd., [1968] 4 C.C.C. 81 (Ont.) – considered

R. v. Strawbridge, [1970] N.Z.L.R. 909 – considered

Sweet v. Parsley, [1970] A.C. 132, 53 Cr. App. R. 221, [1969] 1 All E.R. 347 (H.L.) – considered

R. v. Pierce Fisheries Ltd., [1971] S.C.R. 5, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591 – considered

R. v. A. O. Pope Ltd. (1972), 5 N.B.R. (2d) at 719, 20 C.R.N.S. 159 – considered

R. v. Custeau, [1972] 2 O.R. 250, 17 C.R.N.S. 127, 6 C.C.C. (2D) 179 (C.A.) – considered

R. v. Cherokee Disposals & Const. Ltd., [1973] 3 O.R. 599, 13 C.C.C. (2d) 87 – considered

R. v. Gillies (1974), 18 C.C.C. (2d) 190 (N.S. C.A.) – considered

R. v. Liquid Cargo Lines Ltd. (1974), 18 C.C.C. (2d) 428 (Ont.) – considered

R. v. North Can. Enterprises Ltd. (1974), 20 C.C.C. (2d) 242 (Ont.) – considered

Hill v. R., [1975] 2 S.C.R. 402, 24 C.R.N.S. 297, 14 C.C.C. (2d) 505, 43 D.L.R. (3d) 532 – considered

R. v. Hickey (1976), 12 O.R (2d) 578, 29 C.C.C. (2d) 23, 68 D.L.R. (3d) 88, reversed 13 O.R. (2d) 228, 30 C.C.C. (2d) 416, 70 D.L.R. (3d) 689 – considered

R. v. Servico Ltd. (1977), 2 Alta. L.R. (2d) 388 (C.A.) – considered

R. v. Surrey Justices; Ex parte Witherick, [1932] 1 K.B. 450 (D.C.) – considered

R. v. Madill, [1943] 1 W.W.R. 365, 79 C.C.C. 206, [1943] 2 D.L.R. 570 (Alta. C.A.) – considered

Kipp v. A.G. Ont., [1965] S.C.R. 57, 45 C.R. 1, [1965] 2 C.C.C. 133 – considered

R. v. Matspeck Const. Ct., [1965] 2 O.R. 730, [1965] 4 C.C.C. 78 – considered

R. v. Internat. Nickel Co. (1972), 10 C.C.C. (2d) 44 (Ont. C.A.) – considered

Ross Hillman Ltd. v. Bond, [1974] Q.B. 435, 59 Cr. App. R. 42, [1974] 2 All E.R. 287 (D.C.) – considered

Kienapple v. R., [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 1 N.R. 322, 44 D.L.R. (3d) 351 – considered

Statute considered:

Ontario Water Resources Act, R.S.O. 1970, c. 332 [title am. 1972, c. 1, s. 70(1)], s. 32(1).

Authorities considered:

Criminal Law, Evidence and Procedure, 2 Hals. (4th), para. 18.

Hall, "Principles of Criminal Law", [1947] ch. 13.

Howard, "Strict Responsibility in the High Court of Australia", 76 L.Q.R. 547.

Jobson, "Far From Clear" (1975-76), 18 Cr. L.Q. 294.

Law Reform Commission of Canada, Our Criminal Law, March 1976,

Law Reform Commission of Canada, The Meaning of Guilt -- Strict Liability.

Morris and Howard, Studies in Criminal Law (1964), p. 200

Perkins, "The Civil Offence" (1952), 100 U. of Pa. L. Rev. 832.

Pound, The Spirit of the Common Law (1906).

Sayre, "Public Welfare Offences" (1933), 33 Colum. L. Rev. 55.

Williams, Criminal Law, The General Part, 2nd ed., p. 262

Appeal by the Crown and cross-appeal by the city from the decision of the Ontario Court of Appeal reported at 30 C.C.C. (2d) 257 at 283.

The judgment of the court was delivered by *DICKSON J.*:

1 In the present appeal the court is concerned with offences variously referred to as "statutory", "public welfare", "regulatory", "absolute liability, or " "strict responsibility", which are not criminal in any real sense but are prohibited in the public interest: *Sherras v. De Rutzen* , [1895] 1 Q.B. 918 (D.C.). Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like. In this appeal we are concerned with pollution.

2 The doctrine of the guilty mind expressed in terms of intention of recklessness, but not negligence, is at the foundation of the law of crimes. In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without mens rea: *R. v. Prince* (1875), L.R. 2 C.C.R. 154 (C.C.R.); *R. v. Tolson* (1889), 23 Q.B.D. 168 (C.C.R.); *R. v. Rees*, [1956] S.C.R. 640, 24 C.R. 1, 115 C.C.C. 1, 4 D.L.R. (2d) 406; *Beaver v. R.*, [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129; *R. v. King*, [1962] S.C.R. 746, 38 C.R. 52, 133 C.C.C. 1, 35 D.L.R. (2d) 386. Blackstone made the point over 200 years ago in words still apt: "to constitute a crime against human law, there must be first a vicious will, and secondly, an unlawful act consequent upon such vicious will": Blackstone's Commentaries, vol. 4, p. 21. I would emphasize at the outset that nothing in the discussion which follows is intended to dilute or erode that basic principle.

3 The appeal raises a preliminary issue as to whether the charge, as laid, is duplicitous and, if so, whether ss. 732(1) and 755(4) [re-en. 1974-75-76, c. 93, s. 94] of the Criminal Code, R.S.C. 1970, c. C-34, preclude the accused city of Sault Ste. Marie from raising the duplicity claim for the first time on appeal. It will be convenient to deal first with the preliminary point and then consider the concept of liability in relation to public welfare offences.

4 The city of Sault Ste. Marie was charged that it did discharge or cause to be discharged or permitted to be discharged or deposited, materials into Cannon Creek and Root River, or on the shore or bank thereof, or in such place along the side that might impair the quality of the water in Cannon Creek and Root River, between 13th March and 11th September 1972. The charge was laid under s. 32(1) of the Ontario Water Resources Act, R.S.O. 1970, c. 332 [title am. 1972, c. 1, s. 70(1)], which provides, so far as relevant, that every, municipality or person that discharges or deposits or causes or permits the discharge or deposit of any material of any kind into any water course or on any shore or bank thereof or in any place that may impair the quality of water, is guilty of an offence and, on summary conviction, is liable on first conviction to a fine of not more than $5,000 and on each subsequent conviction to a fine of not more than one year or to both fine and imprisonment.

5 Although the facts do not rise above the routine, the proceedings have to date had the anxious consideration of five courts. The city was acquitted in Provincial Court (Criminal Division) but was convicted following a trial de novo on a Crown appeal. A further appeal by the city to the Divisional Court was allowed and the conviction was quashed (30 C.C.C. (2d) at 260]. The Court of Appeal for Ontario on yet another appeal directed a new trial [30 C.C.C. (2d) 257 at 283]. Because of the importance of the legal issues, this court granted leave to the Crown to appeal and leave to the city to cross-appeal.

6 To relate briefly the facts, the city on 18th November 1970 entered into an agreement with Cherokee Disposal and Construction Co. Ltd. for the disposal of all refuse originating in the city. Under the terms of the agreement, Cherokee became obligated to furnish a site and adequate labour, material and equipment. The site selected bordered Cannon Creek which, it would appear, runs into the Root River. The method of disposal adopted is known as the "area" "continuous slope" method of sanitary land fill, whereby garbage is compacted in layers which are covered each day by natural sand or gravel.

7 Prior to 1970, the site had been covered with a number of fresh-water springs that flowed into Cannon Creek. Cherokee dumped material to cover and submerge these springs and then placed garbage and

wastes over such material. The garbage and wastes in due course formed a high mound sloping steeply toward, and within 20 feet of, the creek. Pollution resulted. Cherokee was convicted of a breach of s. 32(1) of the Ontario Water Resources Act, the section under which the city has been charged. The question now before the court is whether the city is also guilty of an offence under that section.

8 In dismissing the charge at first instance, the judge found that the city had had nothing to do with the actual disposal operations, that Cherokee was an independent contractor and that its employees were not employees of the city. On the appeal de novo Judge Vannini found the offence to be one of strict liability and he convicted. The Divisional Court in setting aside the judgment found that the charge was duplicitous. As a secondary point, the Divisional Court also held that the charge required mens rea with respect to causing or permitting a discharge. When the case reached the Court of Appeal that court held that the conviction could not be quashed on the ground of duplicity because there had been no challenge to the information at trial. The Court of Appeal agreed, however, that the charge was one requiring proof of mens rea. A majority of the court (Brooke and Howland JJ.A.) held there was not sufficient evidence to establish mens reas and ordered a new trial. In the view of Lacourciere J.A., dissenting, the inescapable inference to be drawn from the findings of fact of Judge Vannini was that the city had known of the potential impairment of waters of Cannon Creek and Root River and had failed to exercise its clear powers of control.

9 The divers, and diverse, judicial opinions to date on the points under consideration reflect the dubiety in these branches of the law.

The duplicity point

10 Turning then to the question of duplicity, and whether the information charged the city with several offences or merely one offence which might be committed in different modes. The argument is that s. 32(1) of the Ontario Water Resources Act charges three offences: (i) discharging; (ii) causing to be discharged; (iii) permitting to be discharged, deleterious materials. The applicable principle is well established: if the information in one count charges more than one offence, it is bad for duplicity: *Kipp v. A.G. Ont.* , [1965] S.C.R. 57, 45 C.R. 1, [1965] 2 C.C.C. 133.

11 The rule against multiplicity of charges in an information is contained in s. 724(1) of the Code, which reads as follows:

724. (1) In proceedings to which this Part applies, the information...

(*b*) may charge more than one offence or relate to more than one matter of complaint, but where more than one offence is charged or the information relates to more than one matter of complaint, each offence or matter of complaint, each offence or matter of complaint, as the case may be, shall be set out in a separate count.

12 Section 731(*a*) provides, however, that no information shall be deemed to charge two offences by reason only that it states that the alleged offence was committed in different modes.

13 Several tests have been suggested for determining whether an indictment or information is multiplicitous. Probably the best known test is that enunciated by Avory J. in *R. v. Surrey Justices; Ex parte Witherick*, [1932] 1 K.B. 450 at 452 (D.C.). The charge was that of driving without due care and attention and without reasonable consideration for other persons. Avory J. said that if a person may do one without the other, it followed as a matter of law that an information which charged him in the alternative would be bad. In *R. v. Madill*, [1943] 1 W.W.R. 365, 79 C.C.C. 206 at 210, [1943] 2 D.L.R. 570 (Alta. C.A.), Ford J.A. applied the test of "whether evidence can be given of distinct acts, committed by the person charged, constituting two or more offences", and in *R. v. Internat. Nickel Co.* (1972), 10 C.C.C. (2d) 44 at 48 (Ont. C.A.), Arnup J.A. expressed the view that if a section containing two or more elements is to be construed as containing only one offence, one must be able to state with precision the essence of the single offence.

14 Each of these tests is helpful as far as it goes, but each is too general to provide a clear demarcation in concrete instances. This is shown by the variety of cases and the diversity of opinion in this case itself. To resolve the matter one must recall, I think, the policy basis of the rule against multiplicity and duplicity. The rule developed during a period of extreme formality and technicality in the preferring of

indictments and laying of informations. It grew from the humane desire of judges to alleviate the severity of the law in an age when many crimes were still classified as felonies, for which the punishment was death by the gallows. The slightest defect made an indictment an nullity. That age has passed. Parliament has made it abundantly clear in those sections of the Criminal Code having to do with the form of indictments and informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities.

15 The duplicity rule has been justified on two grounds: to be fair to the accused in the preparation of his defence and to enable him to plead autrefois convict in the future. As Avory J. said in *R. v. Surrey Justices; Ex parte Witherick*, supra, at p. 452:

It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot than know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading autrefois convict.

16 The problem of raising a defence of autrefois convict is illusory even when there is duplicity. It is difficult to see as a practical matter why the Crown would begin new proceedings after having just concluded a successful prosecution. Even if there were a prosecution, it could not succeed. Assume conviction of the city on a charge of (i) discharging, (ii) causing discharge of or (iii) permitting discharge of a pollutant at a stated time and place. If another charge were laid at a later date in respect of (i) or (ii) or (iii), as related to the same pollutant and the same time and place, the new charge would be based on the same cause or matter which had already formed the basis of a conviction, and a further conviction would be barred: *Kienapple v. R.* , [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 1 N.R. 322, 44 D.L.R. (3d) 351. It is equally clear that no problem of autrefois acquit arises, even where there is duplicity, because an acquittal means acquittal on all the offences charged, and thus there is no difficulty in raising the defence of autrefois acquit to a later charge of one of the same offences alone.

17 In my opinion, the primary test should be a practical one, based on the only valid justification for the rule against duplicity, does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge? Viewed in that light, as well as by the other tests mentioned above, I thing we must conclude that the charge in the present case was not duplicitous. There is nothing ambiguous or uncertain in the charge. The city knew the case it had to meet. Section 32(1) of the Ontario Water Resources Act is concerned with only one matter, pollution. That is the gist of the charge and the evil against which the offence is aimed. One cognate act is the subject of the prohibition. Only one generic offence was charged, the essence of which was "polluting," and that offence could be committed in one or more of several modes. There is nothing wrong in specifying alternative methods of committing an offence, or in embellishing the periphery, provided only one offence is to be found at the focal point of the charge. Furthermore, although not determinative, it is not irrelevant that the information has been laid in the precise words of the section.

18 I am satisfied that the legislature did not intend to create different offences for polluting, dependent upon whether one deposited or caused to be deposited or permitted to be deposited. The legislation is aimed at one class of offender only, those who pollute.

19 In *R. v. Matspeck Const. Co.*, [1965] 2 O.R. 730, [1965] 4 C.C.C. 78, Hughes J. considered the very section now under study and, adopting the approach I favour, concluded that the charge was not duplicitous. The judge said, p. 732:

There can be no doubt in the mind of accused that he is charged with having in one mode or another, discharged or deposited material into water and that this material may have impaired its quality.

20 On the other hand, in the English case of *Ross Hillman Ltd. v. Bond* , [1974] Q.B. 435, 59 Cr. App. R. 42, [1974] 2 All E.R. 287 (D.C.) , where very similar language was used, May J. said, p. 291, that the Act (in that case s. 40(5) (*b*) of the Road Traffic Act, 1972) created three distinct types of offence. I think that the authority of the English cases in this area of the law must be carefully considered and their aid discounted to the extent that the statutory provisions applicable differ from those contained in our Code.

21 I conclude that the charge in this case is not duplicitous. It is unnecessary, therefore, to consider whether a defendant can raise a duplicity object for the first time on appeal.

The mens rea point

22 The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such inquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

23 In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense yet be branded as a malefactor and punished as such.

24 Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.

25 Public welfare offences evolved in mid-19th century Britain (*R. v. Woodrow* (1846), 15 M. & W. 404, 153 E.R. 907, and *R. v. Stephens* (1866), L.R. 1 Q.B. 702) as a means of doing away with the requirement of mens rea for petty police offences. The concept was a judicial creation, founded on expediency. That concept is now firmly imbedded in the concrete of Anglo- American and Canadian jurisprudence, its importance heightened by the ever increasing complexities of modern society.

26 Various arguments are advanced in justification of absolute liability in public welfare offences. Two predominate. Firstly, it is argued that the protection of social interests requires a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them. The removal of any possible loophole acts, it is said, as an incentive to take precautionary measures beyond what would otherwise be taken in order that mistakes and mishaps be avoided. The second main argument is one based on administrative efficiency. Having regard to both the difficulty of proving mental culpability and the number of petty cases which daily come before the courts, proof of fault is just too great a burden in time and money to place upon the prosecution. To require proof of each person's individual intent would allow almost every violator to escape. This, together with the glut of work entailed in proving mens rea in every case, would clutter the docket and impede adequate enforcement as virtually to nullify the regulatory statutes. In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legislation and the social ends to be achieved are of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude. In further justification, it is urged that slight penalties are usually imposed and that conviction for breach of a public welfare offence does not carry the stigma associated with conviction for a criminal offence.

27 Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked. The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time. legal costs, exposure to the processes of the criminal law at trial and, however, one may downplay it, the opprobrium of conviction. It is not sufficient to say that the public interest is engaged and, therefore, liability may be imposed without fault. In serious crimes, the public interest is involved and mens rea must be proven. The administrative argument has little force. In sentencing, evidence of due diligence is admissible and therefore the evidence might just as well be heard when considering guilt. Additionally, it may be noted that s. 198 of the Highway Traffic Act of Alberta, R.S.A. 1970, c. 169, provides that upon a person being charged with an offence under this Act, if the judge trying the case is of the opinion that the offence (a) was committed wholly by accident

or misadventure and without negligence and (b) could not by the exercise of reasonable care or precaution have been avoided, the judge may dismiss the case. See also s. 230(2) [am. 1976, c. 62, s. 48] of the Manitoba Highway Traffic Act, R.S.M. 1970, c. H60, which has a similar effect. In these instances at least, the legislature has indicated that administrative efficiency does not foreclose inquiry as to fault. It is also worthy of note that historically the penalty for breach of statutes enacted for the regulation of individual conduct in the interests of health and safety was minor -- $20 or $25; today, it may amount to thousands of dollars and entail the possibility of imprisonment for a second conviction. The present case is an example.

28 Public welfare offences involve a shift of emphasis from the protection of individual interests to the protection of public and social interests: see Sayre, "Public Welfare Offences" (1933), 33 Colum. L. Rev. 55; Hall, "Principles of Criminal Law", [1947] Ch. 13; Perkins, "The Civil Offences" (1952), 100 U. of Pa. L. Rev. 832; Jobson, "Far From Clear" (1975-76), 18 Cr. L.Q. 294. The unfortunate tendency in many past cases has been to see the choice as between two stark alternatives: (i) full mens rea; or (ii) absolute liability. In respect of public welfare offences (within which category pollution offences fall) where full mens rea is not required, absolute liability has often been imposed. English jurisprudence has consistently maintained this dichotomy: see 2 Hals. (4th), para. 18, Criminal Law, Evidence and Procedure. There has, however, been an attempt in Australia, in many Canadian courts, and indeed in England to seek a middle position, fulfilling the goals of public welfare offences while still not punishing the entirely blameless. There is an increasing and impressive stream of authority which holds that where an offence does not require full mens rea, it is nevertheless a good defence for the defendant to prove that he was not negligent.

29 Dr. Glanville Williams has written: "There is a half-way house between *mens rea* and strict responsibility which has not yet been properly utilized, and that is responsibility for negligence": Criminal Law, The General Part, 2nd ed., p. 262. Morris and Howard in Studies in Criminal Law (1964), p. 200, suggest that strict responsibility might with advantage be replaced by a doctrine of responsibility for negligence strengthened by a shift in the burden of proof. The defendant would be allowed to exculpate himself by proving affirmatively that he was not negligent. Professor Howard ("Strict Responsibility in High Court of Australia" (1960), 76 L.Q.R. 547) offers the comment that English law of strict responsibility in minor statutory offences is distinguished only by its irrationality and then has this to say in support of the position taken by the Australian High Court, p. 548:

Over a period of nearly sixty years since its inception the High Court has adhered with consistency to the principle that there should be no criminal responsibility without fault, however minor the offence. It has done so by utilising the very half-way house to which Dr. Williams refers, responsibility for negligence.

30 In his work Public Welfare Offences, at p. 78, Professor Sayre suggests that if the penalty is really slight, involving, for instance, a maximum fine of $25, particularly if adequate enforcement depends upon wholesale prosecution or if the social danger arising from violation is serious, the doctrines of basing liability upon mere activity rather than fault is sound. He continues, however, p. 79:

On the other hand, some public welfare offenses involve a possible penalty of imprisonment or heavy fine. In such cases it would see sounder policy to maintain the orthodox requirement of a guilty mind but to shift the burden of proof to the shoulders of the defendant to establish his lack of a guilty intent if he can. For public welfare offenses defendants may be convicted by proof of the mere act of violation; but, if the offense involves a possible prison penalty, the defendant should not be denied the right of bringing forward affirmative evidence to prove that the violation was the result of not fault on his part.

31 And at p. 82:

It is fundamentally unsound to convict a defendant for a crime involving a substantial term of imprisonment without giving him the opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent. If the public danger is widespread and serious, the practical situation can be met by shifting to the shoulders of the defendant the burden of proving a lack of guilty intent.

32 The doctrine proceeds on the assumption that the defendant could have avoided the prima facie offence through the exercise of reasonable care and he is given the opportunity of establishing, if he can, that he did in fact exercise such care.

33 The case which gave the lead in the branch of the law is the Australian case of *Proudman v. Dayman* (1941), 67 C.L.R. 536, where Dixon J. said, at p. 540:

It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.

34 This case, and several others like it, speaks of the defence as being that of reasonable mistake of fact. The reason is that the offences in question have generally turned on the possession by a person or place of an unlawful status, and the accused's defence was that he reasonably did not know of this status: e.g., permitting an unlicensed person to drive or lacking a valid licence oneself or being the owner of property in a dangerous condition. In such cases negligence consists of an unreasonable failure to know the facts which constitute the offence. It is clear, however, that in principle the defence is that all reasonable care was taken. In other circumstances, the issue will be whether the accused's behaviour was negligent in bringing about the forbidden event when he knew the relevant facts. Once the defence of reasonable mistake of fact is accepted, there is no barrier to acceptance of the other constituent part of a defence of due diligence.

35 The principle which has found acceptance in Australia since *Proudman v. Dayman*, supra, has a place also in the jurisprudence of New Zealand: see *R. v. Strawbridge*, [1970] N.Z.L.R. 909; *R. v. Ewart*, [1906] N.Z.L.R. 709.

36 In the House of Lords' case of *Sweet v. Parsley*, [1970] A.C. 132, 53 Cr. App. R. 221, [1969] 1 All E.R. 347, Lord Reid noted the difficulty presented by the simplistic choice between mens reas in the full sense and an absolute offence. He looked approvingly at attempts to find a middle ground. Lord Pearce, in the same case, referred to the "sensible half-way house" which he thought the courts should take in some so-called absolute offences. The difficulty, as Lord Pearce saw it, lay in the opinion of Viscount Sankey L.C. in *Woolmington. v. D.P.P.*, [1935] A.C. 462, 25 Cr. App. R. 72 (C.C.A.), if the full width of that opinion were maintained. Lord Diplock, however, took a different and, in my opinion, a preferable view, p. 164:

Woolmington's case did not decide anything so irrational as that the prosecution must call evidence to prove the absence of any mistaken belief by the accused in the existence of facts which, if true, would make the act innocent, any more than it decided that the prosecution must call evidence to prove the absence of any claim of right in a charge of larceny. The jury is entitled to presume that the accused acted with knowledge of the facts, unless there is some evidence to the contrary originating from the accused who alone can know on what belief he acted and on what ground the belief, if mistaken, was held.

37 In *Woolmington's* case the question was whether the trial judge was correct in directing the jury that the accused was required to prove his innocence. Viscount Sankey L.C. referred to the strength of the presumption of innocence in a criminal case and than made the statement, universally accepted in this country, that there is no burden on the prisoner to prove his innocence; it is sufficient for him to raise a doubt as to his guilt. I do not understand the case as standing for anything more than that. It is to be noted that the case is concerned with criminal offences in the true sense; it is not concerned with public welfare offences. It is somewhat ironic that *Woolmington's* case, which embodies a principle for the benefit of the accused, should be used to justify the rejection of a defence of reasonable care for public welfare offences and the retention of absolute liability, which affords the accused no defence at all. There is nothing in *Woolmington's* case, as I comprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence on the balance of probabilities.

38 There have been several cases in Ontario which open the way to acceptance of a defence of due diligence. In *R. v. McIver*, [1965] 2 O.R. 475, 45 C.R. 401, [1965] 4 C.C.C. 182, the Court of Appeal held that the offence charged, namely, careless driving, was one of strict liability but that it was open to an accused to show that he had a reasonable belief in facts which, if true, would have rendered the act innocent. MacKay J.A., who wrote for the court, relied upon *Sherras v. De Rutzen*, supra, *Proudman v. Dayman*, supra, *Maher v. Musson* (1934), 53 C.L.R. 100, and *R. v. Patterson*, [1962] 2 Q.B. 429, 46 Cr. App. R. 106, [1962] 2 Q.B. 429, 46 Cr. App. R. 106, [1962] 1 All E.R. 340 (C.C.A.), in availing an accused

the opportunity of explanation in the case of statutory offences that do not by their terms require proof of intent. The following two short passages from the judgment might be quoted (pp. 407 and 408):

On a charge laid under s. 60 of the Highway Traffic Act [R.S.O. 1960, c. 172] it is open to the accused as a defence, to show an absence of negligence on his part. For example, that his conduct was caused by the negligence of some other person, or by showing that the cause was a mechanical failure, or other circumstance, that he could not reasonable have foreseen...

In the present case it was open to the accused to show, if he could, that the collision of his care with the care parked on the shoulder of the road, occurred without fault or negligence on his part. He having failed to do so was properly convicted.

39 An appeal to this court was dismissed, [1966] S.C.R. 254, 48 C.R. 4, [1966] 2 C.C.C. 289, on other grounds.

40 Later, in *R. v. Custeau*, [1972] 2 O.R. 250, 17 C.R.N.S. 127, 6 C.C.C. (2d) 179 (C.A.), MacKay J.A., again speaking for the court, returned to the same point, p. 128:

In the case of an offence of strict liability (sometimes referred to as absolute liability) it has been held to be a defense if it is found that the defendant honestly believed on reasonable grounds in a state of facts which, if true, would render his act an innocent one.

41 In the British Columbia Court of Appeal the concept of reasonable care was discussed in *R. v. Larocque* (1958), 28 C.R. 331, 25 W.W.R. 434, 120 C.C.C. 246 (selling liquor to an interdicted person contrary to a provincial statute) by Sheppard J.A., speaking for the court, p. 332:

That test has been defined in *Bank of New South Wales v. Piper*, [1897] A.C. 383 at 389-90, as follows:

On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent.

The onus would therefore be upon the accused to show not merely that he did not know that Pierre was an interdicted person but also that he, the accused, had used honest and reasonable efforts to become acquainted with the information supplied by the department and to comply therewith and that notwithstanding such efforts he had an honest and reasonable belief that Pierre was not an interdicted person.

42 In an early Saskatchewan Court of Appeal decision in *R. v. Regina Cold Storage & Forwarding Co.*, 17 Sask. L.R. 507, [1923] 3 W.W.R. 1387, 41 C.C.C. 21, [1924] 2 D.L.R. 286 (unlawful possession of liquor) it was held that mens rea was an essential element for conviction and that that element was absent. Haultain C.J.S. appears to have conceptualized absence of means rea, not as lack of knowledge or intent, but rather in terms of reasonable care in an offence of strict liability. He said, p. 23: "Absence of *mens rea* means an honest and reasonable belief by the accused of the existence of facts which, if true, would make the charge against him innocent".

43 In the New Brunswick case of *R. v. A.O. Pope Ltd.*(1972), 5 N.B.R. (2d) at 719, 20 C.R.N.S. 159 (failing to provide properly fitted goggles contrary to the Industrial Safety Act, 1964 (N.B.), c. 5) Keirstead Co. Ct. J. held that the offence was one of strict but not absolute liability, and a defence of reasonable care was open to the accused to prove that the act was done without negligence or fault on his part. An appeal to the New Brunswick Supreme Court, Appeal Division, was dismissed (5 N.B.R. (2d) 715, 10 C.C.C. (2d) 430) without, however, any discussion of this issue.

44 Two more recent cases, one being from the province of Ontario and the other from the province of Alberta, deserve attention. In *R. v. Hickey* (1976), 12 O.R. (2d) 578, 29 C.C.C. (2d) 23, 68 D.L.R. (3d) 88 (speeding) the Divisional Court held that the offence was one of strict liability but that the accused would have a valid defence if he proved on the balance of probabilities that he honestly believed on reasonable grounds in a mistaken set of facts which, if true, would have made his conduct innocent. The accused had testified that he honestly believed because of the speedometer reading that he was not exceeding the speed limit. A test conducted by a police officer at the scene showed that the speedometer was, in

fact, not working properly. The majority of the court, therefore, set aside the conviction. Galligan J. Made the following comment, pp. 36-37:

Submissions were made to this Court about the difficulties involved in the prosecution of speeding cases and other strick liability offences if this defence is a valid on in law. In my opinion, the availability of the defence as a matter of law should make no unreasonable burden upon the prosecution or the Courts. It is clear from the Australian authorities that not only is the burden of proving such a defence upon the accused, he must prove it upon a balance of probabilities. It is not sufficient merely to raise a reasonable doubt. In this respect, the defence of mistake when raised as a defence to an offence of strict liability is very different than is the defence of mistake of fact when it is raised in a case involving *mens rea* as an essential ingredient of the offence. In the former case, the mistake of fact must not only be an honest one, but it must be based on reasonable grounds and it must be proved by the accused on the balance of probabilities. In the latter case the defence need only be an honest one and need not necessarily be based upon reasonable grounds and it need only cause the Court to have a reasonable doubt: see *R. v. Morgan*, [1975] 2 W.L.R. 913 (H.L.), and *Beaver v. R.*, [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129.

45 The decision in *Hickey* was subsequently appealed to the Court of Appeal, 13 O.R. (2d) 228, 30 C.C.C. (2d) 416, 70 D.L.R. (3d) 689. The Court allowed the appeal and restored the conviction. Jessup J.A., in giving judgment for the court, said:

Assuming, without deciding, that statutory offences can be classified into one of three groups as mentioned by Estey, C.J.H.C., in his judgment given in Divisional Court, we are of the opinion that the offence here in question, of speeding, under the *Highway Traffic Act*, R.S.O. 1970, c. 202, is a statutory offence within the third group mentioned by Estey, C.J.H.C.; that is one of absolute liability in the sense that reasonable mistake of fact is not a defence.

46 No reasons were given for the identification of the offence as one of absolute liability once the three groups of statutory offences were assumed to exist.

47 In the Appellate Division of the Alberta Supreme Court, the defence of reasonable care for an offence of strict liability was accepted, after full consideration of the issues involved, in the recent case of *R. v. Servico Ltd.* (1977), 2 Alta. L.R. (2d) 388. The offence in question was that an employer "shall not permit a person under the full age of eighteen years to work during the period of time prohibited by this section." Morrow J.A., writing for the majority of the court, said (at p. 397):

While the language of the particular regulation under review does in my view come within the category of absolute or strict liability offences, I am also of the opinion that the general language used -- particularly with the inclusion ofthe word 'permit', which has a connotation suggesting some intent is to be considered -- brings this section into what probably can be described as the exception to the rule of absoluteness as suggested by Estey C.J.H.C. in his dissenting judgment in *R. v. Hickey* [supra], where at p. 580 he describes statutes which prohibit a specified act or omission but which are interpreted to permit the defence of an honest belief held on reasonable grounds in a mistaken set of facts which if true would render the act or omission innocent.

The above exception or type of defence has long been recognized in Australia.

48 It is interesting to note the recommendations made by the Law Reform Commission to the Minister of Justice (Our Criminal Law) in March 1976. The commission advises (p.32) that: (i) every offence outside the Criminal Code be recognized as admitting of a defence of due diligence; (ii) in the case of any such offence for which intent or recklessness is not specifically required the onus of proof should lie on the defendant to establish such defence; (iii) the defendant would have to prove this on the preponderance or balance of probabilities. The recommendation endorsed a working paper (The Meaning of Guilt -- Strict Liability) in which it was stated that negligence should be the minimum standard of liability in regulatory offences, that such offences were (p. 32) "to promote higher standards of care in business, trade and industry, higher standards of honesty in commerce and advertising, higher standards of respect for the . . . environment and [therefore] the . . . offence is basically and typically an offence of negligence"; that establishes that he acted with due diligence, that is, that he was not negligent. In the working paper, the commission further stated (p. 33), "let us recognize the regulatory offence for what it is -- an offence of negligence -- and frame the law to ensure that guilt depends upon lack of reasonable care." The view is

expressed that in regulatory law, to make the defendant disprove negligence -- prove due diligence -- would be both justifiable and desirable.

49 In an interesting article on the matter now under discussion, "Far From Clear", supra, Professor Jobson refers to a series of recent cases, arising principally under s. 32(1) of the Ontario Water Resources Act, the section at issue in the present proceedings, which [p. 297] "openly acknowledge a defence based on lack of fault or neglect: these cases require proof of the *actus reus* but then permit the accused to show that he was without fault or had no opportunity to prevent the harm." The paramount case in the series is *R. v. Indust. Tankers Ltd.*, [1968] 4 C.C.C. 81 (Ont.), in which Sprague Co. Ct. J., relying upon *R. v. Hawinda Taverns Ltd.* (1955), 112 C.C.C. 361 (Ont.) and *R. v. Bruin Hotel Co.* (1954), 19 C.R. 107, 12 W.W.R. 387, 109 C.C.C. 174 (Alta. C.A.), held that the Crown did not need to prove that the accused had mens rea, but it did have to show that the accused had the power and authority to prevent the pollution, and could have prevented it, but did not do so. Liability rests upon control and the opportunity to prevent, i.e., that the accused could have and should have prevented the pollution. In *Indust. Tankers*, the burden was placed on the Crown to prove lack of reasonable care. To that extent *Industr. Tankers* and s. 32(1) cases which followed it, such as *R. v. Sheridan*, [1973] 2 O.R. 192, 10 C.C.C. (2d) 545, differ from other authorities on s. 32(1) which would place upon the accused the burden of showing as a defence that he did not have control or otherwise could not have prevent the impairment: see *R. v. Cherokee Disposals & Const. Ltd.*, [1973] 3 O.R. 599, 13 C.C.C. (2d) 87; *R. v. Liquid Cargo Lines Ltd.* (1974), 18 C.C.C. (2d) 428 (Ont.); and *R. v. North Can. Enterprises Ltd.* (1974), 20 C.C.C. (2d) 242 (Ont.).

50 The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by "supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control": Lord Evershed in *Lim Chim Aik v. R.*, [1963] A.C. 160 at 174, [1963] 1 All E.R. 223 (P.C.). The purpose, Dean Roscoe Pound has said (The Spirit of the Common Law (1906)), is to "put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety morale" As Devlin J. noted in *Reynolds v. G. H. Austin & Sons Ltd.*, [1951] 2 K.B. 135 at 149, [1951] 1 All E.R. 606: "a man may be made responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark." Devlin J. added, however: "if a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim."

51 The decision of this court in *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, is not inconsistent with the concept of a "half-way house" between mens rea and absolute liability. In *Pierce Fisheries* the charge was that of having possession of undersized lobsters contrary to the regulations under the Fisheries Act, R.S.C. 1952, c. 119 [now R.S.C. 1970, c. F-14]. Two points arise in connection with the judgment of Ritchie J., who wrote for the majority of the court. First, the adoption of what had been said by the Ontario Court of Appeal in *R. v. Pee-Kay Smallwares Ltd.*, [1947] O.R. 1019, 6 C.R. 28 at 36-37, 90 C.C.C. 129, [1948] 1 D.L.R. 235:

If, on a prosecution for the offences created by the Act, the Crown had to prove the evil intent of the accused, or if the accused could escape by denying such evil intent, the statute, by which it was obviously intended that there should be complete control without the possibility of any leaks, would have so many holes in it that in truth it would be nothing more than a legislative sieve.

52 Ritchie J. held that the offence was one in which the Crown, for the reason indicated in the *Pee-Kay Smallwares* case, did not have to prove mens rea in order to obtain a conviction. This, in my opinion, is the ratio decidendi of the case. Second, Ritchie J. did not, however, foreclose the possibility of a defence. The following passage from the judgment (at p. 285) suggests that a defence of reasonable care might have been open to the accused but that in that case care had not been taken to acquire the knowledge of the facts constituting the offence:

As employees of the company working on the premises in the shed 'where fish is weighed and packed' were taking lobsters from boxes 'preparatory for packing' in crates, and as some of the undersized lobsters were found 'in crates ready for shipment', it would not appear to have been a difficult matter for some 'officer or responsible employee' to acquire knowledge of their presence on the premises.

53 In a later passage Ritchie J. added (p. 286):

In this case the respondent knew that it had upwards of 60,000 pounds of lobsters on its premises; it only lacked knowledge as to the small size of some of them, and I do not think that the failure of any of its responsible employees to acquire this knowledge affords any defence to a charge of violating the provisions of s. 3(1)(*b*) of the Lobster Fishery Regulations.

54 I do not read *Pierce Fisheries* as denying the accused all defences, in particular the defence that the company had done everything possible to acquire knowledge of the undersized lobsters. Ritchie J. concluded merely that the Crown did not have to prove knowledge.

55 The judgment of this court in *Hill v. R.*, [1975] 2 S.C.R. 402, 24 C.R.N.S. 297, 14 C.C.C. (2d) 505, 43 D.L.R. (3d) 532, has been interpreted (*R. v. Gillis* (1974), 18 C.C.C. (2d) 190 (N.S. C.A.)) as imposing absolute liability and denying the driver of a motor vehicle the right to plead in defence an honest and reasonable belief in a state of facts which, if true, would have made the act non-culpable. In *Hill*, the appellant was charged under the Highway Traffic Act with failing to remain at the scene of an accident. Her care had "touched" the rear of another vehicle. She did not stop but drove off, believing no damage had been done. This court affirmed the conviction, holding that the offence was not one requiring mens rea. In that case the essential fact was that an accident had occurred, to the knowledge of Mrs. Hill. Any belief that she might have held as to the extent of the damage could not obliterate that fact or make it appear that she had reasonable grounds for believing in a state of facts which, if true, would have constituted a defence to the charge. The case does not stand in the way of a defence of reasonable care in a proper case.

56 We have the situation therefore in which many courts of this country, at all levels, dealing with public welfare offences favour: (1) *not* requiring the Crown to prove mens rea; (2) rejecting the notion that liability inexorably follows upon mere proof of the actus reus, excluding any possible defence. The courts are following the lead set in Australia many years ago and tentatively broached by several English courts in recent years.

57 It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it should be recalled that both the concept of absolute liability and the creation of a jural category of public welfare offences are the product of the judiciary and not of the legislature. The development to date of this defence, in the numerous decisions I have referred to of courts in this country as well as in Australia and New Zealand, has also been the work of judges. The present case offers the opportunity of consolidating and clarifying the doctrine.

58 The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to *Pierce Fisheries* and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.

59 In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

60 I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Estey C.J.H.C. so referred to them in *Hickey's* case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

61 Offences which are criminal in the true sense fall in the first category. Public welfare offences would prima facie be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly" or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

Ontario Water Resources Act, s. 32(1)

62 Turning to the subject matter of s. 32(1) -- the prevention of pollution of lakes, rivers and streams -- it is patent that this is of great public concern. Pollution has always been unlawful and, in itself, a nuisance: *Groat v. Edmonton*, [1928] S.C.R. 522, [1928] 3 D.L.R. 725. A riparian owner has an inherent right to have a stream of water "come to him in its natural state, in flow, quantity and quality": *Chasemore v. Richards* (1859), 7 H.L. Cas. 349 at 382, 11 E.R. 140. Natural streams which formerly afforded "pure and healthy" water for drinking or swimming purposes become little more than cesspools when riparian factory owners and municipal corporations discharge into them filth of all descriptions. Pollution offences are undoubtedly public welfare offences enacted in the interest of public health. There is thus no presumption of a full means rea.

63 There is another reason, however, why this offence is not subject to a presumption of mens rea. The presumption applies only to offences which are "criminal in the true sense", as Ritchie J. said in *R. v. Pierce Fisheries*, supra, at p. 278. The Ontario Water Resources Act is a provincial statute. If it is valid provincial legislation (and no suggestion was made to the contrary), then it cannot possible create an offence which is criminal in the true sense.

64 The present case concerns the interpretation of two troublesome words frequently found in public welfare statutes: "cause" and "permit". These two words are troublesome because neither denotes clearly either full mens rea or absolute liability. It is said that a person could not be said to be permitting something unless he knew what he was permitting. This is an over- simplification. There is authority both ways, indicating that the courts are uneasy with the traditional dichotomy. Some authorities favour the position that "permit" does not import means rea: see *Millar v. R.*, [1954] 1 D.L.R. 148 (Man. C.A.); *R. v. Royal Can. Legion*, [1971] 3 O.R. 552, 4 C.C.C. (2d) 196, 14 Cr. L.Q. 106, 21 D.L.R. (3d) 148 (C.A.); *R. v. Teperman & Sons Ltd.* , [1968] 2 O.R. 174, [1968] 4 C.C.C. 67, application for leave to appeal dismissed for want of jurisdiction [1968] 2 O.R. 174n, [1968] 4 C.C.C. 67n (Can.); *R. v. Jack Cewe Ltd.* (1975), 23 C.C.C. (2d) 237 (B.C.); *Browning v. J. W. H. Watson Ltd.*, [1953] 1 W.L.R. 1172, [1953] 2 All E.R. 775 (D.C.); *Lyons v. May*, [1948] 2 All E.R. 1062 (D.C.); *Korten v. West Sussex County Council* (1903), 72 L.J.K.B. 514. For a mens rea construction see *James & Son Ltd. v. Smee*; *Green v. Burnett*, [1955] 1 Q.B. 78, [1954] 3 All E.R. 273 (D.C.); *Somerset v. Hart* (1884), 12 Q.B.D. 360 (D.C.); *Grays Haulage Co. v. Arnold* , [1966] 1 W.L.R. 534, [1966] 1 All E.R. 896 (D.C.); Smith and Hogan, Criminal Law, 3rd ed., at p. 87; Edwards, Mens Rea and Statutory Offences (1955), at pp. 98-119. The same is true of "cause". For a non-mens rea construction see *R. v. Peconi*, [1970] 3 O.R. 693, 1 C.C.C. (2d) 213, 13 Cr. L.Q. 124, 14 D.L.R. (3d) 17; *Alphacell Ltd. v. Woodward*, [1972] A.C. 824, [1972] 2 All E.R. 475 (D.C.); *Sopp v. Long*, [1970] 1 Q.B. 518, [1969] 1 All E.R. 855 (C.A.); *Laird v. Dobell*, [1906] 1 K.B. 131 (D.C.); *Korten v. West Sussex County Council*, supra; *Shave v. Rosner*, [1954] 2 Q.B. 113, [1954] 2 All E.R. 280 (D.C.). Others say that "cause" imports a requirement for mens rea: see *Lovelace v. D.P.P.*, [1954] 1 W.L.R. 1468,

[1954] 3 All E.R. 481 (D.C.); *Ross Hillman Ltd. v. Bond*, supra; Smith an Hogan, Criminal Law, 3rd ed., at pp. 89-90.

65 The Divisional Court of Ontario relied on these latter authorities in concluding that s. 32(1) created a mens rea offence.

66 The conflict in the above authorities, however, shows that in themselves the words "cause"and "permit" fit much better into an offence of strict liability than either full mens rea or absolute liability. Since s. 32(1) creates a public welfare offence, without a clear indication that liability is absolute and without any words such as "knowingly" or "wilfully" expressly to import mens rea, application of the criteria which I have outlined above undoubtedly places the offences in the category of strict liability.

67 Proof of the prohibited act prima facie imports the offence, but the accused may avoid liability by proving that he took reaonable care. I am strengthened in this view by the recent case of *R. v. Servico Ltd.*, supra, in which the Appellate Division of the Alberta Supreme Court held that an offence of "permitting" a person under 18 years to work during prohibited hours was an offence of strict liability in the sense which I have described. It also will be recalled that the decisions of many lower courts which have considered s. 32(1) have rejected absolute liability as the basis for the offence of causing for permitting pollution and have equally rejected full mens rea as an ingredient of the offence.

The present case

68 As I am of the view that a new trial is necessary, it would be inappropriate to discuss at this time the facts of the present case. It may be helpful, however, to consider in a general way the principles to be applied in determining whether a person or municipality has committed the actus reus of discharging, causing or permitting pollution within the terms of s. 32(1), in particular in connection with pollution from garbage disposal. The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring but fail to do so. The "discharging" aspect of the offence centres on direct acts of pollution. The "causing" aspect centres on the defendant's active undertaking of something which it is in a position to control and which results in pollution. The "permitting" aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen. The close interweaving of the meanings of these terms emphasizes again that s. 32(1) deals with only one generic offence.

69 When the defendant is a municipality, it is of no avail to it in law that it had no duty to pick up the garbage, s. 354(1) [am. 1976, c. 69, s. 10(1)], (76) of the Municipal Act, R.S.O. 1970, c. 284, merely providing that it "may" do so. The law is replete with instances where a person has no duty to act but where he is subject to certain duties if he does act. The duty here is imposed by s. 32(1) of the Ontario Water Resources Act. The position in this respect is no different from that of private persons, corporate or individual, who have no duty to dispose of garbage, but who will incur liability under s. 32(1) if they do so and thereby discharge, cause or permit pollution.

70 Nor does liability rest solely on the terms of any agreement by which a defendant arranges for eventual disposal. The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution. If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution. Whether it "discharges", "causes" or "permits" the pollution will be a question of degree, depending on whether it is actively involved at the point where pollution occurs or whether it merely passively fails to prevent the pollution. In some cases the contract may expressly provide the defendant with the power and authority to control the activity. In such a case the factual assessment will be straightforward. Prima facie, liability will be incurred where the defendant could have prevented the impairment by intervening pursuant to its right to do so under the contract, but failed to do so. Where there is not such express provision in the contract, other factors will come into greater prominence. In every instance the question will depend on an assessment of all the circumstances of the case. Whether an "independent contractor" rather than an "employee" is hired will not be decisive. A homeowner who pays a fee for the collection of his garbage by a business which services the area could probably not besaid to have caused or permitted the pollution if the collector dumps the garbage in the river. His position would be analogous to a householder in Sault Ste. Marie who could not be said to have caused or permitted the pollution here. A large corporation

which arranges for the nearby disposal of industrial pollutants by a small local independent contractor with no experience in this matter would probably be in an entirely different position.

71 It must be recognized, however, that a municipality is in a somewhat different position by virtue of the legislative power which it possesses and which others lack. This is important in the assessment of whether the defendant was in a position to control the activity which it undertook and which caused the pollution. A municipality cannot slough off responsibility by contracting out the work. It is in a position to control those whom it hires to carry out garbage disposal operations and to supervise the activity, either through provisions of the contract or by municipal by-laws. It fails to do so at is peril.

72 One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the context of a statutory defence of due diligence see *Tesco Supermarkets v. Nattrass*, [1972] A.C. 153, [1971] 2 All E.R. 127 (H.L.).

73 The majority of the Ontario Court of Appeal directed a new trial as, in the opinion of that court, the findings of the trial judge were not sufficient to establish actual knowledge on the part of the city. I share the view that there should be a new trial, but for a different reason. The city did not lead evidence directed to a defence of due diligence, nor did the trial judge address himself to the availability of such a defence. In these circumstances, it would not be fair for this court to determine, upon findings of fact directed toward other ends, whether the city was without fault.

74 I would dismiss the appeal and direct a new trial. I would dismiss the cross-appeal. There should be no costs.

Appeal and cross-appeal dismissed.

Books, Articles and Commentaries

ARCHBOLD REFERENCES

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§ 1–127), the prosecution should not be entitled to rely on any earlier date that may appear from the evidence if that date is not within the relevant time limit.

Where the exact date of the offence is not known the date should be stated as being on or about a particular date, or on a day unknown between two stated dates, so as to isolate the date of the offence alleged as accurately as possible. Unless the offence is a "continuous" one (*post*, § 1–133), the date of the offence should not be given merely as between two stated dates because this may give rise to problems of duplicity, *post*, §§ 1–135 *et seq.*

See also the *Children and Young Persons Act* 1933, s.14(4), *post*, § 19–323 (continuous offences against children).

Materiality of averment as to date and place

1–127 In *R. v. Wallwork, ante*, it was held that the lack of precision as to place in the particulars did not invalidate the indictment because the place of commission of the offence was not material to the charge.

Despite the old authorities to the effect that the date of the offence must be shown in the indictment it never seems to have been necessary for the date shown to be proved by the evidence unless time is of the essence of the offence.

In other cases, if the time stated were prior to the finding of the indictment, a variance between the indictment and evidence of the time when the offence was committed was not material: 2 Co. Inst. 318; 3 Co. Inst. 230; *Sir H. Vane's Case* (1662) Kel.(J.) 16; *R. v. Aylett, ante*; *R. v. Dossi, ante*. In *Dossi* it was held that a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be good practice to do so (provided there is no prejudice, *post*) where it is clear on the evidence that if the offence was committed at all it was committed on a day other than that specified.

1–128 The prosecution should not be allowed to depart from an allegation that an offence was committed on a particular day in reliance on the principle in *Dossi* if there is a risk that the defendant has been misled as to the allegation he has to answer or that he would be prejudiced in having to answer a less specific allegation: see *Wright v. Nicholson*, 54 Cr.App.R. 38, DC; *R. v. Robson* [1992] Crim.L.R. 655, CA.

1–129 In *R. v. Hartley* [1972] 2 Q.B. 1, 56 Cr.App.R. 189, CA, the court observed that where the words "on or about [the date]" are used, the offence must be shown to have been committed "within some period which has reasonable approximation to the date mentioned in the indictment". However this dictum was *obiter* and should not be taken as more than an indication of the desirability of identifying the relevant date as accurately as possible so that the defendant is not misled as to the case which he has to meet.

1–130 For further examples of circumstances in which it has been held that a variance between the evidence and the particulars was immaterial, see *R. v. Bonner* [1974] Crim.L.R. 479, CA; *R. v. Browning* [1974] Crim.L.R. 714, CA; *R. v. Fernandes* [1996] 1 Cr.App.R. 175, CA; and *Kay v. Biggs and another, The Independent (C.S.)*, November 23, 1998, DC. For examples of allegations as to time, or time and place, being held to be material, see *R. v. Radcliffe* [1990] Crim.L.R. 524, CA (allegation of indecency with child contrary to s.1 of the *Indecency with Children Act* 1960, *post*, § 20–272, an essential ingredient of which is that the child is under 14 at the time of the act of indecency); *R. v. Allamby and Medford*, 59 Cr.App.R. 189, CA (having an offensive weapon in a public place, *post*, § 24–107); *R. v. Pickford* [1995] 1 Cr.App.R. 420, CA (inciting incest where boy incited was under age of capacity for part of period particularised); and *R. v. Macer, The Times*, February 17, 1995, CA (convictions quashed where based on general allegations rather than on specific evidence relating to the particular occasions charged).

UNEARTHING THE CUSTOMARY LAW FOUNDATIONS OF "FORCED MARRIAGE" DURING SIERRA LEONE'S CIVIL WAR: THE POSSIBLE IMPACT OF INTERNATIONAL CRIMINAL LAW ON CUSTOMARY MARRIAGE AND WOMEN'S RIGHTS IN POST CONFLICT SIERRA LEONE

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> *[T]here was, in the olden days, marriage by capture. The Protectorate of Sierra Leone was, up to the turn of this century, the battle ground for tribal wars. Men saw in these wars an opportunity of winning wives for themselves. An attack upon a town or village resulted in the extermination of the male inhabitants and the capture of the women, who subsequently became the wives of their conquerors. No requirement was essential for the validity of such marriage other than a public declaration by the captor of his intention to cohabit with his captive followed by actual cohabitation. Such wife was, however, regarded as a slave .... Nowadays, there are no longer inter-tribal wars in the country and, with the abolition of slavery in 1928, this kind of marriage no longer exists.*" [FN1]

> *I.S., ... abducted and gang raped by the West Side Boys from January to August 1999, explained how Commander "Blood" had initiated the "wife" selection process: "One of the commanders said he was going to ***552** amputate all of us. But another commander, C.O. Blood, said 'Don't kill them, let's chose them as wives.' Then we were divided up. The one who seemed to be in charge, C.O. Blood, chose me. When he looked at me I was frightened. His pupils were huge-- he was high on drugs. He took me to a house and told me to lie down on the ground. He said if I did not allow him to have sex, he would kill me.*" [FN2]

During the civil war that ravaged Sierra Leone from 1990 to 2001, thousands of women and girls were raped, abducted, and taken to Revolutionary United Front (RUF), West Side Boys, or Armed Forces Revolutionary Council (AFRC) rebel camps. [FN3] They were assigned to a man and, from that day forward, had to submit to him sexually and perform countless domestic tasks for him. This relationship between the rebels and their captives was commonly known as "forced marriage," with the captive women testifying that they were assigned to a "husband" or "rebel husband," and the rebel men referring to their captives as "wives" or "bush wives." [FN4] The type of marriage that was thought to have disappeared with the conclusion of inter-tribal wars and the abolition of slavery appeared to have returned to Sierra Leone from its past, invigorated and with new force.

In their articles about the conflict, reporters used the terms "wife," "husband," and "marriage" [FN5] in quotation marks. Quotation marks were also consistently used for those terms by investigators who reported on the "forced marriage" phenomenon occurring in different armed conflicts, [FN6] ***553** clearly indicating their uneasiness, if not disbelief, in the appropriate use of familial labels to describe these relationships. In fact, these reporters stated on numerous occasions that the use of such matrimonial terminology to refer to the type of situation suffered by Sierra Leonean women was inappropriate: "[d]escribing this experience as a 'forced' marriage is a complete misrepresentation and distortion of a [girl's] experience"; [FN7] "[t]he arrangement was

sometimes referred to as 'forced marriages' and the women held as 'wives,' but these terms obfuscate the total lack of consent by the women and the coercive conditions under which they were held." [FN8]

This Article will explore the use (and misuse) of the word "marriage" to describe the relationship between rebels and their captured "wives," as well as its potential impact on the customary law of marriage. Part I sets forth the argument that the term "marriage" is a criminal misnomer that masked what, under international criminal law, was clearly a situation of sexual slavery. Part II examines the customary law of marriage in Sierra Leone to help explain why the word "marriage" may have been considered an appropriate label to describe the rebel-captive relationship. It uncovers the similarities between "forced marriages" and marriages under customary law, most significantly the possibility that sexual slavery may occur within customary law marriages.

To that end, Part III proposes that categorizing "forced marriages" as sexual slavery has a potentially transformative effect on the customary law of marriage. Recognition of the right of female sexual autonomy is essential in amending customary law so as to prevent a recurrence of "forced marriages" or the existence of sexual slavery within customary marriage. Established to prosecute crimes committed in Sierra Leone since November 30, 1996, the Special Court of Sierra Leone could use the language of sexual autonomy in defining sexual violence crimes by relying on existing international criminal law. As this Article discusses, the International Criminal Tribunal for the Former Yugoslavia has recognized a ***554** woman's right to sexual autonomy. Should the Special Court use similar reasoning in pending cases, it would create domestic precedent for the recognition of such a right. Its decisions could have a transformative effect not just on the laws of Sierra Leone, but on human rights discourse internationally.

Part IV examines the role that the Sierra Leone Truth and Reconciliation Commission had--and its Report continues to have--in initiating the movement for reform of traditional practices that violate women's rights. The Truth and Reconciliation Commission was in a privileged position to connect the sexual violence suffered by women during the conflict to their pre-conflict status and, in so doing, directly denounce violations of women's rights brought about by customary law. It played an essential role that was complementary to the Court's. The Article concludes with the observation that the power of international criminal law is not limited to its ability to shed light on customary practices that discriminate against women. It also has the potential to shape the law and/or instigate legal reform when considered or relied upon by transitional justice institutions such as the Special Court and the Truth and Reconciliation Commission. In this way, international criminal law may aid in the creation of equal status for Sierra Leonean women during times of peace and during times of conflict.

I. "FORCED MARRIAGE" DURING THE SIERRA LEONE CONFLICT: ITS TRUE NATURE UNCOVERED

A. A Marriage in Quotation Marks

A "forced marriage" during the Sierra Leone conflict would begin when rebels attacked a village, wreaking violent havoc. [FN9] The "future wife" would be utterly terrified, witnessing appalling atrocities committed against the women of her community: [FN10] the rebels would insert boiling oil and embers into the vagina of some victims; [FN11] amputate arms and hands; [FN12] pluck ***555** nursing infants from their mothers' arms, slice them in two, or toss them in the air; [FN13] cut open the bellies of pregnant women to confirm their bets on the sex of the unborn child. [FN14] Girls were brutally gang raped vaginally and anally. [FN15] They were often still virgins, only eleven or twelve years old. [FN16] In this psychologically devastating context, "marriage" would begin; a girl would be abducted and assigned to a combatant or commander. [FN17] Members of her family who tried to intervene would be killed. [FN18]

The new "wife" was forced to follow her "husband" to the rebel camp. H.K, a former rebels' abductee,

reported to Human Rights Watch that she was completely at her "husband's" disposal sexually, made to do whatever he liked, whenever he liked: "He used to sex me twice every night. He made me take his penis in my mouth. I tried to refuse him but he always threatened to kill me." [FN19] The rebels, who generally exercised exclusivity over their "wives," [FN20] made the decisions about their pregnancies. A rebel would force his "wife," under the threat of death, to abort a child she was expecting when he abducted her [FN21] or to keep a child if it was his. [FN22] In addition to the sexual aspect of life with a "rebel husband," the "wife" was forced to perform a vast array of domestic tasks--cooking, laundry, ***556** cleaning, farming, and carrying looted items [FN23]--and was subjected to abuse. "Bush wives" were frequently beaten with sticks and guns, and at times, sexually tortured. [FN24] They were abandoned when their "husbands" got tired of them, or when they became too ill to meet their demands. [FN25]

How could they get out of their situation? Trying to flee meant risking their lives: "I wanted to run away, to escape, but there was no way. If you were caught trying to escape, you were killed or put in a box." [FN26] Running away from a rebel faction also meant risking capture by another. [FN27] The rebels made escape more difficult by carving the faction's letters--"RUF" or "AFRC"--onto the chests of their "wives." [FN28] Women who were caught by government forces and suspected of being rebels were often killed. [FN29] The obstacles to escaping also loomed heavily on another front: "In many instances, women--intimidated by their captors and the situation they were in-- felt powerless to escape their lives of sexual slavery, and were advised by other female captives to tolerate the abuses, 'as it was war.'" [FN30] The rebels "perniciously instilled fear in their 'wives' by telling them that their families would not accept them back." [FN31] Indeed, "ex-wives" of rebels have experienced ostracism from their community and rejection from their former husbands. [FN32] What were the economic and social alternatives for these women if they did leave their "husband" who, at least, provided them ***557** with minimal protection and means of support? [FN33] "Numerous victims end up being commercial sex workers, selling their bodies for as little as U.S. 50¢." [FN34] After seeing their family decimated and becoming accustomed to their new life, some--particularly those who were abducted young and have had children fathered by a rebel--even came to consider their "rebel husband" as a surrogate family. [FN35] Those who stayed with their captors considered "themselves married ... and believ[ed] that they [had] no choice but to remain with their husbands." [FN36] The number of "wives" who remain with their abductors today is unknown. [FN37]

Investigators into similar forms of sexual violence during armed conflict maintain that this situation is in no way one of marriage. [FN38] Gay McDougall, United Nations Special Rapporteur on the issue of systematic rape, sexual slavery, and slavery-like practices in armed conflict, states that "women [are] being repeatedly raped by soldiers under the guise of 'marriage.'" [FN39] Women forced to become such "wives" in Rwanda were described as being "in fact captives, looted possessions of the militiamen, held in sexual slavery." [FN40] This Article argues that the situation of abducted Sierra Leonean women was, and in some cases still is, one of sexual slavery, poorly veiled by the euphemism "marriage." [FN41] The Special Court ***558** for Sierra Leone, [FN42] under its statute, has jurisdiction over the crime of sexual slavery when it is committed as part of a widespread or systematic attack against a civilian population. [FN43] Many accused are now being charged with the crime against humanity of sexual slavery before the Special Court. [FN44] The Court is therefore in the best position to shed light on the true nature of "forced marriages."

***559 B. Sexual Slavery Unmasked**

According to Barry, in a very broad sense, "[f]emale sexual slavery is present in all situations where women or girls cannot change the immediate conditions of their existence; where regardless of how they got into those conditions, they can not [sic] get out; and where they are subject to sexual violence and exploitation." [FN45] The crime of sexual slavery appears for the very first time in the Rome Statute of the International Criminal Court, [FN46] where it is not defined. However, its elements are enumerated in the International Criminal

Court's *Elements of Crimes*, which was designed for use as an interpretive guide by ICC judges. [FN47] Sexual slavery is also ***560** listed as a crime against humanity in the Statute of the Special Court for Sierra Leone, but is not defined. [FN48] The Special Court has found the elements of the crime of sexual slavery under its statute to be similar to the elements of the crime against humanity of sexual slavery enumerated in the *Elements of Crimes*. [FN49] That the *Elements* could serve as persuasive authority for the Special Court is perhaps not surprising. The Rome Statute sets the norm in international criminal law, and, the Special Court's statute mirrors that of the Rome Statute regarding crimes of sexual violence. [FN50] There is currently no further case law on sexual slavery under either of these instruments. [FN51] ***561** Nonetheless, legal authors consistently view sexual slavery as a specific form or subcategory of enslavement, characterized by its sexual dimension. [FN52] Enslavement has been defined in the international jurisprudence, in *Prosecutor v. Kunarac*, as "the exercise of any or all of the powers attaching to the right of ownership over a person." [FN53] The indicators listed by the Trial Chamber to infer a situation of enslavement include "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, forced labour" and the buying, selling, or inheriting of a person or his or her labour or services. [FN54] This Article proposes that, by listing the crime of sexual slavery, the Statute for the Special Court and the Rome Statute specifically recognize cases in which slavery includes the specific factor of control of someone's sexuality, making such cases more visible and thus facilitating their prosecution. [FN55] ***562** Control of someone's sexuality may thus be considered the actus reus of the crime of sexual slavery, [FN56] or its "key indicator." [FN57] In the *Kunarac* case, the court found the accused guilty of enslaving the women they held captive in their apartments namely because they exercised control over the women's sexuality by extracting sexual favors from them at will. The rebels in the Sierra Leone conflict similarly exercised control over their "wives'" sexuality; these women had to submit, often under threat of violence, to all sexual contact desired by a sexual partner they did not choose. The rebels also exercised control over their reproductive faculties, ordering them to terminate pregnancy or forbidding them from doing so.

What makes these acts ones of *control* over the women's sexuality is that the women had no escape. They were captives or, as specified in the *Elements of Crimes*, they were deprived of their liberty. [FN58] The importance of not interpreting this deprivation of liberty in the narrow, physical sense of imprisonment was emphasized by some delegations during the negotiations of the *Elements of Crimes*:

> [T]he expression 'similar deprivation of liberty' does not exclude certain situations, which took place during the Rwandese and Bosnian conflicts, in which women, sexually abused, were not locked in a particular place and therefore were 'free to go,' but were in fact deprived of their liberty as they had nowhere else to go and feared for their lives. [FN59] As McDougall stated:
>
> The mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery should not be interpreted as nullifying a claim of slavery .... This is ***563** particularly true when the victim is in a combat zone during an armed conflict, whether internal or international in character. [FN60] Thus, the International Criminal Tribunal for the Former Yugoslavia (ICTY) recognized, in the *Kunarac* case, that the women were held captive in the apartments of the accused, even though the accused sometimes left the apartment door unlocked or gave the women the key: "[T]he girls were also psychologically unable to leave, as they would have had nowhere to go had they attempted to flee. They were also aware of the risks involved if they were re-captured." [FN61] The Serb soldiers, well aware of this situation, exploited the vulnerability of the women, as did the rebels during the conflict in Sierra Leone.

The "wives," although not chained or confined, were captives. The rebels took deliberate measures to prevent them from escaping: they threatened the women with death if they tried to flee, carved the faction's initials onto their chests, and exercised pernicious psychological control over them by making them fear that their families would ostracize them. But the rebels, as in the *Kunarac* case, did not have much to fear by "leaving the door unlocked"; where could their "wives" go? With civil war ravaging the country, they would either be captured again or possibly subjected to even more appalling violence. Many of them had lost their families and had limited means of survival without this "husband," who at least offered some protection and support. The rebels took advantage of this overall situation, which made the women particularly vulnerable to subjugation.

The argument may be raised that these women consented to the arrangement; particularly those who "chose" to remain with their "husbands" after the conflict ended and were therefore no longer captives or deprived of their liberty. However, in *Kunarac*, the ICTY indicated that no one can consent to being enslaved. [FN62] The Appeals Chamber stated that lack ***564** of consent is not an element of the crime of enslavement, and that, to the extent it might be relevant from an evidential point of view as going to the question of whether the Prosecutor has established that a power attaching to the right of ownership has been exercised, "circumstances which render it impossible to express consent may be sufficient to presume the absence of consent." [FN63] Those circumstances include "the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions." [FN64] If these factors, which were clearly present when the victims were abducted and throughout the conflict, persist after the conflict has ended, the women cannot have consented to staying with their "husbands." In such cases, given their limited socioeconomic options, the psychological pressures and the physical abuse from their "husbands," it is not implausible to believe that it would have been impossible for them to have given any real consent.

Other indications of enslavement defined in the *Kunarac* case are also found in the "forced marriages" that prevailed in Sierra Leone. The ICTY considered the domestic tasks the Serb soldiers made their captives perform-- cooking, washing, cleaning--as forced labor, an indication of enslavement. [FN65] The rebels also exacted forced labor from the "bush wives," who had to perform the same domestic chores, in addition to farming and carrying looted items. Another indication of enslavement is the use of force or subjection to cruel treatment and abuse. [FN66] The rebels, as previously indicated, commonly beat their "wives." An additional factor that may be ***565** considered, but that is not a requirement for enslavement, is the provision of a monetary consideration; [FN67] this factor, however, is absent from the "forced marriages" in Sierra Leone, as the bush wives were not acquired in exchange for monetary or other compensation.

Thus, the mask of marriage falls, and the true face of the situation, with features of sexual slavery, is revealed. One question, however, remains to be asked and is certainly worth analysis: why was the concept of marriage used to describe this situation? The type of marriage that prevailed during the conflict is clearly not the same as a civil marriage presided over by a civil status officer. [FN68] A "forced marriage" lacks two essential elements to be considered a valid marriage under customary law: the consent of the wife's family, and the payment of a consideration (the future husband's gift of property or money to the wife's family). [FN69] And yet, the term "marriage" was used by the victims in their testimonies. One victim reported that: "I was taken as a wife by a commander .... He raped me everyday .... *He said he didn't have a wife* so I cooked and washed for him." [FN70] Could it be that the captivity of women during the Sierra Leone conflict was understood and referred to by the victims and their aggressors as "marriage" because the women were required to fulfill a role similar to that of wives in times of ***566** peace? Are there similarities between "forced marriage" during times of war and marriage during times of peace in Sierra Leone?

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II. CUSTOMARY MARRIAGE IN SIERRA LEONE: THE EXPLOITATION OF WOMEN MASKED BY TRADITION

> *Customary law is ... the centerpiece of African culture. Unfortunately, it is also the source of women's disempowerment.* [FN71]

A. Foray into Customary Law

Customary law, which is unwritten, is recognized by the Constitution of Sierra Leone and is defined therein as "the rules of law by which customs are applicable to particular communities in Sierra Leone." [FN72] Applied in the provinces by the local courts, which are made up of elders ***567** and tribal chiefs, customary law governs the everyday lives of more than half of the population, [FN73] the majority of which is rural. [FN74] This Article will therefore focus on customary marriage, although it coexists in Sierra Leone with other types of marriage. [FN75]

***568** In customary law, marriage serves three main purposes: procreation, [FN76] the provision of domestic labor by the woman ("to take care of the matrimonial residence, do the domestic work, care for the children, and work for her husband as directed by him"), [FN77] and the creation of an alliance between two families. In fact, customary marriage has traditionally been considered the union of two families rather than two individuals. [FN78] While the consent of the wife's family is necessary for a valid marriage, that of the wife is not. [FN79] Customary marriage often takes place when girls are very young, as soon that they have developed breasts, started menstruating, and been initiated in women's secret society. [FN80] This initiation involves the traditional practice of female circumcision, believed to encourage virginity until marriage and faithfulness thereafter due to its diminishment of sexual pleasure. [FN81] In a society where remaining a virgin ***569** until marriage is a fundamental value, parents hasten to marry their daughters when they reach puberty in order to relieve themselves of the enormous responsibility of guarding their virginity. [FN82] Families may even coerce them into these marriages. [FN83] In many cases, girls are destined to a union to which they have not consented, [FN84] which might be termed a "forced marriage." [FN85] It would appear that the consent of the bride to be is being sought more and more in modern Sierra Leone, [FN86] which would make these unions more like arranged marriages in which the parties consent to the parents' choice. [FN87] Different factors, however, make it very difficult to determine whether the bride-to-be "consents" to the union, especially when she is only a child:

> Although the majority of women tacitly consent to these practices, *the reality remains that their option not to consent is essentially non-existent. This is particularly true in the case of female children. For instance, the ability of a young girl to refuse her parents' choice of husband or their decision that she undergo circumcision is often fictive.* Culturally, they lack the power to ***570** decide and demand otherwise. If they do insist otherwise, domestic violence or ostracism may result. They have few, if any, meaningful alternatives to, or escape from, such severe results. [FN88] Because they depend on their family and their ability to withhold their consent is severely limited by their sociocultural milieu, many girls in Sierra Leone clearly do not choose their sexual partner.

Control over female sexuality extends into marriage. Domestic violence is socially accepted: under customary law, the man has the right to beat his wife if she "misbehaves." [FN89] The concept of marital rape does not exist in customary law, [FN90] and women have a duty to submit to their husband's sexual desires, with a few exceptions. [FN91] In early marriages, where the man is usually much older and dominant, sexual relations are often forced relations: "in many (but not necessarily all) cases of early marriages, girls are coerced by their spouses into having sex and lack the social and physical power to refuse." [FN92] These early sexual relations mean early pregnancies, even though the girl is not physically mature and thus not ready to carry a

child, especially not repeatedly. The negative repercussions ***571** on the physical health of these girls range from growing problems to complications during childbirth and death. [FN93]

Control over female sexuality is often justified by the payment of a consideration, i.e., the husband's gift of property to his future wife's family, which is the second condition for a valid marriage under customary law. [FN94] Men "argue that if they paid [bridewealth], they should have full power over their wives." [FN95] On this assumption, "husbands may claim the right to chastise their wives and to demand sexual favors at will, or the power to make decisions in matters such as adopting birth-control measures." [FN96] With the payment of consideration, there is an implicit expectation that the women will bear children. [FN97] Some authors see consideration as a transfer of rights over the reproductive and productive abilities of the woman, [FN98] or go so far as to maintain that it is used to purchase the woman and her reproductive faculties (to "buy a womb"); [FN99] others see it as compensation to the woman's family for the loss of their daughter, a tribute to their dignity, and a stabilizing factor for the marriage. [FN100] It has also been argued that this African practice has changed and become corrupted in a capitalistic context where the goods traditionally offered for marriage consideration--food, ***572** clothes, and cattle--have been mainly replaced by money. [FN101] Many families see the bridewealth as an opportunity to acquire capital, so they request enormous considerations and may force the daughter to "consent" to the most profitable marriage. [FN102] "The outcome of such phenomena is that some men virtually claim that they own their spouses, just as a man would claim a piece of furniture as his own." [FN103]

The consideration can be seen as binding the women to the union:

> [Bridewealth] has a concrete effect on women's rights and freedoms only in the way that it may bind them to unwanted marriages. If a wife seeks divorce, her family is theoretically obliged to return the [bridewealth], and rather than do so, they may force her to put up with an unhappy relationship. [FN104] In Sierra Leone, depending on the tribe, there are no, or very few, recognized reasons (such as impotence or persistent cruelty) for which a wife may divorce her husband without an obligation to refund the marriage payments. [FN105] By contrast, the consideration will be refundable when a man requests a divorce for reasons as varied as his wife's repeated disobedience, persistent laziness in performing household tasks, and noncooperation with ***573** co-wives. [FN106] In many cases, the family is simply unable to pay back the consideration. [FN107] Divorce is thus rendered difficult for a woman to obtain under customary law.

This foray into customary law, albeit brief, enables us to answer the question asked at the outset: why was the concept of "marriage" used to refer to the type of union that prevailed between rebels and their captives during the conflict in Sierra Leone?

B. Marriage--An Institution of Sexual Slavery?

In light of the information reported, it can be asserted that "bush wives" during the conflict were required to perform the same functions as wives under customary law: to carry out all the domestic tasks and be sexually submissive. Thus, "bush wives" played the traditional role of wives to the combatants, but under extreme circumstances. [FN108] This foray into customary law provides some troubling observations: some of the characteristics of "forced marriage" during the conflict are also found in customary marriage. As previously indicated, the Special Court for Sierra Leone could find these characteristics, in the context of "forced marriage," as constituting the crime of sexual slavery. [FN109] The primary characteristic common to both types of marriage is control over the woman's sexuality. In customary marriage, which is often early marriage, the girl may be bound to a sexual partner who is not of her choosing; her parents indicate to her, when she has barely reached puberty, the man they want her to marry, thus exercising authority that she cannot oppose. In

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somes cases, families may even coerce her into marriage. Control over sexuality is found particularly within customary marriage, as the woman has a duty to bear children for the man, who has paid a consideration. Further, she must submit to him sexually without exception, as the concept of marital rape does not exist. Moreover, early marriages often result in forced sexual relations.

***574** What makes this situation one of veritable control over the woman's sexuality is that she cannot change her situation unless she goes to great lengths. Divorce is difficult to obtain, and is often an illusion if her family cannot or will not pay back the consideration they received when she married. She could be considered a captive of the marriage. In a broader sense, what deprives her of her freedom to change her situation are the social dictates and cultural norms that comprise tradition. This proves to be a formidable barrier because "there is no social safety net on which to fall back should they choose to break with tradition." [FN110] If she rejects the sexual partner imposed by her parents, refuses sexual relations during marriage, uses birth control, ends sexual relations with her partner by obtaining a divorce, or otherwise questions her condition and tradition, she will face ostracism from her community. [FN111] In a sociocultural context with so few alternatives for women, it is difficult to contend that they ever freely consented to their servile condition:

> The women interviewed in the study thus expressed their wishes (for themselves as well as their daughters) not to be violated sexually or otherwise by their husbands or anybody else, and not to be subjected to abuse or violence. However, many of them also expressed that they were aware that they would not be able to fulfill these wishes in light of the scope of choices available to them. When the cards were down, they would consistently choose to subject their lives and their bodies to harmful socio-cultural norms and practices for the sake of the benefits loyalty to these norms would bring .... In fact, what women consider an acceptable trade-off depends on their real alternatives and their negotiating power. *The limits of these choices are the limits of their freedom* .... [FN112] In addition to control over the woman's sexuality in a context of "captivity" in the broad sense, there are arguably other indications of a situation of enslavement within customary marriage: the use of force, subjection to cruel treatment and abuse (domestic violence being a socially accepted ***575** practice), and monetary compensation (the consideration). The provision of money or other compensation, although not a requirement, is indicative of a situation of enslavement. [FN113] Consequently, an argument could be made that the payment of marriage consideration is an indicia of the exercise of ownership over someone. As some authors maintain, consideration constitutes the purchase of a woman and her productive and reproductive capabilities. [FN114] The *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* of 1956 provides that "[a]ny institution or practice whereby a woman, without the right to refuse, is promised or given in marriage on payment of a consideration or in kind to her parents" creates a servile condition. [FN115] Could the experience of sexual slavery be concealed by the concept of customary marriage in Sierra Leone in the same way that it was masked by that of "forced marriage" in the context of the conflict? Indeed, "[s]lavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves [.] ... Involuntary servitude, even if tempered by humane treatment, is still slavery." [FN116] Nmehielle, in discussing the prohibition of all forms of slavery in Article 5 of the *African Charter on Human and Peoples' Rights*, [FN117] suggests that "other areas of concern are forced marriages in exchange for dowry [and] marital servitude[.]" [FN118] Equating customary marriage with sexual slavery would certainly be an overgeneralization. In the first place, it would be problematic because customary marriage is not concretely a single institution with uniform procedures and effects; rather, the expression can ***576** best be understood in terms of its distinctive features. [FN119] A case-by-case study would surely reveal that not all women in customary marriages are sexual slaves. It is nevertheless the case that customary law tolerates many features or practices that, when put together in certain marriages, take the shape of

sexual slavery. It is this Article's position that when a girl enters into a marriage with such features--i.e., she is forced into an early marriage where forced sexual relations are likely, beatings are to be considered normal, and divorce is an impossibility--she may be considered a sexual slave. Although such characteristics (which do not necessarily embrace all instances of sexual slavery) might well not be found in all marriages under customary law, they are certainly a reality for many girls in Sierra Leone.

The foregoing analysis thus leads to the disturbing conclusion that customary marriage in Sierra Leone might be considered an institution of sexual slavery. Barry openly denounces the family as an institution of sexual slavery not only tolerated by patriarchal societies, but well protected from any criticism because it is presented as culturally specific:

> *The family as an institution of sexual slavery* and one that *cultivates preconditions* to slavery is a condition for women throughout the world, in every patriarchal order. Many women's common experience of female sexual slavery across the cultures is *doubly protected* from exposure: first, it is *hidden in the privacy of the home* and second, it is *justified and protected as culturally specific* and therefore a culturally unique practice. [FN120] Barry's assertions recently proved to be incredibly well-founded in the area of international criminal law.

C. Rome Statute Negotiations and Sexual Slavery in Marriage

The Rome Statute negotiations reveal that several states feared some of their traditional and religious practices related to the family would be characterized as sexual slavery. When discussing the inclusion of sexual slavery as a crime against humanity in the statute, "[t]hese States feared that the law of crimes against humanity was too ambiguous and might be used by activist judges not simply to deal with atrocities but as a tool of 'social ***577** engineering.'" [FN121] For example, a "group of Arab States" was concerned that certain laws, such as those that "made obtaining a divorce more difficult for women than for men," would "amount[] to a crime against humanity of 'sexual slavery' or 'imprisonment.' They recognized that such laws and norms were not well-regarded by others and might be seen in some cases as raising human rights issues, but they did not believe that they amounted to crimes against humanity." [FN122]

A crime against humanity can, in fact, be committed in times of peace. [FN123] Any of the acts listed in Article 7 of the Rome Statute can constitute such a crime "when committed as part of a widespread or systematic attack directed against any civil population, with knowledge of the attack," [FN124] this attack being "pursuant to or in furtherance of a State or organizational policy to commit such attack." [FN125] Could a state's tolerance of customary practices violating women's rights be seen as a policy "by omission?" Acording to Robinson, "[t]he underlying concern of the delegations advocating cultural references was that Western judges would apply an expansionist interpretation of crimes against humanity ... They feared the law of crimes against humanity would be used to 'Europeanize the world.'" [FN126] On the basis of this fear, the states sought to protect their traditional family-related norms by ensuring that these practices did not come within the scope of international criminal law. Specifically, the Arab states sought to limit the crime of enslavement by specifying in the ***578** *Elements of Crimes* [FN127] that "[p]owers attaching to ownership does not include rights, duties and obligations incident to marriage between a man and a woman or between parent and child." [FN128] They also sought to limit the crime of sexual slavery by specifying that "[p]owers attaching to ownership do not include rights, duties and obligations incident to marriage between a man and a woman." [FN129] It was then proposed that "family matters" [FN130] be excluded from crimes against humanity, and that a more restrictive exemption be included "to the effect that 'acquiescence in the long standing cultural or religious norms concerning family matters' would not suffice to satisfy the policy element." [FN131] However, for the rest of the international community, such exemptions introducing the concept of cultural relativity in international criminal law were

unacceptable, as crimes against humanity are intended to be universal by definition. [FN132] The parties finally agreed to indicate in the *Elements* that crimes against humanity must be strictly construed, [FN133] and that, for a state to have a policy to commit an attack ***579** against a civilian population, it must actively promote or encourage such an attack. [FN134] A policy that can be inferred only on the basis of the fact that the State abstains from any action--except under exceptional circumstances--is difficult to prove. [FN135] Some authors maintain that the restrictive language of the *Elements* is contrary to the definition of crimes against humanity given in the Rome Statute, which seems broad enough to allow for a policy by inaction. [FN136] It can, however, be submitted that several states agreed to be party to the Rome Statute because they were assured that the definition of crimes against humanity would not be widely used or construed to eradicate their tolerated customary norms and practices that potentially violate human rights, and that the International Criminal Court, "intended as a criminal court, would [not] transform itself into a body dealing with all kinds of human rights issues." [FN137]

The Special Court for Sierra Leone, like the International Criminal Court, has jurisdiction over the crime of sexual slavery as a crime against humanity. [FN138] Although the Statute for the Special Court does not explicitly require armed conflict or state policy to be behind the attack, [FN139] the Court is focusing on acts of sexual violence, including sexual slavery, that were perpetrated during the conflict. However, it is not on the court's agenda to review those customary marriages that harbor the acts of sexual slavery.

The Special Court for Sierra Leone, like the ICC, exists to punish the most serious crimes of concern to the international community, thus demonstrating that some conduct is unacceptable to the entire international ***580** community. [FN140] If traditional practices were to fall within the international criminal law by means of a broad interpretation of what constitutes a "crime against humanity," particularly the concepts of attack against a population and of state policy, one can wonder whether state parties to the Rome Statute--especially those who objected to criminalization of state inaction to certain customary practices-- would see the ICC as a tool of social engineering. As one European delegate stated, "the Court was 'created to deal with the most serious international crimes, not as a panacea for all ills' and the Court 'must maintain its focus on only the most serious international crimes if it is to maintain its credibility and stature.'" [FN141]

Nonetheless, by creating so much debate around the definition of crimes against humanity, and by fearing that the definition would be so broad as to reach some of their traditional practices, those states raised a lot of dust that is not about to settle. They implicitly recognized that many of these practices violate women's rights, as exemplified by their quick anticipation of the argument that women may be, in some customary law scenarios, sexual slaves within marriage. More importantly, however, their resistance made it so that the statute did not represent any real threat to their customs regarding marriage, despite such a possibility. These observations are very disquieting. As Ray notes, "[i]nternational human rights law through a war crimes tribunal addresses only one moment during entire lives of sex discrimination and sexual terrorism .... [It] ignores each incident of sexual terrorism until a soldier representing a state violates women's rights during time of 'war.'" [FN142]

Does this mean that the fabric of traditional practices violating women's rights are not jeopardized by the international criminal law's recognition of such acts of sexual violence as crimes? In other words, if it is true that customary marriage and the "forced marriage" that prevailed during the Sierra Leone conflict share certain characteristics, and if these characteristics were found by the Special Court for Sierra Leone as ***581** constituting a crime of sexual slavery in the case of "forced marriage," would such characteristics of customary marriage be completely protected from any criticism?

III. CHARACTERIZATION OF "FORCED MARRIAGE" AS A CRIME OF SEXUAL VIOLENCE BY INTERNATIONAL CRIMINAL JUSTICE--THE IMPACT ON CUSTOMARY MARRIAGE IN SIERRA

A. The Transforming Power of the Concept of Autonomy

> Rape as a tactic of war is a sexual abuse that targets female sexuality, even though its primary purpose is not to control female sexuality. By contrast, forced child marriage, while not a sexual act, is in large part perpetuated in order to prevent girls from engaging in premarital sex. *Both of these abuses should be denounced as human rights violations that compromise women's sexual autonomy* .... [FN143]

While the primary purpose of "forced marriage" in the Sierra Leone conflict may have been to terrorize the civilian population for strategic military ends, control over female sexuality was, as previously indicated, one of its prominent characteristics. It is also a prominent characteristic of customary marriage. The young age of the girl when married, the payment of a consideration perceived as giving the man "rights" over the woman, and the non-existence of the concept of marital rape all form part of the framework of customary marriage and serve to ensure control over female sexuality. For Adjetey, these norms violate the reproductive autonomy of women and their ability to make decisions "on whether or not to have sex, whether to have children, how many children to have and the spacing of her births, whether to use contraception and the type of contraception, and whether to carry a pregnancy to term." [FN144] In a broader sense, this Article submits that they violate the sexual autonomy of women--"the ability of women to make decisions about when, how and with whom to conduct their sexual lives ... [and] to control their bodies," [FN145] as well as "the freedom to determine one's own experiences, to choose how and with whom one ***582** expresses oneself sexually." [FN146] In short, the control over female sexuality that is characteristic of the sexual slavery in both "forced marriage" and customary marriage violates the sexual autonomy of women. In identifying "forced marriage" as as a form of sexual slavery, such criminalization could have repercussions, although indirect, on customary practices that similarly violate women's sexual autonomy.

Autonomy is, more broadly, the ability to exercise self-determination, to choose one's life. [FN147] The concept "derives from the legal and societal recognition that each person should make moral, social and political choices, especially those choices that define the self." [FN148] It must be developed in positive terms so as to emphasize people's ability to achieve their life plan. [FN149] The notion of autonomy has undeniable transforming power. As Nedelsky explains, autonomy is inseparable from the overall social context of experiences and relations: "Autonomy is a capacity that exists only in the context of social relations that support it and only in conjunction with the internal sense of being autonomous .... [S]ubordination and powerlessness are incompatible with autonomy." [FN150] The achievement of autonomy for women necessarily implies a social context from which oppression and subordination have been eliminated, i.e., a redefinition of and a change in the status of women in patriarchal societies.

For these reasons, Coomaraswamy considers autonomy a central principle that must be used as a guide in examining customary norms and cultural practices:

> Pursuing the principle of autonomy would imply removing those aspects of customary and religious law and practice that prevent women from being in a position to make decisions about their ***583** lives. In some ways, the concept is related to choice, but the principle of autonomy recognizes social, economic and political constraints and attempts to maximize women's power within those realities. In addition, the term autonomy recognizes that it is not only choice in an abstract political sense but choice in terms of economic and social reality that matters. For this reason, the concept of autonomy is also concerned with economic and social rights of women as a way of ensuring meaningful choice in everyday life. [FN151] Sexual autonomy is an essential component of this concept of autonomy: "Having control over who touches one's body and how lies at the core of human dignity and autonomy." [FN152]

According to Lai and Ralph, the concept of sexual autonomy, which would make it possible to question several aspects of customary marriage, must be conveyed through human rights discourse:

> To ensure women's sexual autonomy, it will first be necessary to change perceptions about women's "proper" role. Central to this transformation is the emergence of a broad-based recognition, grounded in human rights principles, that women are entitled to control their own bodies. Despite its limitations, human rights discourse has tremendous normative influence that could and should be brought to bear on the promotion and protection of women's sexual autonomy. [FN153] For the past decade, women's rights advocates have tried to persuade the international community to recognize women's right to sexual autonomy through sexual rights. [FN154] "Sexual rights include the individual's right to have control over and to decide freely in matters related to her or his sexuality," [FN155] and concerns "the international recognition of the rights of ***584** women over their bodies and their sexuality." [FN156] Sexual rights include the right to choose one's sexual partner without discrimination, the right to choose to be sexually active or not, the right for two partners to have freely consenting sexual relations and to marry of their own free will, and the right to sexuality independent of procreation. [FN157] The World Conference on Human Rights in Vienna (1993), where women's rights were finally recognized as human rights, [FN158] represents the starting point of this movement. However, the concepts of sexual rights and autonomy were not included in the declarations and action programs of the International Conference on Population and Development in Cairo (1994) and the World Conference on Women in Beijing (1995). [FN159] This omission was a result of fierce opposition from the Vatican and other conservative States. [FN160] Despite the fact that the language used in these documents tends toward the notion of autonomy, [FN161] nowhere are the terms "autonomy" and "sexual rights" ***585** used. Although these instruments have significant persuasive value and are used for lobbying at the local level, they are not binding for the party states. [FN162]

While human rights discourse does not presently reflect a consensus from the international community on the concept of sexual autonomy that would enable us to question several facets of customary marriage, women's right to sexual autonomy seems to be emerging in international criminal law.

B. Sexual Autonomy and the Power of Normative Discourse in International Criminal Law

As a result of pressure from civil groups advocating women's rights, the Rome Statute lists for the first time a range of crimes of sexual violence under war crimes and crimes against humanity, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. [FN163] Although these provisions do not make the right to autonomy a distinct, legally protected interest, they can be seen as a springboard, in both case law and legal writings, for those who wish to promote the ideal. In fact, giving a court jurisdiction over a crime of sexual violence enables it to elaborate on the essence of such crime and perhaps even generate progressive normative discourse that legal writing could then take further.

Discourse on sexual autonomy has emerged in international criminal law with the reformulation, in the *Kunarac* decision, of elements of the crime of rape previously defined in the *Furundzija* case: [FN164]

> ***586** The matters identified in the *Furundzija* definition--force, threat of force or coercion--are certainly the relevant considerations in many legal systems but the full range of provisions referred to in that judgement suggest that *the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual autonomy.* [FN165] The ICTY, in the *Kunarac* decision, further stated that "[s]exual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant." [FN166] Consent "must be ...

given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances." [FN167] According to the Trial Chamber, the threat or use of force is only an indication of a violation of autonomy and not a mandatory condition for the crime of rape. [FN168]

Boon affirms that

> the ICTY has now given sexual autonomy a distinct formulation warranting protection under international law. This interest is not premised on a showing of force, because it is cast from the perspective of the individual victim, the autonomous agent, the woman who can and should choose when and how to engage in sexual and reproductive acts. [FN169] Making the link with the Rome Statute, she adds that "[t]he *Kunarac* decision makes explicit what the ICC Statute suggests: that sexual autonomy is intrinsically connected to human dignity and bodily ***587** integrity." [FN170] In fact, the concept of sexual autonomy can be discerned behind several of the crimes listed in the Rome Statute, namely the crime of forced pregnancy [FN171] and particularly the crime of sexual slavery: "Implicit in the definition of slavery are notions concerning limitations on autonomy, freedom of movement and power to decide matters relating to one's sexual activity." [FN172] After emphasizing that the Rome Statute negotiations "had become a critical--and one of the only--fora in which to advance or restrain the notions of female dignity, autonomy, and consent," [FN173] Boon boldly writes:
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> > The ICC provisions ... highlight the gender component of sexual violence ... and they mark how women's rights are human rights. They also demonstrate that *the principles of human dignity and autonomy are central to the international legal order and to democracy, and that they function in times of peace as in war, regardless of gender, regardless of circumstances. The ICC is the first international instrument to provide a legal framework in which women's autonomy and consent can be articulated, assessed, and promoted.* [FN174] It goes without saying that the embryo of women's rights, namely that of autonomy, has found in international criminal law a chrysalis in which to develop. The Statute of the Special Court for Sierra Leone, like the Rome Statute, gives a court jurisdiction over the specific crime of sexual slavery. Thus, the Special Court, by condemning the sexual slavery ("forced marriage") that prevailed during the conflict, is able to elaborate on the definition of this crime. It could, like the ICTY in the *Kunarac* decision, choose to use the language of autonomy, and thus articulate and promote ***588** that value, by emphasizing the fact that the crime of sexual slavery condemns control over female sexuality as a violation of female sexual autonomy. [FN175] Such a definition of sexual slavery, which would certainly not be confined to the area of criminal law, could fuel human rights discourse by serving as the basis for a consensus on the concept of autonomy by the international community, or even influence case law at the national level. International criminal law would be a medium for the promotion of the right to autonomy that forms the essential basis of any examination of customary norms aimed at redefining the status of women in patriarchal societies.

This resourceful means of promoting women's right to sexual autonomy by using "developing language" in international criminal law is certainly to be hailed: "[W]e must have a language that adequately captures our highest goals, in terms that reflect both the individual and the social dimensions of human beings." [FN176] However, the concept of autonomy is thought to be "integrally linked to concepts of freedom and choice that underpin what is loosely called a western epistemology," [FN177] an epistemology developed during the Age of Enlightenment. In light of the Rome Statute negotiations, it is doubtful that all the party states agreed on the recognition of such a right to autonomy for women. [FN178] As a result, if the ICC (or, as relevant to this Article, the Special Court for Sierra Leone) started to discuss the socially transforming concept of sexual autonomy, it could risk being perceived merely as a puppet of a Western feminist group or as a dreadful tool of

social engineering. [FN179] Detractors may argue that the *589 inclusion of women's rights as part of the court's jurisprudence would tax the institution's legitimacy and jeopardize its much needed function as a tribunal that renders punishment for crimes repugnant to humanity as a whole. The ICC or the Special Court have, in fact, the potential to become forums for the definition of women's rights that would be ahead of international human rights discourse, with the curious result that women would have rights recognized in times of war that were non-existent, or in the embryonic stage, in times of peace. It is within this curious result that the role of the Truth and Reconciliation Commission is examined. As this Article discusses, the Commission had an important complementary role to that of the Court because its mandate allowed it not only to examine sexual violence perpetrated against women during the conflict, but also to evaluate women's status pre-conflict. The TRC constituted an authoritative forum to directly denounce violations of women's rights brought about by customary law relating to marriage and has laid the foundation for such potential changes to customary law through its recommendations to the Sierra Leone government.

IV. THE TRUTH AND RECONCILIATION COMMISSION AND THE OPPORTUNITY TO INITIATE INTERNAL DISCOURSE TO CHANGE THE CUSTOM

A. Establishing a Link with the Past: Violations of Women's Rights from One Type of Marriage to Another

The Truth and Reconciliation Commission (TRC) for Sierra Leone was an independent body provided for by the Lomé Peace Agreement of July 7, 1999, and established by an act of the Parliament of Sierra Leone on February 10, 2000. [FN180] It presented its final report of Sierra Leone's President *590 and to the United Nations Security Council in October 2004. [FN181] Its mandate was:

> [T]o create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity; to respond to the needs of the victims; to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered. [FN182] One aspect of this mandate is particularly pertinent here: preventing a repetition of the violations and abuses suffered. This aspect necessarily required the TRC to investigate and report on the causes and nature of the human rights violations perpetrated during the conflict and of the context in which these abuses took place. [FN183] The TRC was mandated to give "special attention to the subject of sexual abuses and to the experiences of children within the armed conflict." [FN184] This Article proposes that an environment, during times of peace, that is characterized by the subordination and vulnerability of women and girls is conducive to the proliferation of crimes of sexual violence during an armed conflict. Human Rights Watch, describing the "forced marriage" that prevailed during the conflict, maintains that "[t]his assertion by men of their power over women is deeply imbedded in societal attitudes in Sierra Leone." [FN185] The situation of captivity and sexual exploitation of women by rebels, referred to as "forced marriage," is an extreme reflection of the exploitation some Sierra Leonean women experience in customary marriage. As this Article has argued, customary marriage, like "forced marriage," may conceal the reality of *591 sexual slavery during times of peace. In order to prevent a repetition of these abuses, the TRC had to prepare the ground for the seeds of change by exploring the relationship between the women's rights violations that prevailed before the conflict and those that were widespread and systematic during it. As Reynolds astutely remarks:
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> Viewing sexual violence in war as an extension of its incidence in peacetime will create a parallel struggle to advance its eradication during both times. Identifying why sexual violence remains a too frequent occurrence in war builds a nexus with peacetime sexual violence: this would increase awareness

of how to confront the attitudes and images that perpetuate violence against women. [FN186] The TRC was therefore in a privileged position, on the one hand, to denounce the violations of women's rights that prevailed in the context of "forced marriage" during the conflict and, on the other hand, to analyze customary marriage and elucidate the fact that some aspects of it led to the same violations. If it is true that customary marriage may at times legalize situations that are the equivalent of sexual slavery, then there are numerous provisions prohibiting slavery in international instruments that are being violated by the practice of customary marriage. [FN187] While there can be little doubt that a case by case study would reveal that not all women in a customary marriage are in a situation of sexual slavery, many of the rights guaranteed to women are affected by certain aspects of customary marriage: for example, *inter alia*, a woman's right to freely choose her husband; [FN188] her right to education (which is jeopardized by early marriage); [FN189] the ***592** inviolability of her body (incompatible with the non-recognition of marital rape and the tolerance of domestic violence); [FN190] her right to health; [FN191] and her right to life (early pregnancies often lead to complications that can cause death). [FN192] Ideally, for the reasons outlined in Part III, any person's control over women's sexuality ought also to be denounced as a violation of their right to autonomy. Accordingly, it was these violations of women's rights in times of peace, which clearly reflect the discrimination suffered by Sierra Leonean women and their inferior status within Sierra Leonean society, which paved the way for the occurrence of "forced marriage" during the conflict, a situation clearly characterized by a repetition of these violations.

While it is true that these violations are perpetrated in a familial or private context, without direct state involvement, as An-Naïm writes, "every state has the responsibility to remove any inconsistency between international human rights law binding on it, on the one hand, and religious and customary laws operating within the territory of that state, on the other." [FN193] This responsibility to ensure that customs are consistent with human rights standards is very real for Sierra Leone, as the country ratified the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention) without reservation. [FN194] Article 16 of the ***593** Women's Convention provides for the direct responsibility of the party states to take all necessary measures to eliminate discrimination against women in all matters relating to marriage and family relations, and article 2(f) reads as follows:

> 2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women and, to this end, undertake: (f) *To take all appropriate measures*, including legislation, *to modify* or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women [FN195] Article 5 (a) elaborates on the nature of this responsibility by stipulating that the party states take all appropriate measures:
>
> *To modify the social and cultural patterns of conduct* of men and women with a view to achieving the elimination of prejudices and *customary and all other practices* which are based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles for men and women. [FN196] Customary marriage masks a range of women's rights violations in the form of discrimination, if not a situation of sexual slavery. Although the Constitution of Sierra Leone prohibits any discrimination based on sex in its "laws" (the custom being expressly recognized as "law"), [FN197] it expressly tolerates discrimination in the area where it is most likely to occur: the family. [FN198] Since family law is largely customary, this means that Sierra ***594** Leone, through its Constitution, explicitly violates its responsibility under the Women's Convention to eliminate all discrimination from its customary law, [FN199] particularly its responsibility to eliminate all discrimination in matters relating to marriage and family relations. [FN200] In the words of Cook, "[i]f a State facilitates, conditions, accommodates, tolerates, justifies, or excuses

> private denials of women's rights ... the State will bear responsibility. The State will be responsible not directly for the private acts, but for its own lack of diligence to prevent, control, correct, or discipline such private acts through its own executive, legislative or judicial organs." [FN201]

Did the TRC take advantage of the "prevention" component of its mandate so as to establish a link between customary marriage and the phenomenon of "forced marriage" during the conflict? The TRC found that during the conflict, women and girls, singled out by perpetrators for some of the most brutal violations of human rights recorded in any conflict, were forced into sexual slavery. [FN202] Children between the ages of ten and fourteen were specifically targeted for sexual slavery, as well as for rape and forced recruitment. [FN203] The TRC later identified the "forced marriage" or "bush wife" phenomenon as a form of sexual slavery. [FN204] The TRC also carefully ***595** studied the status of women and children before the war, as well as the national laws impacting them. [FN205] It found that before, during, and after the conflict, women and girls in Sierra Leone were subjected to structural discrimination by practice, custom, and law; such discrimination pervaded in the social, political, and economic public setting as well as in the family. [FN206] The TRC argued that the application of customary and statutory laws to women and girls, especially in the field of personal law, was discriminatory and did not adequately protect them against violence. [FN207] The TRC emphasized that "[s]tructural and cultural discrimination, early marriage and other harmful traditional practices impede the access of women to education and economic advancement." [FN208]

In fact, the TRC emphasized the prevalence of the practice of early marriages under customary law, [FN209] observing that

> [t]he abductions and use of young girls and women as bush wives and sex slaves by armed groups during the war could be attributed to the traditional beliefs that governed this issue prior to the war. Some of the armed groups did not consider it an aberration to rape young women or use them as sex slaves. [FN210] The Commission also found that the culture of domestic violence, especially in traditional societies, partially explains the brutality ***596** experienced by women during the conflict period. [FN211] It cited a 1998 report from Freetown that concluded: "It is perhaps not surprising that a culture that has spawned such apparently high rates of war-related sexual violence, also suffers from high rates of domestic partner abuse." [FN212] Further, the Commission, dealing with the question of why women became such a specific target of the war, made the following revealing remark:
>
> Prior to the war, the status of women in Sierra Leone at almost every level was low. Their low status meant that issues concerning women and women themselves were not of paramount importance in society. Consequently, *it was easy for armed combatants to treat women with disdain and appropriate a sense of ownership of women's bodies to themselves, as they probably were wont to do, albeit to a lesser extent, in peacetime.* The patriarchal hegemony that had existed in Sierra Leone continued and worsened during the conflict, evolving in the most macabre manner. The cultural concept that a woman was "owned" by a man played itself out in many of the violations that women suffered during the conflict. [FN213] The Commission never denounced customary marriage as a possible arena of sexual slavery. It did not expressly link customary marriage to the "forced marriage" that prevailed during the conflict. However, the above-cited passages of the Report, though scattered and brief, can be viewed as clearly linking the violence suffered by the women during the conflict with the inferior status of the women, the practice of early marriage, the concept of "ownership" of a woman by a man, and the prevalence of domestic violence before the conflict. Moreover, the Commission listed all of the international instruments to which Sierra Leone is a signatory and ***597** enumerated the human rights protected by those instruments. [FN214] Discriminatory customary laws, namely in the area of marriage, were

denounced as "a challenge for the enjoyment of women's rights, their advancement in the family and contribution to the political, economic, and social development in Sierra Leone." [FN215] The Commission noted that the practice of early marriage "negatively [impacts] young girls by affecting [their] full development, particularly in terms of education, economic autonomy, and physical and psychological health." [FN216] Further, the Commission found that early marriage poses "a major challenge to the government of Sierra Leone" [FN217] and is "in clear contravention of international law to which the government of Sierra Leone is [a] signatory." [FN218] The Commission emphasized that under customary law, early marriage and the fact that the bride's consent is not required "contradict basic human rights." [FN219] Noting that the State has not yet taken the necessary steps to eradicate the structural inequality against women pervading Sierra Leonean society, [FN220] the Commission stressed the "urgent need to review national law with a view to ensuring that the government of Sierra Leone fulfills its obligations in terms of international law." [FN221] Finally, it suggested that "[w]hile it is commendable that Sierra Leone has undertaken the obligations by ratifying or acceding to all seven of the principal United Nations human rights treaties, and several of the other international human rights instruments, this would seem to be little more than a mere formality, if we are to judge by its failure to submit reports." [FN222]

The TRC's efforts to denounce the violations of Sierra Leonean women's and girls' rights brought about by certain aspects of customary marriage, and to point out the failure of Sierra Leone to fulfill its international obligations, must be applauded. The Commission was perhaps ***598** one of the only forums where these violations could be articulated and denounced. [FN223] Moreover, making appropriate recommendations to the government of Sierra Leone gave the TRC an opportunity to take advantage of its potential to initiate internal discourse to change customs and "address the plight of women and girls at the highest levels. For example, giving effect to the provisions of CEDAW and to other international human rights instruments, which provide inspiration and the impetus to improve the quality of life for women and children, would be a tremendously symbolic step." [FN224]

B. Preparing for the Future: The Opportunity to Initiate Internal Discourse to Change Customs

The TRC was given the task of making recommendations concerning reforms and measures, whether legal, political, administrative, or otherwise needed to achieve its objective, which includes preventing the repetition of the violations and abuses suffered. [FN225] The TRC Act directs that those recommendations be "faithfully and timeously" implemented, [FN226] and provides for the establishment of a "follow-up Committee" which is to report on government compliance with the recommendations of the Commission. [FN227] The TRC was consequently in a privileged position not ***599** only to "denounce," but also to remind, the government of Sierra Leone of its responsibility to make customary law, namely relating to marriage, comply with its international obligations, which the TRC has managed to accomplish.

The Commission recommended that the Government take steps to immediately implement its obligations under the CEDAW. [FN228] The Commission found it imperative that the government, *inter alia*, repeal "all statutory and customary laws that discriminate against women." [FN229] To accomplish this objective, the Commission recommended that the government repeal those sections of the Constitution that exempt certain areas of the law, including marriage and divorce, from protection against discrimination, [FN230] as well as abolish all "practices which discriminate against women in the realm of inheritance, land ownership, marriage, [and] divorce." [FN231] Moreover, the Commission imperatively recommended that the government make it criminal to "permit, authorise and assist in the marriage of children under 18 years of age." [FN232] In fact, the Commission recommended that legislation be enacted abolishing the practice of early marriage, and that a minimum age of eighteen for marriage be established. [FN233] The Commission also requested that the

government work towards "the enactment of specific legislation to address domestic violence," including the crime of marital rape. [FN234] Lastly, it recommended ***600** that the government establish a Human Rights Commission to "serve as both a watchdog and a visible route through which people can access their rights." [FN235]

These recommendations, if implemented, have the power to change the face of customary marriage. Such change may occur soon, as a Law Reform Commission has been working on harmonizing Sierra Leone laws with its international obligations. [FN236] Nonetheless, although legislative reforms set the objectives to be achieved, they are certainly not sufficient to change deeply-rooted practices. As An-Naïm says, "the only viable and acceptable way of changing religious and customary laws is by transforming popular beliefs and attitudes, and thereby changing common practice." [FN237] People must therefore be convinced that changing customs is ***601** valid and useful. [FN238] According to Packer, "if Africans are to have a sense of moral obligation to uphold a law banning child marriages, they must believe that a law is needed, for which they must first be convinced that the practice is 'wrong.'" [FN239]

The Women's Convention clearly specifies the state's direct responsibility to work toward changing attitudes: it must "take all appropriate measures" and "modify the social and cultural patterns of conduct of men and women" in order to change customs that discriminate against women and perpetuate the idea of their inferiority. It is vital for the state to help raise women's awareness of their rights through the educational programs it supports, as "the strength of a people's determination to insist on the protection of their human rights is proportionate to their belief that those rights are essential for their human existence." [FN240] Once women have a greater awareness of their rights, they will be in a practical position to exercise them. For this, awareness must be raised among the key actors in the communities: leaders, chiefs, and elders, as well as the police and the judiciary. [FN241] Packer emphasizes that "[l]egislation ... will ... remain ineffective without popular support, and popular support will not be gained without more local initiatives and the input of key opinion leaders." [FN242] Men are often overlooked, yet fathers, husbands, and sons have enormous potential in ensuring that the winds of change are blowing. What if men refused from now on to take a child for a wife?

The TRC seized the opportunity it was given to make necessary recommendations to the government of Sierra Leone regarding its direct responsibility to work towards changing the custom to redefine the status of ***602** women. In fact, it recommended that the Government, through the Law Reform Commission, begin a national dialogue on reform of customary law with special emphasis on the rights of women and children. [FN243] The TRC recommended that this process commence with a consultation of the principal people concerned, such as women and peasant farmers at the chiefdom level. [FN244] It identified the ultimate aim as bringing customary law into line with CEDAW and the Convention on the Rights of the Child. [FN245] The Commission's strength lies in the fact that it has a majority membership that is comprised of citizens of Sierra Leone who have an intimate familiarity with the nation, in addition to the fact that three of the commissioners are women. [FN246] The opinion was expressed that "the individual chosen for the Sierra Leone TRC inspire confidence" and that "the religious background of some commissioners, as well as experience in the region and in other conflicts, may add to their credibility with the public." [FN247] The female commissioners' experience with, and commitment to, addressing women's issues were also underlined. [FN248] Moreover, the TRC ***603** established direct dialogue with the victims of sexual crimes perpetrated during the conflict and their aggressors, giving each group a chance to express themselves: "Unlike the SC, the TRC can give a voice to the ordinary people of Sierra Leone, providing them with a necessary link to the processes of international justice." [FN249] These individuals are, it must be remembered, the mothers, wives, fathers, and husbands of post-war Sierra Leone.

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An-Naïm believes that "there is no substitute for internal discourse for transforming attitudes and perceptions. It is primarily the task of internal actors, supported and encouraged by external allies, to promote and sustain the necessary degree of official commitment and popular political support for a program for changing ... laws." [FN250] It is of crucial importance that internal discourse comes to question customary law: exclusively external involvement in this respect could be perceived as emblematic of imperialistic or neo-colonial values and may thus doom the initiative to failure. [FN251] The TRC is a local forum that is part of the internal Sierra Leonean and African process of changing attitudes. Its discussions and recommendations are a spark that will hopefully ignite internal discussion, especially at this time when the country is reorganizing and the people are still suffering from a decade of atrocities. This process of changing attitudes would benefit by support from external actors, [FN252] particularly capital donations from members of the international community who would support the concrete initiatives chosen by the government to change these customs. [FN253] Help could include, for example, support of public education programs about the law. [FN254]

***604** A change in Sierra Leonean customs may prove more than justified. Chanock has long studied the evolution of customary law, or rather the official version of customary law in African countries that were former British colonies. He concludes that the version of customary law condoning the subordination of women is, in fact, a rigid, biased "invention" that imposed worse treatment for women than in pre-colonial times.

> [T]he customary law that has been accepted is the result, in the former British colonies, of a congruence of interests between male elders and British administrators. More fundamentally it stems from the ways in which the defensive response by elements in African societies to the disruptive changes of the twentieth century led them to try to erect and emphasize particular forms of family, marriage, duty, right and obligation. The new economy, and the consequent needs for new controls over domestic labour, and new rights over family property, provided a customary law tailored to the needs of some, in a situation that was anything but customary. [FN255] In light of this, asking an African state to adjust this version of customary law to the human rights standards provided for in international instruments should not be perceived as an attack on its value system. This rigid version of customary law must be reinterpreted.

Armstrong sees customary law as a potential means of conveying a new view of women, and not as an obstacle to the improvement of women's rights:

> There is another version of customary law, which may be labelled the 'living law' which reflects the real life experience of people on a day-to-day basis. This body of law is rich, varied and flexible; it changes in response to changing conditions ... [t]he ***605** dynamism of the living law is a potential force in the improvement of women's rights. [FN256] Therefore, African customary law is living, dynamic, evolving, and changing. [FN257] Change is moreover a fundamental characteristic of tradition, since by definition, "tradition never reaches definitive form, but is rather, in the present, a series of interactive statements of information." [FN258] Customary law may therefore be progressively questioned and reinterpreted so that it can be brought into line with international human rights standards, and the foundations for a new status for women in Sierra Leone can be established. The TRC Report has set this transformation in motion.

V. CONCLUSION

During the Second World War, women, primarily Korean, were detained in facilities guarded by the Japanese army; every day, they were forced to provide sexual favors to many soldiers. These slaves of the Japanese army, euphemistically called "comfort women," were forgotten for more than half a century. [FN259] The Statute of the Special Court for Sierra Leone, like the Rome Statute, expressly names the crime of sexual

slavery for the first time. As the situation of "forced marriage" that prevailed during the Sierra Leone conflict is being examined by the Special Court, we can be confident that the sexual slaves of the rebels in Sierra Leone will not be forgotten behind the euphemism of "bush wives."

By specifically naming a range of crimes of sexual violence, the Statute of the Special Court for Sierra Leone, like the Rome Statute, gives these crimes more visibility, increasing the likelihood that they will be remembered and that those responsible will be punished. But it is not only the visibility of the crimes in conflict that will be increased; it is also the ***606** visibility of the same crimes in times of peace. The express naming of the crime of sexual slavery facilitates reevaluation of customary marriage in Sierra Leone since, as this Article has argued, it shares characteristics with "forced marriages." The international community's criminalization of acts that violate a woman's sexual autonomy during times of armed conflict thus provides the language and law necessary to label as crimes acts that are violative of women's sexual autonomy but tolerated domestically, for example, under customary law. It therefore has a "magnifying effect" on customary practices during times of peace and whether those customary practices lay the foundation for crimes perpetrated against women during war. If international criminal law thus serves to stimulate reflection on the need to bring those practices to the state's attention, and on the best ways to eradicate those practices, it will have greatly contributed to the advancement of women's rights on a national level that may not have occurred "but for" the international condemnation of these types of crimes against humanity or war crimes.

However, the power of international criminal justice to eradicate traditional practices involving elements of sexual slavery is limited. In addition to the practical difficulties inherent in characterizing a customary practice as a crime against humanity, there is the considerable challenge of ensuring that international criminal justice maintains its credibility and does not become a tool of social engineering. Nonetheless, the Special Court's recognition of women's right to sexual autonomy, a central concept to an examination of customary norms aimed at a redefinition of the status of women in patriarchal societies, could have a transformative effect not just on Sierra Leone's laws, by creating a domestic precedent for the recognition of such a right, but also on human rights discourse internationally, by serving as the basis for a consensus on the concept of sexual autonomy for the international community.

Meanwhile, at a more concrete level, the TRC was probably the best forum to begin the harmonization of national law with international law through its recommendations to the government of Sierra Leone. Because of its mandate, it was in a privileged position to explore the relationship between the women's rights violations that prevailed before the conflict and those that were widespread and systematic during the conflict, and, in so doing, directly dealt with customary law. The TRC identified "forced marriage" as a form of sexual slavery. It did not go as far as to find that sexual slavery could take place in the framework of customary marriage, violating women's sexual autonomy. However, the TRC denounced the violations of women's and girls' rights brought about by certain aspects of customary marriage and pointed out Sierra Leone's ***607** failure to comply with its international obligations in this regard. The TRC's recommendations to the government of Sierra Leone, aimed at bringing customary law into line with its human rights obligations, have the potential to set the tone of national discourse aimed at changing the custom. Its legitimacy was based, *inter alia*, on its membership being comprised of mostly Sierra Leonean citizens and was solidified by its establishment of a direct dialogue with victims, other parties to the conflict, and the various components of civil society. The recommendations of the Commission, which stemmed from domestic considerations and concerns, might consequently be perceived as representative of Sierra Leone's evolving mentalities rather than emblematic of imperialistically imposed values. The TRC Report, in conjunction with the much-awaited judgments of the Special Court, will address Sierra Leonean women's plight before, during, and after the conflict. Any potential reform that results from their work must be recognized as a remarkably positive illustration of two transitional justice institutions working side by

side to achieve gender justice in Sierra Leone.

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[FN1]. H. M. JOKO SMART, SIERRA LEONE CUSTOMARY LAW 28-29 (1983).

[FN2]. HUMAN RIGHTS WATCH, "WE'LL KILL YOU IF YOU CRY": SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT 45-46 (2003), *available at* http:// hrw.org/reports/2003/sierraleone/sierleon0103.pdf [hereinafter HRW REPORT].

[FN3]. For a detailed account of the origins of the conflict, the hostilities that took place, and the acts of sexual violence perpetrated, see *id.*; *see also* PHYSICIANS FOR HUMAN RIGHTS, WAR-RELATED SEXUAL VIOLENCE IN SIERRA LEONE (2002), *available at* http://www.phrusa.org/research/sierra_ leone/report.html [hereinafter PHR REPORT]; SIERRA LEONE TRUTH & RECONCILIATION COMMISSION, WITNESS TO TRUTH (2004), *available at* http:// www.trcsierraleone.org/ [hereinafter TRC REPORT].

[FN4]. Testimony of victims. *See* HRW REPORT, *supra* note 2, at 28-45; PHR REPORT, *supra* note 3, at 63-81; 3b TRC REPORT, *supra* note 3, at 273.

[FN5]. These terms always appear in quotation marks in the HRW REPORT, *supra* note 2, and in the PHR REPORT, *supra* note 3.

[FN6]. *See* GRAçA MACHEL, GOV'T OF CANADA, INT'L CONF. ON WAR-AFFECTED CHILDREN: THE IMPACT OF ARMED CONFLICT ON CHILDRENN (2000), *available at* http:// www.waraffectedchildren.gc.ca/machel-en.asp; Lisa Alfredson, *Sexual Exploitation of Child Soldiers: An Exploration and Analysis of Global Dimensions and Trends*, Dec. 2001, at 5, *available at* http:// www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5RPBPA/SFILE/csusc-exploit.pdf? OpenElement.

[FN7]. Alfredson, *supra* note 6, at 5 (quoting MACHEL, *supra* note 6, ch. 2, para. 3) (quotation marks ommitted). Both authors discuss the "forced marriage" phenomenon in general, as it has occured in a number of conflicts.

[FN8]. HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH 56 (1996), *available at* http:// www.hrw.org/reports/1996/Rwanda.htm (discussing the "forced marriages" that also prevailed during the Rwandan genocide) [hereinafter SHATTERED LIVES].

[FN9]. For a detailed account of the experiences of women and girls during the Sierra Leone conflict, see HRW REPORT, *supra* note 2, at 28-53, the PHR REPORT, *supra* note 3, at 63-81, and the 3b TRC REPORT, *supra* note 3, at 136-209, 258-322. These documents gather testimonies of victims of sexual violence during the conflict.

[FN10]. 3b TRC REPORT, *supra* note 3, at 138.

[FN11]. *Id.* at 271; HRW REPORT, *supra* note 2, at 33.

[FN12]. 3b TRC REPORT, *supra* note 3, at 156-57, 274-75; HRW REPORT, *supra* note 2, at 35-36.

[FN13]. 3b TRC REPORT, *supra* note 3, at 155; HRW REPORT, *supra* note 2, at 33.

[FN14]. 3b TRC REPORT, *supra* note 3, at 154-56.

[FN15]. *Id.* at 158, 270; HRW REPORT, *supra* note 2, at 28-29, 30.

[FN16]. "Although the rebel forces raped indiscriminately irrespective of age, the rebels favored girls and young women whom they believed to be virgins. This was evident not only by their actions, but was also explicitly stated by them as they chose their victims." HRW REPORT, *supra* note 2, at 28.

[FN17]. *Id.* at 42; 3b TRC REPORT, *supra* note 3, at 139-40, 164, 272.

[FN18]. HRW REPORT, *supra* note 2, at 42; 3b TRC REPORT, *supra* note 3, at 271.

[FN19]. HRW REPORT, *supra* note 2, at 44. Another former abductee of the RUF also testified to the TRC of her duties towards her "bush husband," that is, "to prepare food and to satisfy 'my bush husband' any time he needs me." 3b TRC REPORT, *supra* note 3, at 139.

[FN20]. However, a woman remained vulnerable to sexual violence by other rebels, especially when her assigned "husband" was absent. *See* 3b TRC REPORT, *supra* note 3, at 164, 272-73; HRW REPORT, *supra* note 2, at 43.

[FN21]. HRW REPORT, *supra* note 2, at 41.

[FN22]. *Id.* at 40-41; 3b TRC REPORT, *supra* note 3, at 165.

[FN23]. HRW REPORT, *supra* note 2, at 43; 3b TRC REPORT, *supra* note 3, at 139-40, 148, 164.

[FN24]. HRW REPORT, *supra* note 2, at 34, 38, 44 (H.K. testified that her "husband" forced an umbrella into her vagina); 3b TRC REPORT, *supra* note 3, at 149, 273.

[FN25]. HRW REPORT, *supra* note 2, at 43.

[FN26]. PHR REPORT, *supra* note 3, at 70. The girls interviewed by the PHR REPORT do not specify what "put in a box" means. However, in the HRW REPORT, there are many accounts of girls having been "caged," or put in wooden cages, and at least one girl referred to such a cage as "the box." HRW REPORT, *supra* note 2, at 32. Punishment was harsh if the girls were recaptured. 3b TRC REPORT, *supra* note 3, at 142.

[FN27]. HRW REPORT, *supra* note 2, at 42.

[FN28]. *Id.* at 43-44; 3b TRC REPORT, *supra* note 3, at 142, 275.

[FN29]. *Id.*

[FN30]. HRW REPORT, *supra* note 2, at 43.

[FN31]. *Id.* at 44.

[FN32]. *See* 3b TRC REPORT, *supra* note 3, at 165-66, 197-99, 320.

[FN33]. According to Human Rights Watch, the RUF rebels established "internal rules" to govern the behavior of the fighters and captives: "A rebel was expected to provide for his 'wives' and children during their captivity .... If a rebel reneged on his responsibility, then he could be put in a cell and beaten to death." HRW REPORT, *supra* note 2, at 45.

[FN34]. *Id.*; *see also* 3b TRC REPORT, *supra* note 3, at 199-200, 313.

[FN35]. HRW REPORT, *supra* note 2, at 44.

[FN36]. PHR REPORT, *supra* note 3, at 76.

[FN37]. HRW REPORT, *supra* note 2, at 44.

[FN38]. *See supra* p. 552-53.

[FN39]. Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, ¶ 10, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (*prepared by* Gay J. McDougall) [hereinafter *Contemporary Forms of Slavery*], *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/0/3d25270b5fa3ea998025665f0032f220? OpenDocument.

[FN40]. SHATTERED LIVES, *supra* note 8, at 56.

[FN41]. 3b TRC REPORT, *supra* note 3, at 164 (finding that "forced marriage" in Sierra Leone was a form of sexual slavery). For a more general discussion of "forced marriages" occurring in different armed conflicts as sexual slavery, see also *Contemporary Forms of Slavery*, *supra* note 39, ¶ 30 (noting that "[s]exual slavery also encompasses situations where women and girls are forced into 'marriage'"); Machel, *supra* note 6, ch. 2, paras. 1-3; Alfredson, *supra* note 6, at 5.

[FN42]. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, *available at* http://www.specialcourt.org/documents/Agreement.htm. The agreement was made following S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000). *See generally* Abdul Tejan-Cole, *The Special Court for Sierra Leone: Conceptual Concerns and Alternatives*, 1 AFR. HUM. RTSS. L.J. 107 (2001).

[FN43]. Statute of the Special Court for Sierra Leone, as amended Jan. 16, 2002, art. 2 (g), *available at* http://www.specialcourt.org/documents/Statute.html (Article 2 provides for crimes against humanity) [hereinafter Statute of the Special Court]. It is estimated that more than 200,000 women in Sierra Leone may have been affected by sexual violence during the conflict. PHR REPORT, *supra* note 3, at 3-4. Moreover, it has been found that "sexual violence and slavery ... were part of the rebel forces' military strategy to dominate, humiliate and punish the civilian population." HRW REPORT, *supra* note 2, at 46; *see also* 3b TRC REPORT, *supra* note 3, at 171 ("Given the widespread nature of rape and sexual violence by the armed groups mentioned[,] ... it is clear that there were deliberate policies systematically to target women and girls and systematically to rape and sexually violate them."). The author of this Article agrees with these reports that the acts of sexual violence perpetrated during the conflict were part of a widespread and systematic attack against the civilian population.

[FN44]. Indictments of the AFRC, RUF, and Charles Taylor are available at the Special Court of Sierra Leone's website, http://www.sc-sl.org/ (last visited Apr. 20, 2006). In terms of sexual violence counts, these defendants have been indicted for crimes against humanity of (1) rape; (2) sexual slavery and any other form of sexual violence; and (3) other inhumane act (Charles Taylor not being charged with (3) above); and (4) for outrage upon personal dignity. RUF Trial, http://www.sc-sl.org/RUF.html (last visited Apr. 20, 2006); AFRC Trial, http://www.sc-sl.org/AFRC.html (last visited Apr. 20, 2006); Indictment of Charles Taylor, http://www.sc-sl.org/Taylor.html (last visited May 6, 2006). A count of "other inhumane act" was added to the AFRC and RUF indictments when they were amended in May 2004 so that "forced marriages" could be prosecuted as "inhumane act." *Id.* Acknowledging the prosecution's array of charges for the same underlying criminal acts, this Article argues that "forced marriages" may be categorized as the crime of sexual slavery. The TRC also found "forced marriages" to be a form of sexual slavery. *See supra* note 41. However, with both "sexual slavery and any other form of sexual violence" and "other inhumane act" counts being presented for adjudication, it remains to be seen how the Special Court will ultimately categorize "forced marriages" under its statute. In the AFRC case of *Prosecutor v. Alex Tamba Brima et. al*, Trial Chamber II of the Special Court was satisfied that there was sufficient evidence upon which a trier of fact could find beyond a reasonable doubt that the accused were responsible for the crimes charged in the indictment. *Prosecutor v. Alex Tamba Brima et al*, Case No. SCSL-04-16-T, Decision on Defense Motions for Judgement of Acquittal Pursuant to Rule 98 (Mar. 31, 2006), *available at* http://www.sc-sl.org/AFRC-decisions.html (select the hyperlinks to all the documents pertaining to "SCSL-04-16-T"; although there are three separate hyperlinks to the opinion, the document is paginated consecutively from the first to the third hyperlink). As a result, the court dismissed the defense motions for acquittal. *Id.* at 97. However, in a separate concurring opinion, Judge Julia Sebutinde wrote that because "forced marriages" are sexual in nature, the accused could not be appropriately charged under the general crime of "other inhumane acts" for such "marriages." *Id.* ¶¶ 10-14, at 100-102. Instead, she argued that "forced marriages" should be dealt with under the other counts of the indictment. *Id.* ¶ 14, at 102. She remarked that "forced marriages" could qualify as "a form of sexual violence" and as a "form of sexual slavery," *id.*, which she argued were two different offenses improperly charged under the single count of "sexual slavery and any other form of sexual violence." *Id.* ¶ 6, at 99. She proposed that the count be amended so that the offenses are split into two separate counts -- one for sexual violence and the other for sexual slavery. *Id.* ¶ 9, at 100. She recommended that the added count of "inhumane act" be struck out from the sexual violence counts, so that only one count of "other inhumane acts" remains in the indictment, dealing with non-sexual acts. *Id.* ¶ 14, at 102.

[FN45]. KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 40 (1984) (emphasis omitted).

[FN46]. Rome Statute of the International Criminal Court, art. 7, § 1(g), July 17, 1998, U.N. Doc A/ CONF.183/9* (sexual slavery as a crime against humanity); *see also id.* art. 8, § 2(b)(xxii) (sexual slavery as a war crime in international conflict); art. 8, § 2(e)(vi) (as a war crime in internal conflict), *available at* http://www.un.org/law/icc/statute/romefra.htm [hereinafter Rome Statute].

[FN47]. Finalized draft text of the Elements of Crimes, U.N. Preparatory Comm'n for the Int'l Criminal Court, Nov. 2, 2000, U.N. Doc. PCNICC/2000/1/Add.2, *available at* http:// www.un.org/law/icc/prepcomm/report/prepreport.htm (locate Section B, ¶ 2; then select the English PDF version of the document, labeled as "E," for the cited paginations herein) [hereinafter *Elements of Crimes*]. *Elements of Crimes* is an appendix to the Rome Statute. As specified in the Rome Statute, art. 9, "Elements of Crimes shall assist the Court in the interpretation and application of articles 6 [Genocide], 7 [War Crimes] and 8 [Crimes against Humanity]." While sexual slavery can be prosecuted as either a crime against humanity or a war crime under the Rome Statute, the *Elements of Crimes* states that the crime shares two elements applicable to either category: (1) "The perpetrator exercised any or all of the powers attaching to the right of ownership over

one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty," and (2) "The perpetrator caused such person or persons to engage in one or more acts of a sexual nature." *Elements of Crimes*, art. 7, § 1(g)(2) at 17, art. 8, § 2(b)(xxii)(2) at 34, art. 8, § 2(e)(vi)(2) at 44.

[FN48]. Statute of the Special Court, *supra* note 43, art. 2 (g). The Sierra Leonean Special Court's statute only gives the Court jurisdiction over sexual slavery as a crime against humanity

[FN49]. *Prosecutor v. Alex Tamba Brima et al*, *supra* note 44, ¶ 109. The Trial Chamber II stated that the following elements define the crime of sexual slavery: "(1) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. (2) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. (3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population. (4) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population." However, the Trial Chamber did not elaborate on the contours of these elements.

[FN50]. Article 2(g) gives the Special Court jurisdiction over the crimes against humanity of "[r]ape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence," echoing the enumeration of those crimes in section 7 (1)(g) of the Rome Statute. Statute of the Special Court, *supra* note 43, art. 2 (g) *and* Rome Statute, *supra* note 46. *See also* Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J.INT'L L. 605, 626 (2004).

[FN51]. It is noteworthy, nevertheless, that the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery found, in its judgment, which is advisory in nature, that the Japanese military and civilian authorities committed sexual slavery as a crime against humanity against women and girls in the context of the "comfort system" during World War II. The Prosecutors and the Peoples of the Asia-Pacific Region v. Hirohito Emperor Showa and the Gov't of Japan, Case No. PT-2000-I-T, 139-158 (Dec. 4, 2001), *available at* http://www1.jca.apc.org/vaww-net-japan/english/index.html, [hereinafter *Women's Tribunal for Japan's Military Sexual Slavery*].

[FN52]. *See* MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 513 (2002); *Contemporary Forms of Slavery*, *supra* note 39, ¶ 30; Machteld Boot, *Article 7: Crimes against Humanity*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 142 (Otto Triffterer ed., 1999).

[FN53]. Prosecutor v. Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 540 (Feb. 22, 2001) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [hereinafter *Kunarac -- Trial*], *available at* http:// www.un.org/icty/kunarac/trialc2/judgement/index.htm. Enslavement is similarly defined in the Rome Statute, *supra* note 46, art. 7, § 2(g), and the same wording is found in the *Elements of Crimes* for the crime of sexual slavery, *supra* note 47.

[FN54]. *Kunarac -- Trial, supra* note 53, ¶ 543. The Appeals Chamber affirmed the definition of enslavement and most of the indications of a situation of slavery (including control of sexuality), defined by the Trial Chamber in Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1A, Judgment in the Appeals Chamber, ¶ 116-19 (June 12, 2002) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) [hereinafter *Kunarac -- Appeal*], *available at*

http://www.un.org/icty/kunarac/appeal/judgement/kun-aj020612e.htm. However, the Appeals Chamber did not consider it necessary to determine whether the particular aspect of the "mere ability to buy, sell, trade or inherit a person or his or her labours or services" was a necessary element of the crime since it was not the issue presented.

[FN55]. *See* Brook Sari Moshan, Comment, *Women, War and Words: The Gender Component in the Permanent International Court's Definition of Crime against Humanity*, 22 FORDHAM INT'L L.J. 154, 181 (1998) (arguing that the enumeration of the crime of sexual slavery "ensures the conspicuity of the crime in the landscape of the Rome Statute, thus increasing the possibility that such crimes will be prosecuted"); *See also* Statute of the Special Court, *supra* note 43, art. 2(g); Oosterveld, *supra* note50.

[FN56]. *Women's Tribunal for Japan's Military Sexual Slavery*, *supra* note 56, ¶ 620, found that "the actus reus of the crime of sexual slavery is the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy." Thus, it considered that "control over a person's sexuality or sexual autonomy may in and of itself constitute a power attaching to the right of ownership." *Id.*

[FN57]. Oosterveld, *supra* note 50, at 605, 648.

[FN58]. *Elements of Crimes*, *supra* note 44.

[FN59]. Eve La Haye, *Article 8(2)(b)(xxii)--Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, and Sexual Violence*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 183, 191-92 (Roy S. Lee ed., 2001) [hereinafter Lee, THE INTERNATIONAL CRIMINAL COURT].

[FN60]. *Contemporary Forms of Slavery*, *supra* note 39, ¶ 29.

[FN61]. *Kunarac -- Trial*, *supra* note 49, ¶ 750.

[FN62]. *Kunarac -- Appeals Chamber*, *supra* note 54, ¶ 120. Oosterveld emphasizes that "[t]he fact that consent cannot serve as a defense to the crime of sexual slavery is another advance in international law." Oosterveld, *supra* note 50, at 640. As Oosterveld points out, a finding of the exercise of powers attaching to the right of ownership involves, by definition, a negation of consent. *See also* Comm'n on Human Rights, Sub-Comm'n on the Promotion and Protection of Human Rights, *Contemporary Forms of Slavery: Update to the Final Report*, 13, ¶ 51, U.N. Doc. E/CN.4/Sub.2/200/21 (June 6, 2000) (*prepared by* Gay J. McDougall), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/ (select the hyperlink to the Sub-Comm'n on the Promotion and Protection of Human Rights, then select the hyperlink to the "52nd Session;" Once selected, choose the hyperlink to "Reports," and then select the hyperlink "E/CN.4/Sub.2/200/21").

[FN63]. *Kunarac -- Appeals Chamber*, *supra* note 50, ¶ 120.

[FN64]. *Kunarac -- Trial*, *supra* note 53, ¶ 542.

[FN65]. *Id.* ¶ 543; *Kunarac -- Appeal*, *supra* note 54, ¶ 119 (considering forced labor as an indicia of enslavement). With respect to the charges of enslavement against Kunarac, the Trial Chamber accepted that the women had to perform household chores and were treated as property. *Kunarac -- Trial*, *supra* note 53, ¶¶ 740, 742. The types of household chores performed were not specified. However, with respect to the charges of enslavement against Kovac, a co-defendant of Kunarac, the Trial Chamber found that the girls had to do "the

household chores, the cooking and the cleaning," and that Kovac "made them cook for him, serve him and do the household chores for him." *Kunarac -- Trial*, *supra* note 53, ¶¶ 751, 780. The testimony of victims was replete with examples of such domestic tasks. *See* Testimony of FWS 87, FWS 75 and A.S., *id.* ¶¶ 63, 188, 210.

[FN66]. *Kunarac -- Trial*, *supra* note 53, ¶ 543; *Kunarac -- Appeal*, *supra* note 54.

[FN67]. *Kunarac -- Trial*, *supra* note 53, ¶ 542 ("The 'acquisition"' or 'disposal' of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone.") Echoing the *Kunarac* trial court's reasoning, Valerie Oosterveld argues that the use of monetary compensation as a proxy for enslavement would be too restrictive an interpretation of the *Elements of Crimes*. Oosterveld, *supra* note 50. For example, although the first element of the crime of sexual slavery is the exercise of "any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty," *Elements of Crimes*, *supra* note 47, could suggest that a monetary element is required in the crime of sexual slavery, Oosterveld convincingly argues that the reference to a "similar deprivation of liberty" does not limit the evaluation of powers attaching to a right of ownership to actions with a commercial or pecuniary aspect. *Id.* at 642-43. Her conclusion flows from the wording and the negotiating history of the *Elements of Crimes*. *Id.* at 648.

[FN68]. *See* Bankole Thompson, *Internal Conflicts in Marriage and Inheritance in Sierra Leone: Some Anachronisms*, 1 AFR. J. INT'L AND COMPP. L. 392, 393 (1989).

[FN69]. These two elements are essential for the validity of a marriage. SMART, *supra* note 1, at 74, 79. Smart states that "marriage with marriage consideration" is the most common of the different types of customary-law marriages in Sierra Leone, *id.* at 24, but that consideration is still provided in the other types of marriage, where it takes the form of a service, a present or token, etc. *Id.* at 29-30, 83-84.

[FN70]. HRW REPORT, *supra* note 2, at 38 (emphasis added).

[FN71]. CORINNE A.A. PACKER, USING HUMAN RIGHTS TO CHANGE TRADITION: TRADITIONAL PRACTICES HARMFUL TO WOMEN'S REPRODUCTIVE HEALTH IN SUB-SAHARAN AFRICA 181 (2002).

[FN72]. CONSTITUTION, ch. XII, § 3 (1991) (Sierra Leone), *available at* http://www.statehouse-sl.org/constitution/constitution-xii.html. Chapter XII, *inter alia*, states:

(1) The laws of Sierra Leone shall comprise --

a. this Constitution

b. laws made by or under the authority of Parliament as established by this Constitution;

c. any orders, rules, regulations and other statutory instruments made by any person or authority pursuant to a power conferred in that behalf by this Constitution or any other law;

d. the existing law; and

e. *the common law.*

(2) The common law of Sierra Leone shall comprise the rules of law generally known as the common law, the rules of law generally known as the doctrines of equity, and the *rules of customary law* including those determined by the Superior Court of Judicature.

(3) For the purposes of this section the expression *"customary law" means the rules of law which by custom are applicable to particular communities in Sierra Leone.*

Id. (emphasis added). Although there are many different ethnic groups and/or tribes in Sierra Leone, *see* 3b

TRC REPORT, *supra* note 3, at 85, 233 (stating there are seventeen ethnic groups), HRW REPORT, *supra* note 2, at 15 (stating there are sixteen ethnic groups), and Smart, *supra* note 1, at 1 (stating that there are twelve tribes within Sierra Leone), and the specifics of customary law may differ according to the region or tribe, the author examines here what appears to be the general characteristics that are found in the customary laws of these groups. SMART, *supra* note 1, at 1, 6.

[FN73]. The exact percentage of the population to which customary law applies varies depending on the source consulted. *See* HRW REPORT, *supra* note 2, at 16 (stating that "customary law governs at least 65 percent of the population"); 3b TRC REPORT, *supra* note 3, at 98 (stating that customary law "applies to the majority of the population"); AMNESTY INT'L. SIERRA LEONE: NO ONE TO TURN TO: WOMEN'S LACK OF ACCESS TO JUSTICE IN RURAL SIERRA LEONEE 2 (2005), http://web.amnesty.org/library/pdf/AFR510112005ENGLISH/ $File/AFR5101105.pdf [hereinafter AMNESTY INT'L, SIERRA LEONE PAPER] (stating that customary law is "recognized and relevant to 85% ... of the local population," and explaining that this percentage is "found in numerous reports and ... commonly quoted to Amnesty International as the percentage of people who live in the rural areas"); *see also* NIBOE THOMPSON, COMMONWEALTH HUMAN RIGHTS INITIATIVE, IN PURSUIT OF JUSTICE: A REPORT ON THE JUDICIARY IN SIERRA LEONE (2002), http://www.humanrightsinitiative.org/publications/ffm/sierra_leone_report.pdf ("Customary law, as opposed to English Common Law, applies to 85 per cent of the population living outside the Western Area and regulates matters of marriage, divorce, succession and land tenure in the provinces."); KLAUS DECKER, CAROLINE SAGE, & MILENA STEFANOVA, WORLD BANK, LAW OR JUSTICE: BUILDING EQUITABLE LEGAL INSTITUTIONS, http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Law_or_Justice_Building_Equitable_Legal_Institutions.pdf ("In Sierra Leone, about 85 percent of the population falls under customary law."); LEILA CHIRAYATH, CAROLINE SAGE & MICHAEL WOOLCOCK, WORLD BANK, CUSTOMARY LAW AND POLICY REFORM: ENGAGING WITH THE PLURALITY OF JUSTICE SYSTEMS (2005), http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf ("In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law."). Thompson, *supra* note 68, at 394, wrote in 1989 that at least seventy-five percent of marriages in Sierra Leone were customary. The author is not aware of the present statistics with respect to the prevalence of customary marriages, but taking into account the large application of customary law to the population, this Article assumes that customary marriage is still a widely contracted type of union.

[FN74]. HRW REPORT, *supra* note 2, at 16.

[FN75]. "There are four types of marriage systems in Sierra Leone: Christian marriage; Civil Marriage; Mohamedan Marriage; and Customary Law marriage." 3b TRC REPORT, *supra* note 3, at 112 (citations omitted). Customary law, Islamic law, and general law (consisting of statutory law and common law) coexist in Sierra Leone. *See* HRW REPORT, *supra* note 2, at 15-16. This analysis of customary marriage is far from exhaustive: the sources on customary law in Sierra Leone are limited and the custom can really be understood only by being "on site." Smart, *supra* note 1, is the only general source written specifically on family customary law in Sierra Leone that the author has found. To supplement the lack of resources on Sierra Leone customary law, the author explored other sources on Africa--the elements discussed in this analysis being, first and foremost, basic elements of African customary law.

[FN76]. PACKER, *supra* note 71, at 43.

[FN77]. SMART, *supra* note 1, at 105.

[FN78]. *Id.* at 21-22; PACKER, *supra* note 71, at 43; SOUTH AFRICAN LAW COMMISSION, THE HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW: REPORT ON CUSTOMARY MARRIAGES 40 (1998), *available at* http:// www.law.wits.ac.za/salc/reportcustomarriage.pdf [hereinafter "SALC"]. Although this is a South African study, it is relevant because it discusses African custom in general.

[FN79]. SMART, *supra* note 1, at 62, 73-74; SALC, *supra* note 78, at 44-45, 72, 76.

[FN80]. SMART, *supra* note 1, at 67; PACKER, *supra* note 67, at 25; 3b TRC REPORT, *supra* note 3, ch. 3, para. 84, at 103, ch. 4, para. 100, at 254; HRW REPORT, *supra* note 2, at 17. *See generally*, on early marriages, Inocenti Research Ctr., UNICEF, *Early Marriage*, 7 INOCENTI DIGEST 1 (2001), http:// www.unicef.org/childrenandislam/downloads/early_marriage_eng.pdf. [hereinafter "UNICEF"].

[FN81]. SMART, *supra* note 1, at 43. Packer writes that "[t]here is a widespread belief that women are otherwise incapable of controlling their sexual urges. The operation therefore needs to be done to 'calm' a girl down and make her submissive." PACKER, *supra* note 71, at 21. Refusal of the practice might lead to social stigma. SMART, *supra* note 1, at 44. Sierra Leonean women justify their submission to this practice--which they themselves perpetuate despite all the harmful effects on their health--by saying that it is "for the sake of tradition." PACKER, *supra* note 71, at 23. Fifty-six percent of the women surveyed in a study conducted in Sierra Leone in 1998 said they submitted to the practice because of "tradition," twenty-three percent because of the need for social recognition, and eleven percent for religious reasons. *Id.* An estimated ninety percent of Sierra Leonean women undergo the operation. Esther M. Kisaakye, *Women, Culture and Human Rights: Female Genital Mutilation, Polygamy and Bride Price*, *in* HUMAN RIGHTS OF WOMEN: INTERNATIONAL INSTRUMENTS AND AFRICAN EXPERIENCES 268, 271 (Wolfgang Benedek et al. eds., 2002). *See generally*, on female genital mutilation, U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. [OHCHR], HARMFUL TRADITIONAL PRACTICES AFFECTING THE HEALTH OF WOMEN AND CHILDREN: FACT SHEET NONO. 23 (1996), http:// www.unhchr.ch/html/menu6/2/fs23.htm.

[FN82]. Oluyemisi Bamgbose, *Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl*, 10 U. MIAMI INT'L & COMP. L.REV. 127, 131-32 (2001); UNICEF, *supra* note 80, at 6. Note, however, that the TRC REPORT, *supra* note 3, at 103, suggests that virginity no longer carries as much significance as it did in the past, especially in light of sexual violence women suffered during the conflict.

[FN83]. 3b TRC REPORT, *supra* note 3, at 254.

[FN84]. SMART, *supra* note 1, at 62, 74 (stating that "instances stil occur when young girls are given in marriage by their parents against the girls' will or consent" and that "marriage can still be negotiated for a daughter by her father without her consent"); *see also* U.N. Comm. of the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Sierra Leone*, paras. 24-25, U.N. doc. CRC/ C/15/Add.116 (2000), *available at* http:// www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.116.En?OpenDocument ("The Committee [was] ... concerned at the practice of arranging marriages--under customary law--for very young girls, in particular against the free will of the child" and made recommendations in order to avoid girls being "forced into marriage.").

[FN85]. Ain O Salish Kendra & Shirkat Gah, INTERRIGHTS, *Information Gathering Exercise on Forced Marriage--Submission to the British Home Office's Group on Forced Marriage*, 2000 CIMEL/INTERRIGHTS ¶ 2, *available at* http:// www.soas.ac.uk/honourcrimes/FMsubmission.htm [hereinafter "INTERRIGHTS"] ("Forced marriage--any marriage conducted without the valid consent of both parties--may involve coercion,

mental abuse, emotional blackmail, and intense family or social pressure.").

[FN86]. SMART, *supra* note 1, at 73-74; 3b TRC REPORT, *supra* note 3, at 103.

[FN87]. INTERRIGHTS, *supra* note 85.

[FN88]. PACKER, *supra* note 71, at 76 (emphasis added). In the same vein, see SALC, *supra* note 78, at 45, 47-48; UNICEF, *supra* note 80, at 8.

[FN89]. SMART, *supra* note 1, at 108-09, 124; 3b TRC REPORT, *supra* note 3, at 105; PHR Report, *supra* note 3, at 55 (noting that "60% of women [surveyed by Physicians for Human Rights] expressed the view that a man has the right to beat his wife if she disobeys"); *see also* PACKER, *supra* note 71, at 31 (observing that domestic violence is socially condoned in sub-saharan Africa).

[FN90]. There are actually no laws in Sierra Leone relating to marital rape. 3b TRC REPORT, *supra* note 3, at 112, 120; HRW REPORT, *supra* note 2, at 20, 24.

[FN91]. SMART, *supra* note 1, at 101 ("A wife must never refuse her husband sexual intercourse unless she has a reasonable cause. The categories of reasonable cause are: serious illness which renders the wife physically incapable of having sexual intercourse; menstruation, suckling a very young child before the prescribed period for weaning; intercourse during the daytime or in the bush and, among the tribal muslims, the feast of Ramadan.") (citation omitted). More than sixty percent of the Sierra Leonean women recently surveyed "expressed the view that ... it is a wife's duty/obligation to have sex with her husband even if she does not want to." PHR REPORT, *supra* note 3, at 55.

[FN92]. PACKER, *supra* note 71, at 67. 3b TRC REPORT, *supra* note 3, at 254 (emphasizing that "when a child or adolescent is compelled to marry at a young age and she refuses to consent to sexual relations or is too young to consent, such marriages may result in sexual violence").

[FN93]. For an analysis of the harmful effects of early pregnancy on the health of girls, see Rebecca J. Cook, *International Human Rights and Women's Reproductive Health*, *in* WOMEN'S RIGHTS, HUMAN RIGHTS 256, 257-59 (Julie Stone Peters & Andrea Wolper eds., 1995); UNICEF, *supra* note 80, at 10-11.

[FN94]. Smart, *supra* note 1, at 84. Traditionally, the wife's family was given animals, food, and clothing. *Id.* at 80. However, the wife's family can waive payment of marriage consideration. *Id.* at 83.

[FN95]. SALC, *supra* note 78, at 93.

[FN96]. *Id.* at 94.

[FN97]. PACKER, *supra* note 71, at 40.

[FN98]. *See, e.g.*, *id.* at 40; Alice Armstrong et al., *Uncovering Reality: Excavating Women's Rights in African Family Law*, 7 INT'L J. L. & FAM. 314, 364 (1993).

[FN99]. *See, e.g.*, Naa-Adjeley Adjetey, *Religious and Cultural Rights: Reclaiming the African Woman's Individuality: The Struggle between Women's Reproductive Autonomy and African Society and Culture*, 44 AM. U.L. REV. 1351, 1359 (1995); Julie Mertus, *State Discriminatory Family Law and Customary Abuses*, *in* WOMEN'S RIGHTS, HUMAN RIGHTS, *supra* note 93, at 135, 139. *But see* SMART, *supra* note 1, at 78-79.

[FN100]. As discussed in Kisaakye, *supra* note 76, at 280-281; SALC, *supra* note 78, at 50.

[FN101]. *See* Patrick Iroegbu, *Marrying Wealth, Marrying Money: Repositioning Igbo Women and Men, in* CHANGING GENDERS IN INTERCULTURAL PERSPECTIVES 103, 110-13 (Barbara Saunders & Marie-Claire Foblets eds., 2002) (analyzing "the impact of cash economy" in Nigeria); SALC, *supra* note 78, at 51-52; PACKER, *supra* note 71, at 40 (citing a publication concerning brideprice in Kenya). Smart, *supra* note 1, at 80, notes that in Sierra Leone, though many of the traditional goods are still given as part of the marriage consideration, the main portion is now paid in money.

[FN102]. THE LAWYER'S CENTRE FOR LEGAL ASSISTANCE, UNEQUAL RIGHTS: DISCRIMINATING LAWS AGAINST WOMEN IN SIERRA LEONE 29 (2005), http://www.lawcla.org/Publications/unequalrights.pdf. ("[I]n some instances girls are married off early so the poverty-stricken parents receive a substantial sum of money.")

[FN103]. Packer, *supra* note 71, at 112 (quoting Emmanuel G. Bello, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 194 HAGUE RECUEIL DE COURS, 9-268, 154 (1985)). Emmanuel Bello served as a Commissioner to the African Commission, and discussed in this article the fact that some families force their girls into marriage in return for money.

[FN104]. SALC, *supra* note 78 at 54-55; in the same vein, *see* Adjetey, *supra* note 99, at 1359 ("Married women are ... trapped within restrictive marriages unless the brideprice can be returned.").

[FN105]. SMART, *supra* note 1, at 158-60.

[FN106]. Many different reasons for divorce can be invoked. *Id.* at 149-58.

[FN107]. HRW REPORT, *supra* note 2, at 18; LAWCLA, *supra* note 102, at 29 ("[A]t times women cannot leave unhappy or abusive relationships just because their parents are unable to repay the dowry.") (citation omitted); Adjetey, *supra* note 99, at 1359.

[FN108]. For a similar observation, see also TRC REPORT, *supra* note 3, at 164. The author arrived at this conclusion independently of the TRC REPORT; however, it is significant that Sierra Leonean citizens have recognized this possibility as well. For a discussion of the composition of the TRC, *see infra* note 246.

[FN109]. See *supra* Section I.B. for an analysis of the criteria for sexual slavery and their application to "forced marriage" in the context of the conflict.

[FN110]. PACKER, *supra* note 71, at 75.

[FN111]. *See* Florence Butwega, *The Challenge of Promoting Women's Rights in African Countries, in* OURS BY RIGHT -- WOMEN'S RIGHTS AS HUMAN RIGHTS 40 (Joanna Kerr ed., 1993) ("Individual women face the danger of social isolation. One common problem is ostracization--a woman who takes her husband to court, for battering her for example, will be shunned by her community, including the women.").

[FN112]. PACKER, *supra* note 71, at 138-39 (emphasis added).

[FN113]. See discussion, *supra*, Section I.B.

[FN114]. David Weissbrodt & Anti-Slavery International, *Contemporary Forms of Slavery: Updated Review of the Implementation of and Follow-up to the Conventions on Slavery*, ¶ 53, U.N. Doc. E/CN.4/Sub2/2000/3

(2000), http:// www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.3.En? OpenDocument. Weissbrodt considers forced marriage and the sale of women as practices akin to slavery.

[FN115]. Sept. 7, 1956, 266 U.N.T.S. 3 (*upheld by* Sierra Leone on Mar. 13, 1962), art. 1(c)(i) & 7(b)(D), *available at* http:// www.ohchr.org/english/law/pdf/slavetrade.pdf.

[FN116]. *Kunarac -- Appeal*, *supra* note 54, ¶ 123 (internal citations and quotations omitted).

[FN117]. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59, ***available at*** http://www.africa-union.org/Official_ documents/ Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf [hereinafter African Charter].

[FN118]. V.O.O. NMEHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE, AND INSTITUTIONS 89 (2001).

[FN119]. Smart, *supra* note 1, at 21, uses this expression to refer "to all marriages celebrated and recognised as valid under any system of customary law in force in Sierra Leone. It must be understood that in any one customary law, there may be several different types of valid customary-law [sic] marriages."

[FN120]. BARRY, *supra* note 45, at 178 (emphasis added).

[FN121]. Darryl Robinson, *The Context of Crimes against Humanity*, *in* Lee, THE INTERNATIONAL CRIMINAL COURT, *supra* note 59, at 65. The states interested in these issues included the "United Arab Emirates and Bahrain on one hand, and Canada, Switzerland, and Lichtenstein on the other hand, with the U.S. working to bring these delegations toward a common agreement." *Id.* at 68 n.30. However, "several delegations, such as Egypt, Sudan, Turkey, China, India and Indonesia, continued to strongly oppose the new suggestions for compromise." *Id.* at 69.

[FN122]. *Id.* at 65.

[FN123]. BOOT, *supra* note 52, at 477; Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, *in* INTERNATIONAL CRIMINAL COURT--THE MAKING OF THE ROME STATUTEE 79, 92-93 (Roy S. Lee ed., 2002) [hereinafter MAKING OF THE ROME STATUTE]. These authors trace the evolution of international law through various international instruments, and through this international jurisprudence, to explain why Article 7 of the Rome Statute does not require any connection with an armed conflict.

[FN124]. Rome Statute, *supra* note 46, art. 7, § 1.

[FN125]. *Id.*, art. 7, § 2(a).

[FN126]. Robinson, *supra* note 121, at 69.

[FN127]. *Elements of Crimes*, *supra* note 47. It should be borne in mind that *Elements of Crimes* assists the Court in the interpretation of genocide, war crimes, and crimes against humanity.

[FN128]. *Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates concerning the elements of crimes against humanity*, Preparatory Comm'n for the Int'l Criminal Court, Working Group on Elements of Crimes, art. 7(1)(c), U.N. Doc. PCNICC/1999/WGEC/DP.39 (1999), *available at* http://documents.un.org (Select "simple

search," and insert "PCNICC/1999/WGEC/DP.39" in the "Symbol" item. Once entered, select the hyperlink to the English document version) [hereinafter *Arab States' Proposal*]. *See also* Robinson, *supra* note 121, at 65.

[FN129]. *Arab States' Proposal*, *supra* note 128, art. 7 (1) (g) (2). *See also* La Haye, *supra* note 59, at 191. Regarding rape, the objecting states also sought to specify that "[n]othing in these elements shall affect natural and legal marital sexual relations in accordance with religious principles or cultural norms in different national laws." *Arab States' Proposal*, *supra* note 128, art. 7(1)(g)(1). *See also* La Haye, *supra* note 59, at 188.

[FN130]. Robinson, *supra* note 121, at 66.

[FN131]. *Id.*

[FN132]. *Id.* at 69.

[FN133]. *Elements of Crimes*, *supra* note 47, art. 7, Introduction, at 9 ("Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.").

[FN134]. *Id.* art. 7, § 1(a)(3).

[FN135]. *Id.* art. 7 n.6 ("A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organization action.")

[FN136]. BOOT, *supra* note 52, at 484.

[FN137]. Robinson, *supra* note 121, at 70.

[FN138]. Statute of the Special Court, *supra* note 43, art. 2(g).

[FN139]. *Id.* The Statute of the Special Court only specifies that the crimes listed in art. 2 (crimes against humanity) must have been committed "as part of a widespread or systematic attack against any civilian population." The Special Court Trial Chamber II, reviewing international jurisprudence, canvassed what were the elements of crimes against humanity pursuant to section 2 of its Statute. *See* Prosecutor v. Alex Tamba Brima et al, *supra* note 44, ¶¶ 40-42.

[FN140]. Cherie Booth, *Prospects and Issues for the International Criminal Court: Lessons from Yugoslavia and Rwanda*, *in* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 157, 178 (Philippe Sands ed., 2003). The preamble of the Rome Statute, *supra* note 46, is also revealing in that it specifies that the ICC has "jurisdiction over the most serious crimes affecting the international community as a whole."

[FN141]. Robinson, *supra* note 121, at 70.

[FN142]. Amy E. Ray, *Gender-Based Terrorism in the Former Yugoslavia*, 46 AM. U. L. REV. 793, 830 (1997).

[FN143]. Sarah Y. Lai & Regan E. Ralph, *Female Sexual Autonomy and Human Rights*, 8 HARV. HUM. RTSS. J. 201, 226 (1995) (emphasis added).

[FN144]. Adjetey, *supra* note 99, at 1352.

[FN145]. Lai & Ralph, *supra* note 143, at 201.

[FN146]. Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 CAN. J. L. & JURISS. 47, 52 (1998).

[FN147]. J.H. Bogart, *Reconsidering Rape: Rethinking Conceptual Foundations of Rape Law*, 8 CAN. J.L. & JURISS. 159, 167 (1995).

[FN148]. THOMAS M. FRANCK, THE EMPOWERED SELF 82 (1999) (citing James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REVV. 1, 30-31 (1995)).

[FN149]. Lacey, *supra* note 146, at 69.

[FN150]. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 25, 36 (1989).

[FN151]. Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REVV. 483, 509-10 (2002) [hereinafter Coomaraswamy, *Identity Within*].

[FN152]. R. v. Ewanchuk, [1999] S.C.R. 330, ¶ 28 (Can.).

[FN153]. Lai & Ralph, *supra* note 143, at 225.

[FN154]. *See generally* Susana T. Fried & Ilana Landsberg-Lewis, *Sexual Rights: From Concept to Strategy, in* WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 91 (Kelly D. Askin & Dorean Koenig eds., 2001).

[FN155]. Yasmin Tambiah, *Sexuality and Human Rights, in* FROM BASIC NEEDS TO BASIC RIGHTS 372 (Margaret A. Sculer ed., 1995).

[FN156]. Radhika Coomaraswamy, *Reinventing International Law: Women's Rights as Human Rights in the International Community, in* DEBATING HUMAN RIGHTS 181 (Peter Van Ness ed., 1999) (citing Tambiah, *supra* note 155, at 372) [hereinafter Coomaraswamy, *Women's Rights as Human Rights*].

[FN157]. HEALTH, EMPOWERMENT, RIGHTS AND ACCOUNTABILITY (HERA), HERA ACTION SHEETS (1998), *available at* http:www.iwhc.org/docuploads/HERAactionsheets.pdf..

[FN158]. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 18, U.N. Doc. A/CONF. 157/23 (July 12, 1993) ("The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights.").

[FN159]. Coomaraswamy, *Women's Rights as Human Rights*, *supra* note 156, at 181 (stating that the term "'sexual rights' was included in the draft [Beijing] Platform for Action ... [but] omitted from the final version, an omission indicating the controversial nature of this suggestion").

[FN160]. For a detailed account of the Vatican's position during these negotiations, see Yasmin Abdullah, *The*

Holy See at UN Conferences: State or Church?, 96 COLUM. L. REV. 1835 (1996).

[FN161]. This, at least, is the opinion of Coomaraswamy, who has argued that "the inclusion of the paragraph [96 in the Beijing Platform], even in this truncated form, and its accompanying vision of sexual autonomy and freedom of choice, are important developments in international human rights discourse." Coomaraswamy, *Women's Rights as Human Rights*, *supra* note 156, at 181-82 (discussing World Conference on Women, Sept. 15, 1995, *Beijing Declaration and Platform for Action*, ¶ 96, U.N. Doc. A/Conf. 177/20 ("[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.")).

[FN162]. Abdullah, *supra* note 160, at 1841.

[FN163]. See Rome Statute, *supra* note 46, and accompanying text for a discussion of the relevant articles. Booth, *supra* note 140, at 166, writes that "[t]he inclusion of these gender provisions in the Rome Statute clearly did not occur in a vacuum. The fact that the Statute is progressive with regard to women's issues is in no small measure due to the struggle of civil society and the women's human rights movement, including in the Rome negotiations." For a description of the proactive role played by feminist activists during the Rome Statute negotiations, see Barbara Bedont & Katherine Hall Martinez, *Ending Impunity for Gender Crimes under the International Criminal Court*, 6 BROWN J. WORLD AFFAIRS 65 (1999).

[FN164]. Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgement (Dec. 10, 1998), http://www.un.org/icty/furundzija/trialc2/judgement/index.htm. The ICTY found Furundzija, the local commander of the Croatian defence council, guilty as a co-perpetrator of torture and of aiding and abetting the perpetration of "outrage on personal dignity," including rape against a Muslim woman. In *Furundzija*, the ICTY held that the objective elements of rape were sexual penetration by coercion or force or threat of force. *Id.* ¶ 185. The Trial Chamber in *Kunarac* stressed that the terms coercion, force or threat of force were not to be interpreted narrowly, *Kunarac-Trial*, *supra* note 53, ¶ 459, and that the elements of the crime of rape were sexual penetration without the consent of the victim: "Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances." *Id.* ¶ 460.

[FN165]. *Kunarac -- Trial*, *supra* note 53, ¶ 440.

[FN166]. *Id.* ¶ 457.

[FN167]. *Id.* ¶ 460.

[FN168]. Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent*, 32 COLUM. HUM. RTS L. REVV. 625, 675 (2001).

[FN169]. *Id.*

[FN170]. *Id.*

[FN171]. *Id.* at 665-66. The value of autonomy conveyed therein was so threatening that some states feared the crime would be construed so as to create a right to abortion, which could eventually question their internal law.

These states insisted that the following limitation be included in the definition of the crime of forced pregnancy the Rome Statute: "This definition shall not in any way be interpreted as affecting national laws relating to pregnancy." Rome Statute, *supra* note 46, art. 7 (2) (f). For a detailed report on the debate of the crime of forced pregnancy during the Rome Statute negotiations, see also Cate Steains, *Gender Issues*, *in* MAKING OF THE ROME STATUTE, *supra* note 123, at 357.

[FN172]. *Contemporary Forms of Slavery*, *supra* note 39, ¶ 29 (citations omitted).

[FN173]. Boon, *supra* note 168, at 640.

[FN174]. *Id.* at 673 (emphasis added).

[FN175]. This is the approach taken by the Women's Tribunal for Japan's Military Sexual Slavery, *supra* note 56, ¶ 620: "We find that the *actus reus* of the crime of sexual slavery is the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy." It is important to note that the language of autonomy remains applicable to the other crimes of sexual violence listed in the Rome Statute.

[FN176]. Nedelsky, *supra* note 150, at 37.

[FN177]. Coomaraswamy, *Identity Within*, *supra* note 151, at 510.

[FN178]. See *supra* Section II.C. for the cautious, conservative position of several delegations as reflected, in particular, in the negotiations on crimes against humanity. *See also* Boon, *supra* note 168, for the turbulent debates on the definition of the crime of forced pregnancy.

[FN179]. The Rome Statute requires that women judges and judges with legal expertise on specific issues, including violence against women, be appointed. Rome Statute, *supra* note 46, art. 36, § 8(a)(iii), art. 36, § 8(b). The fear was even expressed that "women judges, particularly women who have attempted to redress human rights violations against women, cannot be impartial because they are predisposed to promote a feminist agenda, and therefore should be recused from adjudicating any case involving crimes against women." Booth, *supra* note 140, at 174. To the author, this fear seems to be clearly exaggerated.

[FN180]. Truth and Reconciliation Commission Act 2000, *available at* http:// www.sierra-leone.org/trcact2000.html [hereinafter TRC Act]. For a detailed analysis of the nature and role of the TRC and the Special Court for Sierra Leone, see Laura R. Hall & Nahal Kazemi, *Prospect for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'LL L.J. 287 (2003); Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS.& DEVV. L.J. 139 (2003). *Cf.* HRW Report, *supra* note 2, at 61-66.

[FN181]. Marian Samu, *Truth and Reconciliation Commission Presents Report*, U.S. STATE DEP'T, Oct. 5, 2004, http://www.statehouse-sl.org/trc-fin-rep-oct5.html; Press Release, Final Report on Ten-Year Sierra Leone Conflict Published; Seeks to Set Out Historical Record, Offer Guidance for Future, ECOSOC/6140, GA/10287, SC/8227 (Oct. 27, 2004), *available at* http:// www.un.org/News/Press/docs/2004/ecosoc6140.doc.htm. The TRC Act provides that the President must "dissolve the Commission by notice in a statutory instrument not later than three months after the submission of the Commission's Report." TRC Act, *supra* note 180, § 9.

[FN182]. TRC Act, *supra* note 180, § 6(1).

[FN183]. *Id.* § 6(2)(a)(1).

[FN184]. *Id.* § 6(2)(b).

[FN185]. HRW REPORT, *supra* note 2, at 73.

[FN186]. Sarnata Reynolds, *Deterring and Preventing Rape and Sexual Slavery During Periods of Armed Conflict*, 16 LAW & INEQ. 601, 604 (1998); *see also* Catherine A. MacKinnon, *Rape, Genocide and Women's Human Rights*, 17 HARV. WOMEN'SS L.J. 5 (1994) (establishing a correlation between the perpetration of rape in times of war and peace).

[FN187]. *See also, e.g.*, Slavery Convention, art. 2(b), Sept. 25, 1926, amended by Protocol of Dec. 7, 1953, 212 U.N.T.S. 17 (signed by Sierra Leone on Mar. 13, 1962); International Covenant on Civil and Political Rights, art. 8, Dec. 19, 1966, 999 U.N.T.S. 171 (ratified by Sierra Leone on Nov. 3, 1996) [hereinafter the *ICCPR*]; African Charter, *supra* note 117, art. 5. Authorities also maintain that slavery constitutes a crime of jus cogens. *See, e.g.*, *Contemporary Forms of Slavery*, *supra* note 39, ¶ 28.

[FN188]. Convention on the Elimination of All Forms of Discrimination Against Women, GA Res. 34/180, UN Doc. A/34/46 (1979), art. 16, § 1(b) (ratified by Sierra Leone on Dec. 11, 1988) [hereinafter Women's Convention]; ICCPR, *supra* note 187, art. 23, § 2.

[FN189]. Women's Convention, *supra* note 188, art. 10; Convention on the Rights of the Child, art. 28, GA Res. 44/25, UN Doc. A/44/49 (Nov. 20, 1989) (ratified by Sierra Leone on June 18, 1990) [hereinafter Convention on the Child]; African Charter, *supra* note 117, art. 17; African Charter on the Rights and Welfare of the Child, art. 11, OAU Doc. CAB/LEG/24.9/49 (July 11, 1990) (signed by Sierra Leone on April 14, 1992) [hereinafter African Charter on the Child].

[FN190]. African Charter, *supra* note 117, art. 4.

[FN191]. Convention on the Child, *supra* note 189, art. 24 § 1; African Charter, *supra* note 117, art. 16; African Charter on the Child, *supra* note 189, art. 14.

[FN192]. *ICCPR*, *supra* note 187, art. 6; Convention on the Child, *supra* note 189, art. 6, § 1; African Charter, *supra* note 117, art. 4; African Charter on the Child, *supra* note 189, art. 5.

[FN193]. Abdullahi A. An-Naïm, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167 (Rebecca J. Cook ed., 1994) [hereinafter An-Naïm, *State Responsibility*].

[FN194]. Women's Convention, *supra* note 188. Note also that the Convention on the Child, *supra* note 189, art. 24, § 3 states: "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." Moreover, the African Charter on the Child states that:

> States ... shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

African Charter on the Child, *supra* note 189, art. 21, § 1.

[FN195]. Women's Convention, *supra* note 188.

[FN196]. *Id.*

[FN197]. NATIONAL CONSTITUTION OF SIERRA LEONE (1991) ch. XII, § 2 ("The common law of Sierra Leone shall comprise the rules of law generally known as the common law, the rules of law generally known as the doctrines of equity, and the *rules of customary law* including those determined by the Superior Court of Judicature.") (emphasis added).

[FN198]. *Id.* ch. III § 27. Although subsection 1 of section 27 prohibits any law that is "discriminatory either of itself or in its effect," subsection 4 states that such an antidiscrimination principle "shall not apply to any law so far as that law makes provision ... with respect of adoption, *marriage*, divorce, burial, devolution of property on death or other interests of personal law." *Id.* (emphasis added).

[FN199]. Women's Convention, *supra* note 188, arts. 2(f), 5(a).

[FN200]. *Id.* art. 16.

[FN201]. Rebecca J. Cook, *State Accountability Under the Women's Convention*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, *supra* note 193, at 229. For further support, see PACKER, *supra* note 71, at 49-53.

[FN202]. TRC REPORT, *supra* note 3, at 28. The TRC did not establish criminal guilt for the violations committed during the conflict as this is the mandate of the Special Court of Sierra Leone. The Commission underlined that it made factual findings in relation to responsibility and accountability, using a standard of proof "more akin to the preponderance or balance of probabilities." 2 TRC REPORT, *supra* note 3, at 26.

[FN203]. *Id.* at 28, 35.

[FN204]. 3b TRC REPORT, *supra* note 3, at 164.

> Forced 'marriage' is a form of sexual slavery as is the detention of women in 'rape camps' or any circumstances under which women are subjected repeatedly to rape or the threat of rape or any other sexual violence. In Sierra Leone, as well as in many other conflicts, women and girls were given as 'wives' to commanders and combatants. These sexual slaves are widely referred to as 'bush wives.' When 'forced marriage' involves forced sex or the inability to control sexual access or exercise sexual autonomy, which, by definition, forced marriage almost always does, it constitutes sexual slavery, as recognised by the Special Rapporteur for Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict.

3b *Id.* at 131 (citation omitted).

[FN205]. *Id.* at 92-121 (with respect to women); 238-42, 247-57 (with respect to children). Subjects explored include education, health, politics, economic and socio-cultural factors, legal status, marriage, divorce, property (land ownership, inheritance), sex, rape and sexual violence, and domestic violence.

[FN206]. 2 *Id.* at 106. The TRC notes that women comprise the largest category of persons without formal education and illiteracy rates stand at eighty-nine percent for the rural female population, *id.*, and remain excluded and marginalised in the management of economic and political affairs in Sierra Leone, *id.* at 105.

[FN207]. *Id.* at 106.

[FN208]. *Id.*

[FN209]. 3b *Id.* at 103, 254.

[FN210]. *Id.* at 103.

[FN211]. *Id.* at 108.

[FN212]. *Id.* at 108 (citing A.L. Coker & D.L. Richter, *Violence Against Women in Sierra Leone: Frequency and Correlates of Intimate Partner Violence and Forced Sexual Intercourse*, 2 AFR. J. OF REPROD. HEALTHTH 61, 65 (1998)). Moreover, the TRC noted its agreement with scholars that have argued that the extreme violence that women suffer during conflict does not arise solely out of the conditions of war, but is directly linked to the violence that exists in women's lives during peacetime in the society in question. *Id.* at 106 ("'Because so much of this persecution goes largely unpunished, violence against women comes to be an accepted norm, one which escalates during conflict as violence in general increases.'") (quoting ELIZABETH REHN & ELLEN JOHNSON SIRLEAF, WOMEN, WAR AND PEACE: THE INDEPENDENT EXPERTS' ASSESMENT ON THE IMPACT OF ARMED CONFLICT ON WOMEN AND WOMEN'S ROLE IN PEACE-BUILDING 11 (2002)).

[FN213]. *Id.* at 170 (emphasis added).

[FN214]. *Id.* at 122-29, 243-46.

[FN215]. *Id.* at 111.

[FN216]. *Id.* at 254.

[FN217]. *Id.* at 254.

[FN218]. *Id.*

[FN219]. 2 *Id.* at 137.

[FN220]. *Id.* at 169.

[FN221]. 3b *Id.* at 243.

[FN222]. 2 *Id.* at 139.

[FN223]. *See* An-Naïm, *State Responsibility*, *supra* note 193, at 169 ("[T]here are serious questions about who is going to raise the issue of the state's failure to comply with its treaty obligations, where, and how. Unlike commercial and other treaties where the states parties would usually have the motivation and resources to raise and pursue the issue of failure to comply in appropriate fora, state self-interest is normally lacking in relation to human rights treaties. Although there are some enforcement mechanisms for human rights treaties, this aspect of international law remains extremely underdeveloped.") *See also* LAWCLA, *supra* note 102. The LAWCLA report is the result of extensive research by a public interest Sierra Leone human rights centre dealing with the discriminatory provisions against women in Sierra Leone statutes and proposing reforms to uplift the status of women. *See also* AMNESTY INT'L, SIERRA LEONE PAPER, *supra* note 73.

[FN224]. 3b TRC REPORT, *supra* note 3, at 229.

[FN225]. TRC Act, *supra* note 180, § 15. The Commission divided its recommendations into three categories:

"imperative" ("ought to be implemented immediately"), "work towards" ("the Government is expected to put in place the building blocks to make the ultimate fulfilment of the recommendation possible"), and "seriously consider" ("the Government is expected to thoroughly evaluate the recommendation, [but] is under no obligation to implement the recommendation"). 2 TRC REPORT, *supra* note 3, at 119-20.

[FN226]. TRC Act, *supra* note 180, § 17.

[FN227]. *Id.* § 18.

[FN228]. 2 TRC REPORT, *supra* note 3, at 172.

[FN229]. *Id.*

[FN230]. *Id.*, at 138, 172.

[FN231]. *Id.* at 172.

[FN232]. *Id.* at 178; *see also* Women's Convention, *supra* note 188, art. 16, § 2, which specifies the obligation of the states to set a minimum age for marriage. Art. 21, § 2 of the African Charter on the Child, *supra* note 189, states that "[c]hild marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory." This minimum age is in conformity with the *Convention on the Child*, *supra* note 189, art. 1, according to which a child is defined as an individual under the age of eighteen.

[FN233]. 2 TRC REPORT, *supra* note 3, at 178.

[FN234]. *Id.* at 170; 3b *Id.* at 112. The criminalization of marital rape could follow the South African example, where "Section 5 of the Prevention of Family Violence Act 133 of 1993 outlawed marital rape ... and [Section] 1(2) makes the Act applicable to customary marriages and cohabitations." SALC, *supra* note 78, at 94 n.48.

[FN235]. 2 TRC REPORT, *supra* note 3, at 136-37. The TRC notes that "the Lomé Peace Accord required the establishment of an 'autonomous quasi-judicial National Human Rights Commission' within 90 days after the signing of the Accord. Such a Commission is still not in place." *Id.* (citation omitted). The powers and mandate of the Human Rights Commission should accord with guidelines set out in the U.N. Principles relating to the Status of National Institutions, known as the Paris Principles, endorsed by the U.N. General Assembly in 1993. *Id.*

[FN236]. In Sierra Leone, a Law Reform Commission "reviews the laws both statutory and others, to reform[,] develop, consolidate, and codify" proposed changes to the law, as well as to propose changes of its own. AMNESTY INT'L, SIERRA LEONE PAPER, *supra* note 73, at 2 n.4. Amnesty International, WITNESS, Campaign for Good Governance (CGG), Conflict Management and Development Associates (CMDA), Centre for Democracy and Human Rights (CDHR), and the Sierra Leone Bar Association emphasized that "[t]he current draft laws on marriage, succession, sexual offences and inheritance, soon to be presented by the Law Officer's Department ... must be passed into law immediately by Parliament and there must be a clear commitment from Government to their timely implementation." Amnesty Int'l, *Sierra Leone Government Urged to Implement the Recommendations of the Truth and Reconciliation Commission (TRC)*, AI Index 51/012/2005, Nov. 29, 2005, *available at* http:// web.amnesty.org/library/Index/ENGAFR510122005?open&of=ENGSLE. The United States ambassador to Sierra Leone also expressed his looking forward to the passage of the new

legislation proposed by the Law Reform Commission. Thomas N. Hull, U.S. Embassador to Sierra Leone, American National Day Reception Remarks, Feb. 17, 2006, http://freetown.usembassy.gov/sp021707.html. To date, however, the author is unaware of what the reformed laws actually contain, although it is apparent from these sources that they will address issues regarding women's equality before the law. *See also* Abu Solomon Tarawallie, *Sierra Leone: African Union Workshop On Governance And Human Rights*, THE INDEPENDENT (S. Afr.), Feb. 24, 2006, at 2, *available at* http://fr.allafrica.com/stories/200602240136.html (reporting that Mr. Momodu Koroma, the minister of Foreign Affairs and International Cooperation of Sierra Leone, "told participants that the Law Reform Commission of Sierra Leone was reviewing laws relating to violence against women and children")

[FN237]. An-Naïm, *State Responsibility*, *supra* note 193, at 178.

[FN238]. *Id.* at 176.

[FN239]. PACKER, *supra* note 71, at 153. For Packer, the legislation is only one facet, and not a priority, of the process of change: "[I]f the power and attitudinal relationship between African men and women does not change, such a [legal] revolution will have a limited impact." *Id.* at 155.

[FN240]. Abdullahi A. An-Naïm, *Expanding Legal Protection of Human Rights in African Contexts*, *in* HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES 1, 8 (Abdullahi A. An-Naïm ed., 2003)

[FN241]. *See* PACKER, *supra* note 71, at 156. These actors play a key role in the eradication of traditional practices. For example, what can a girl who refuses to marry and seeks assistance from the police do if the police send her home, telling her to solve such a "private" problem with her family? *Id.* at 151.

[FN242]. *Id.* at 174.

[FN243]. TRC REPORT, *supra* note 3, at 138.

[FN244]. *Id.*

[FN245]. *Id.* The TRC recommended that the government work towards eventually codifying this reformed customary law.

[FN246]. Truth and Reconciliation Commission -- Professional Staff and Commissioners, http://www.sierra-leone.org/trc-biographies.html (last visited Apr. 20, 2006). The TRC is comprised of four Sierra Leonean commissioners: Reverend Dr. Joseph Humper, Chairperson (bishop of the United Methodist Church), Justice Laura Marcus-Jones, Deputy Chair (retired judge of the High Court), Professor John Kamara (former principal of Njala University College), and Mr. Sylvanus Torto (Institute of Public Administration and Management, University of Sierra Leone). The three international commissioners are Ms. Yasmin Sooka (former commissioner of South Africa's TRC, now Director of the Foundation for Human Rights in South Africa), Ms. Ajaaratou Satang Jow (former Minister of Education in The Gambia), and Professor William Schabas (Director of the Irish Center for Human Rights, National University of Ireland). With respect to the selection of Commissioners, see TRC Act, *supra* note 180, § 3; 1 TRC REPORT, *supra* note 3, at 53.

[FN247]. Hall & Kazemi, *supra* note 180, at 293.

[FN248]. Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's*

Rape Victims, 18 HARV. HUM. RTSS.J. 85, 93 (2005). Nowrojee noted the diversity of views and experience among the commissioners, as "some commissioners had previously worked on women's rights issues while others held traditional views on women's role in society and had no previous exposure to or experience in dealing with sexual violence victims." *Id.* She recognized Commissioner Jow's previous work with women's nongovernmental groups in Gambia and Commissioner Sooka's help in organizing the gender hearings of the South African TRC.

[FN249]. *Id.* at 300.

[FN250]. An-Naïm, *State Responsibility*, *supra* note 193, at 184.

[FN251]. *Id.* at 176.

[FN252]. *Id.* at 179 ("[E]xternal actors should support and encourage indigenous actors who are engaging in internal discourse to legitimize and effectuate a particular human right. However, external actors must not, in any way, attempt or appear to dictate the terms of internal discourse or pre-empt its conclusions.").

[FN253]. Hall & Kazemi, *supra* note 180, at 299. Sierra Leone being one of the poorest countries in the world, Hall and Kazemi note that the TRC itself was forced to rely on foreign donations to develop its potential.

[FN254]. The TRC recommended the development of a compulsory program of human rights education in schools at the primary, secondary, and higher levels of education to address this issue. It emphasized that public education about the law is one of the most effective means of creating a culture of rights, and called upon the international community to support the introduction into Sierra Leone of "Street Law," a program involving law students in the participatory teaching of law to the general public at the community level. 2 TRC REPORT, *supra* note 3, at 134-35. The TRC also recommended the establishment of educational programmes to counter attitudes and norms that lead to the oppression of women. *Id.* at 67.

[FN255]. Martin Chanock, *Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform*, 3 INT'L J.L. & FAM. 72, 85-86 (1989).

[FN256]. Armstrong, *supra* note 98, at 362-63.

[FN257]. *See* Nmehielle, *supra* note 118, at 135; Abdullahi A. An-Naïm & Jeffrey Hammond, *Cultural Transformation and Human Rights in African Societies, in* CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 1, 13 (Abdullahi A. An-Naïm ed., 2002).

[FN258]. H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD 19 (2000). "In the language of modern information theory, a tradition will always include a great deal of noise, not essential for understanding the primary message of the tradition." *Id.* at 14. Glenn sees tradition as a conceptual "bran-tub," or "a conglomeration of data," in which information is constantly being "massaged." *Id.* at 12, 14.

[FN259]. *See* Susan Jenkins Vanderweert, *Seeking Justice for "Comfort" Women*, 27 N.C.J. INT'L. L. & COM. REGG. 141, 145 (2001).
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GREENWOOD, " THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA"

The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia

Christopher Greenwood[1]

I. Introduction

1997 may well have been a turning point for the International Criminal Tribunal for the Former Yugoslavia. For the first three years of its existence, the Tribunal, which was established by the Security Council in 1993,[2] had been surrounded by doubts that it could play an effective part in bringing to justice those responsible for the appalling violations of humanitarian law in the former Yugoslavia, let alone contribute to the maintenance of international peace — the ostensible reason for its creation.[3] Those doubts stemmed, for the most part, from the perceived inability of the Tribunal to enforce its will. Although the Prosecutor had issued indictments against numerous defendants, including the former political and military leaders of the Bosnian Serbs, by the end of the Tribunal's third year of operation, only seven defendants were actually in custody[4] and the Tribunal had spent much of the year to 31 July 1996 holding proceedings, under Rule 61 of its Rules of Procedures, in respect of defendants who were still at liberty.[5] As Judge Sidhwa explained, this procedure was basically an apology for the Tribunal's helplessness in not

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1 The author acknowledges with gratitude the assistance of Mr. Christoph Safferling, LL.M, in undertaking some of the research for this article. The responsibility for any errors remains that of the author alone.

2 See S/RES/827 (1993) of 25 May 1993.

3 See Part II, below.

4 Report of the President to the United Nations General Assembly, Doc. A/51/292; S/1996/665, para. 8.

5 See below, p. 112.

being able to effectively carry out its duties, because of the attitude of certain States that do not want to arrest or surrender accused persons, or even to recognize or cooperate with the Tribunal.[6]

Eighteen months later, the Tribunal was in a markedly better position.[7] Although only one trial had been completed,[8] a total of 22 defendants were in custody, several trials were under way and the President of the Tribunal had appealed to the General Assembly to create another Trial Chamber in order to accelerate progress.[9] Moreover, although the high-ranking defendants named in the Rule 61 proceedings were still at liberty, the trial of one senior officer[10] was under way and a number of middle-ranking defendants were in custody in The Hague. Perhaps the most important development was the arrest of two suspects by units of the multinational Stabilisation Force ("SFOR") in Bosnia-Herzegovina and of another by troops in the United Nations administered area of Croatia. These arrests, which attracted considerable publicity, put an end to complaints that assisting the Tribunal had too low a priority for the various international forces in the former Yugoslavia. These developments have greatly enhanced the Tribunal's reputation.

The increased effectiveness of the Tribunal means that its jurisprudence has become of greater importance. In part that is merely because the rulings given in the early cases will have an effect as precedents in the numerous cases which are now pending.[11] It is likely, however, that the jurisprudence of the Tribunal will now have a lasting impact upon the development of international humanitarian law, which may well turn out to be the most

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6 Separate Opinion in *Prosecutor* v. *Rajic* (IT-95-12-R61), 5 July 1996 and 13 September 1996; *ILR* 108 (1998), 141 et seq., (171).

7 See the address of President Cassese to the United Nations General Assembly, 4 November 1997.

8 *Prosecutor v. Tadic* (IT-94-1-T), Decision of the Trial Chamber of 7 May 1997; to be reported in Vol. 112 of the *International Law Reports*. At the time of writing the Appeals Chamber was due to hear appeals in this case.

9 Address of President McDonald to the United Nations Security Council, 12 February 1998; ICTY Press Release 291-E; 16 February 1998.

10 General Blaskic, former Chief of Staff of the Bosnian Croat army. A senior Bosnian Serb officer, General Djukic, had been arrested and indicted but had died before his trial had commenced.

11 The decisions of the Yugoslav Tribunal may also prove important precedents for the International Criminal Tribunal for Rwanda, established by S/RES/955 (1994) of 8 November 1994. The Rwanda Tribunal has already held in the *Rutaganda* Case (ICTR-96-3-T), 26 September 1996, that it will take account of the jurisprudence of the Yugoslav Tribunal, a development which was inevitable given that the two Tribunals share a common Appeals Chamber.

important legacy of the Tribunal. The purpose of this article is therefore to examine that jurisprudence in so far as it concerns the substantive law to be applied by the Tribunal. No attempt is made here to examine the numerous rulings on evidence and procedure.[12] Nor is it the intention to enter into the debates about the establishment of the Tribunal,[13] except in so far as it is necessary to the discussion of the nature of the Tribunal.

Part II of this article will examine the legal nature of the Tribunal and its relationship with the Security Council and with States, as well as reviewing the extent of the Tribunal's jurisdiction. Part III will consider the nature and extent of the armed conflicts in the former Yugoslavia, a matter of great significance both for the jurisdiction of the Tribunal and the law which it is directed to apply. The jurisprudence of the Tribunal regarding the law applicable in international and non-international conflicts will then be discussed in Parts IV and V respectively. Part VI will consider the case law of the Tribunal on crimes against humanity and genocide, while Part VII will look at the decisions on degrees of culpability. The author's conclusions are set out in Part VIII.

II. The Constitution and Jurisdiction of the Tribunal

An assessment of the jurisprudence of the Tribunal has to begin with a consideration of the manner in which the Tribunal was established and of its position in international law, for these questions go to the legitimacy

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12 On these matters, see J. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1997; V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, 1995 and P. King and L. Rosa, "The Jurisprudence of the Yugoslavia Tribunal 1994–96", *EJIL* 8 (1997), 123 et seq. These works also contain valuable discussions of the substantive law issues. For a particularly important discussion of the jurisprudence on the difficult question of the reluctant witness, see F. Hampson, "The International Criminal Tribunal for Yugoslavia and the Reluctant Witness", *ICLQ* 47 (1998), 50–74.

13 Amongst the extensive literature on this subject, see International Criminal Tribunal for the Former Yugoslavia, *The Path to the Hague*, 1996; C. Greenwood, "The International Tribunal for Former Yugoslavia", *Int'l Aff.* 69 (1993), 641 et seq. and D. Shraga and R. Zacklin, "The International Criminal tribunal for the Former Yugoslavia", *EJIL* 5 (1994), 360. Most of the literature supports the creation of the Tribunal. For a contrary view, see T.D. Mak, "The Case against an International War Crimes Tribunal for the Former Yugoslavia", *International Peacekeeping* 2 (1995), 536.

of the Tribunal and the scope of its authority and thus affect the weight likely to be given to its decisions both now and in the future. While the Tribunal has stressed its unique character[14] and described itself as a "self-contained system",[15] it does not operate in a legal vacuum. In particular, its legal authority is not something which it can itself generate; that authority has to be derived from some act or acts of others, rooted in rules of law.

Although frequently compared with the International Military Tribunal at Nuremberg, the International Criminal Tribunal for the Former Yugoslavia rests on legal foundations which differ in important respects from those of the Nuremberg Tribunal.[16] The Nuremberg Tribunal was established by the four principal allied Powers; it was therefore a multinational, rather than an international, tribunal. It derived its legal authority from the fact that each of the States which was party to its establishment possessed jurisdiction over the defendants for the offences with which they were charged. The Nuremberg process could thus be said to have represented a pooling of independent national jurisdictions.[17]

The International Criminal Tribunal for the Former Yugoslavia, by contrast, was established by the United Nations Security Council acting

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14 Thus, in *Prosecutor* v. *Tadic (Protection of Witnesses)*, 10 August 1995, *ILR* 105 (1997), 599, the Trial Chamber held that the unique character of the Tribunal meant that the decisions of human rights tribunals regarding the standards of a fair trial were of limited relevance, para. 27.

15 See the Decision of the Appeals Chamber in *Prosecutor* v. *Tadic (Jurisdiction)*, 2 October 1995, *ILR* 105 (1997), 419, para.11.

16 The comparison is also misleading in other respects. Whereas the Nuremberg Tribunal was established following the end of hostilities and after the principal Defendants had been arrested and at a time when those which established the Tribunal had complete power in Germany, the International Criminal Tribunal was created during the conflicts in the former Yugoslavia and has always been dependent upon States, particularly the belligerents, to detain and surrender those whom it indicts. In addition, the Nuremberg Tribunal was specifically established to try defendants from one party to World War II, whereas the International Criminal Tribunal has jurisdiction over persons from any of the belligerents and has, indeed, brought to trial Serbs, Croats and Bosnian Muslims.

17 This aspect of Nuremberg could be seen in the subsequent arrangements for the detention of prisoners at Spandau. The Tokyo IMT also exercised a jurisdiction which belonged to the States which had established it, although the manner of its establishment differed from that of the Nuremberg Tribunal.

on behalf of the entire international community.[18] Moreover, the Council established the Tribunal in the exercise of its powers under Chapter VII of the United Nations Charter, not as a result of any agreement between States. That is in marked contrast to the proposals for the creation of a permanent international criminal court, where it has generally been assumed that the court must be established by treaty.[19] There were, of course, sound practical reasons for following the course of employing a Security Council resolution in the case of the Yugoslav Tribunal. As the United Nations Secretary-General explained in his Report submitting the draft Statute of the Tribunal to the Council, the normal approach of proceeding by way of a treaty would have been too slow and would almost certainly have been ineffective, because those States most directly affected would have declined to become parties.[20] The Chapter VII approach, on the other hand, "would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII."[21]

The manner in which the Tribunal was established has several important legal consequences. First, it means that the source of the Tribunal's authority is derived not, as in Nuremberg, from the consent of States which themselves possess jurisdiction over the crimes in question but from the act of an organ of the United Nations which possesses no criminal jurisdiction at all. Secondly, whatever the practical advantages of creating the Tribunal by a resolution under Chapter VII of the Charter, it means that the legal justification for the establishment of the Tribunal rests not on the inherent value of enforcing the law or upholding justice but on the

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18 S/RES/827 (1993) of 25 May 1993. Prior to the adoption of resolution 827, the Council had adopted a number of resolutions regarding violations of humanitarian law in the former Yugoslavia; see resolutions 764 (1992) of 13 July 1992, 771 (1992) of 13 August 1992, 780 (1992) of 6 October 1992 and 808 (1993) of 22 February 1993. Resolution 780 established a Commission of Experts. The first Report of the Commission, Doc. S/25274 (10 February 1993) was influential in leading to the establishment of the Tribunal and gave an indication of the scale of the task with which the Tribunal was to be confronted. The Commission also published two subsequent reports, Docs S/26545 (5 October 1993) and S/1994/674 (27 May 1994).

19 For the difficulties which this approach creates, see J. Dugard, "Obstacles in the Way of an International Criminal Court", *CLJ* 56 (1997), 329. Cf. also A. Zimmermann in this Volume.

20 Doc. S/25704, paras 19–21.

21 *Ibid.*, para. 23.

decision of the Council that the creation of the Tribunal will contribute to the restoration of international peace and security, since that is the purpose for which the Security Council is given its powers under Chapter VII. Finally, although it is the creation of the Security Council, the Tribunal is dependent upon the cooperation of States and its relationship with the States and ability to require their assistance are bound up with the extent of the powers of the Council under Chapter VII.

1. The Security Council and the Legitimacy of the Tribunal

The fact that the Tribunal was established by the Security Council has led some to question its legitimacy.[22] That issue was examined by the Tribunal itself in its first decision, *Tadic (Jurisdiction)*.[23] The Defendant there challenged the validity of the establishment of the Tribunal on a number of grounds, which were considered at some length by the Appeals Chamber.[24] The Defendant argued that the Security Council lacked the power to establish a tribunal possessing criminal jurisdiction. This assertion rested on several different grounds but two are of particular importance for the present study. First, the Defendant argued that the Council had exceeded its powers under Chapter VII, because that Chapter did not authorize the Security Council to create a judicial tribunal as a measure to address a threat to international peace and security. Secondly, he contended that it was a general principle of human rights law that a judicial tribunal had to be "established by law" and that a resolution of the Security Council, even if *intra vires*, did not satisfy this requirement.

With regard to the first argument, the Appeals Chamber held that Chapter VII in general and Article 41 in particular conferred upon the Security Council a broad, although not an unlimited, discretion regarding the measures which were appropriate to address a threat to international

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22 See, e.g., J.M. Sjocrona, "The International Criminal Tribunal for the Former Yugoslavia: Some Introductory Remarks from a Defence Point of View", *LJIL* 8 (1995), 463.

23 *Prosecutor v. Tadic* (Case No. IT-94-1-AR72), 2 October 1995; *ILR* 105 (1997), 419. For a critical discussion of the Tribunal's treatment of this challenge, see J.E. Alvarez, "Nuremberg Revisited: the *Tadic* Case", *EJIL* 7 (1996), 245.

24 *ILR* 105 (1997), 453. The Trial Chamber had earlier ruled that it had no jurisdiction to inquire into the validity of its own establishment, *ILR* 105 (1997), 427. In the Appeals Chamber, however, only Judge Li took that approach.

peace and security. Since the Council had already determined[25] that the violations of humanitarian law in the conflicts in the former Yugoslavia were exacerbating a threat to international peace and security and the concept of individual criminal responsibility has long been seen as one of the means by which international law seeks to deter, or prevent repetition of, war crimes, the establishment of the Tribunal could not be said to have been manifestly outside the scope of the Council's powers under Chapter VII.[26] This part of the decision is plainly correct. While measures designed to stop, or at least contain, the conflicts in the former Yugoslavia were the most important ones for addressing the threat to international peace, measures to curb the atrocities which were occurring were also part of a reasoned strategy to deal with that threat. Moreover, while it was the situation in Yugoslavia with which the Security Council was concerned, the longer term effect of the Tribunal should also be considered. It can reasonably be argued that if the Tribunal is perceived as an effective body, its work could have a deterrent effect on future violations of humanitarian law and thus contribute to limiting future threats to the peace.

A more difficult aspect of the defendant's argument was that the Council could not have the power to establish a subsidiary organ with judicial powers when it had no judicial competence itself. The Appeals Chamber rejected this argument on the ground that it was based on a misunderstanding of the "constitutional set-up of the Charter".[27] Article 29 gave the Council the power to establish "such subsidiary organs as it deems necessary for the performance of its functions". The Appeals Chamber considered that the Defendant's argument confused the function with the means of its performance. While the Council did not have a judicial *means* of operation, it did have clearly established *functions* in respect of peace and security and it was as a means for assisting in the performance of those functions that it had established the Tribunal. The Appeals Chamber relied upon the Advisory Opinion of the International Court of Justice in the *Effect of Awards* Case,[28] in which the Court had upheld the legality of the General Assembly's act of creating a tribunal to hear staff cases and thus to assist in the performance of the Assembly's function of regulating staff relations, notwithstanding that the Assembly had no judicial competence of its own. The two cases are not, however, on a par. The Assembly, in the *Effect of Awards* Case, had dealt with a matter internal to the United Nations and in respect of which no national court would normally have

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25 See above, p. 101.

26 *ILR* 105 (1997), 465–470, paras 28–36.

27 *ILR* 105 (1997), 470, para. 37.

28 ICJ Reports 1954, 47 et seq., (61).

possessed jurisdiction. By contrast, the Council created the Tribunal as an alternative to the exercise of jurisdiction by national courts and conferred primacy upon it. Nevertheless, there seems no reason in principle why the Security Council, if it considers that the creation of a judicial instrument is necessary for it effectively to perform its functions in respect of peace and security, should not create such an instrument.

Tadic's second argument, that the Tribunal was not "established by law", was a more formidable one and the reply by the Appeals Chamber less convincing. The right of an individual to have a criminal charge against him determined by a tribunal established by law is recognized by a wide range of international human rights instruments.[29] The Appeals Chamber considered, however, that this requirement applied to national, not international courts, in part because there was no legislature in international society. Moreover, the Chamber held that in the international context what mattered was that the Tribunal was grounded in the rule of law and offered all the guarantees embodied in the relevant international human rights instruments.[30] That answer confuses the question whether the Tribunal has been established by law with the question whether it functions in accordance with law. A tribunal may function in accordance with all legal guarantees and yet still not have been established by law. A more convincing justification is that the Tribunal was established by a decision of the Council lawfully taken under a legally binding instrument, the Charter, and that it was therefore established "by law".[31]

Although, therefore, some aspects of the reasoning in *Tadic (Jurisdiction)* give rise to misgivings,[32] on the whole the decision of the Appeals Chamber is successful in vindicating the legitimacy of the Tribunal's establishment by the Security Council. Whether the Appeals Chamber should have embarked upon this inquiry at all is a different matter and one which falls outside the scope of the present study.

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29 The Appeals Chamber referred to article 14 para. 1 of the International Covenant on Civil and Political Rights, article 6 para. 1 of the European Convention on Human Rights and article 8 para. 1 of the American Convention on Human Rights.

30 *ILR* 105 (1997), 471–476, paras 41–48.

31 The Chamber referred to this argument at para. 44 of its judgment.

32 For more stringent criticism, see Alvarez, see note 23. It is noticeable that a Trial Chamber of the International Criminal Tribunal for Rwanda has followed *Tadic* in: *Prosecutor v. Kanyabashi* (ICTR-96-15-T), Decision of 18 June 1997, noted at *AJIL* 92 (1998), 66–70.

2. Criminal Justice and the Maintenance of Peace and Security

The fact that the Tribunal was created by a Chapter VII resolution means that it was established in order to contribute to the maintenance of international peace and security by means of the administration of criminal justice, not because the administration of justice was an end in itself. Indeed, as *Tadic (Jurisdiction)* demonstrates, this feature of the Tribunal is essential to its legality, because the powers of the Council under Chapter VII exist only for the purpose of restoring and maintaining international peace and security. As one commentator puts it, entrusting the creation of the Tribunal to the Security Council "amounted to allowing the imperatives of maintaining peace to take precedence over those of law and justice."[33]

In some respects, that may not matter. It is clear from the decision of the Appeals Chamber in *Tadic (Jurisdiction)* that the Tribunal will jealously guard its independence against any attempt by the Security Council to interfere in particular cases and rejects the notion that it is at the mercy of the Council.[34] Indeed, the Council has so far shown no inclination to interfere with the work of the Tribunal. It could be argued that if peace and security were to be restored in the former Yugoslavia, then the justification for the Tribunal would disappear. That argument, however, overlooks the fact that the work of the Tribunal could still be considered necessary for the maintenance of peace and security in the former Yugoslavia or, at least, that the Security Council could legitimately take that view. Moreover, as was suggested in the preceding section, in assessing the contribution of the Tribunal to the achievement of the objectives of Chapter VII of the Charter, it is necessary to look not only at the situation in the former Yugoslavia but also at the likely effect of the Tribunal on wider considerations of peace and security related to other conflicts.

Nevertheless, it would appear to be open to the Security Council to determine that the Tribunal no longer served the purpose for which it was created, or that the maintenance of peace and security was better served

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33 P. Tavernier, "The Experience of the International Criminal Tribunals for the former Yugoslavia and Rwanda", *Int. Rev. of the Red Cross* 37 (1997), 605 et seq., (611).

34 *ILR* 105 (1997), 459–460, paras 16–18. The Report of the Secretary-General containing the Statute of the Court, which was expressly approved by the Council in resolution 827, stated that the Tribunal "would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions" (Doc. S/25704, para. 28).

by putting an end to its work.[35] Even if one accepts the view of the Appeals Chamber in *Tadic (Jurisdiction)* that the powers of the Council under Chapter VII are not unlimited, the Chamber considered that those powers – and the margin of discretion enjoyed by the Council – were very broad. The result is that, as the Trial Chamber in *Tadic (Jurisdiction)* put it, the abolition of the Tribunal before it had completed its work would be within the power of the Security Council.[36]

3. The Powers of the Tribunal and the Security Council to Require Cooperation

The fact that the Tribunal was established by a Chapter VII decision of the Council also affects the duty of States and other parties to cooperate with it in its work. Lacking a police force or other agencies of implementation of its own, the Tribunal is obviously heavily dependent upon the cooperation of States and of entities such as the Bosnian Serb republic ("Republika Srpska") to arrest accused persons and surrender them to the Tribunal as well as to furnish evidence and assist in investigations. The duty of States to cooperate in these ways is clearly established by para. 4 of Security Council resolution 827, which states that the Security Council decides that:

> "... all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the statute, including the obligations of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the statute."

By virtue of Article 25 of the Charter, this decision is binding upon all Member States of the United Nations.[37] In accordance with Article 103 of the Charter, the obligation to comply with this decision takes precedence over other obligations of States. Moreover, the general principle of inter-

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35 This possibility was expressly contemplated in the Secretary-General's Report, para. 28.

36 *ILR* 105 (1997), 434, para. 20.

37 See M. Wood, " The Interpretation of Security Council Resolutions", in this Volume, p. 73–95. For discussion of article 25, see J. Delbrück, "On Article 25", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 1994, 407 et seq.

national law by which a State may not rely upon its own internal law as a justification for its failure to comply with an international obligation means that a State has a duty to comply with an order of the Tribunal or a request for assistance made under article 29 of the Statute even if it has not yet enacted the necessary national legislation or, indeed, if its national law prohibits the compliance sought.[38] The obligation to comply with decisions of the Tribunal also applies to non-State *de facto* entities (in particular "Republica Srpska").[39]

Nevertheless, it is clear that a number of States, including in particular those most closely involved in the conflict and therefore in the Tribunal's work, have persistently refused to comply with this obligation.[40] Since a State which fails to execute a warrant of arrest or to comply with an order or request for assistance from the Security Council is in breach of a binding decision of the Security Council, the Council has the power to take action against it, although such action is unlikely unless the Council considers the breach to be a particularly serious one. The question is whether the Tribunal itself can take action against a recalcitrant State.

This matter was considered by the Tribunal in the case of *Blaskic (Objection to the Issue of subpoenae duces tecum).*[41] The issue there concerned *subpoenae duces tecum* issued in accordance with article 54 of

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38 The Trial Chamber drew attention to this principle in *Tadic (Deferral), ILR* 101 (1995), 1 (8 November 1994). See also the Decision of President Cassese in *Prosecutor v. Blaskic (Application to vary conditions of detention)* Case IT-95-14-T, *ILR* 108 (1998), 69 (3 April 1996), paras 7–9. The fact that the Tribunal has jurisdiction only over individuals does not, of course, preclude the possibility that it can issue binding orders to States; see *Prosecutor v. Blaskic (Objections to the Issue of subponae duces tecum)*, Decision of the Appeals Chamber, 29 October 1997, *ILR* 110 (1998), 607, para. 26.

39 The Security Council has on several occasions treated Republica Srpska as bound by decisions of the Council; see, e.g., S/RES/942 (1994) of 23 September 1994. The obligation for the Bosnian Serbs to cooperate with the tribunal is specifically incorporated into the Dayton Peace Agreement, 1995, article X; *ILM* 35 (1996), 75. See also J. Jones, "The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia", *EJIL* 7 (1996), 226 et seq.

40 See the Address of President Cassese to the United Nations General Assembly, 4 November 1997.

41 Case IT-95-14-T, Decision of Trial Chamber II, 18 July 1997, *ILR* 110 (1998), 607, (616), and Case IT-95-14-AR108 *bis*, Decision of 29 October 1997, *ILR* 110 (1998), 607, (688). The Appeals Chamber had the benefit of a number of briefs from *curiae*, including one from the Max Planck Institute, which is reproduced in: *Max Planck UNYB* 1 (1997), 349 et seq.

the Rules of Procedure of the Tribunal to the Republic of Croatia and to certain senior Croatian Government officials requiring the production of documents. A *subpoena* is, as its name suggests, an order to take specified action on pain of a penalty for non-compliance. Although both the Statute and the English and French versions of the Rules of Procedure envisage that the Tribunal can issue mandatory orders, the term *subpoena* itself appears only in the English version of article 54 of the Rules of Procedure. The Appeals Chamber held that the Tribunal could issue a *subpoena* in the technical sense of the term only to individuals acting in their private capacities. If the Tribunal wanted a State to produce documents, it could issue a binding order to that effect but it had no power itself to impose a penalty for non-compliance.[42] The power to impose sanctions for non-compliance remained vested in the Security Council and the only recourse which the Tribunal possessed in the event of a State disobeying a binding order issued to it was to make a finding of violation and then communicate that finding to the Security Council.[43] Moreover, the Appeals Chamber held that the Tribunal was not empowered to issue binding orders to State officials acting in their official capacity, on the ground that:

> "Such officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity."[44]

It is submitted that the conclusions of the Appeals Chamber in this respect are correct. While the Security Council clearly manifested an intention to confer upon the Tribunal the power to take decisions binding upon States,

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42 Appeals Chamber Decision, paras 20–21.

43 *Ibid.*, paras 35–36. This is the procedure specifically laid down in relation to the execution of warrants of arrest by Rule 61(E).

44 *Ibid.*, para. 38. A similar approach has been taken by national courts in a number of countries regarding the extension to individual officials of the immunity of the State which they serve; see *Jaffe* v. *Miller*, *ILR* 95 (1994), 446 and *Walker* v. *Bank of New York*, *ILR* 104 (1997), 277 (Canada), *Church of Scientology* v. *Commissioner of the Metropolitan Police*, *ILR* 65 (1984), 193 (Germany), *Propend Finance Limited* v. *Sing*, to be published in Vol. 111 of the *ILR* (1998), (England) and *Herbage* v. *Meese*, *ILR* 98 (1994), 101 (United States).

there is no indication in resolution 827 or in the Statute of the Tribunal that the Council intended to delegate to the Tribunal any part of its power to impose sanctions upon States (if, indeed, it could do so) and the Tribunal could not confer such a power upon itself through the Rules of Procedure which it adopted. Moreover, in practice there is plainly no sanction available to the Tribunal other than that of adverse publicity. Any action would have to be taken by the Council itself in the exercise of its powers under Chapter VII. The decision in *Blaskic* is another indication that the Tribunal, as a creation of the Security Council, is dependent upon the Council to enforce its decisions.[45]

4. The Jurisdiction of the Tribunal

An assessment of the jurisprudence of the Tribunal in relation to humanitarian law also requires a brief analysis of the Tribunal's jurisdiction. The Statute confers jurisdiction in respect of four categories of "serious violations of international humanitarian law" committed by individuals in the territory of the former Yugoslavia since 1991.[46] The four categories of offence are specified in articles 2 to 5 of the Statute as follows:

> "*Article 2: Grave Breaches of the Geneva Conventions of 1949*
> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
> (a) wilful killing;
> (b) torture or inhuman treatment, including biological experiments;
> (c) wilfully causing great suffering or serious injury to body or health;

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45 One surprising feature of the *Blaskic* decision is that the Appeals Chamber considered that a State official who was part of a United Nations force or other United Nations operation could be required to give evidence because he was not acting in his capacity as a *State* official but rather as an official of the United Nations (paras 46–51). This decision has already led to friction with the Government of France which has refused to allow members of the French armed forces to testify; see ICTY Press release 275-E, Statement of Judge Louise Arbour, Prosecutor, 15 December 1997.

46 Statute of the Tribunal, arts. 1, 6 and 8. In contrast to the position at Nuremberg, there is no jurisdiction in respect of organizations; see article 6 and the express rejection of such jurisdiction in the Secretary-General's Report, Doc. S/25704, para. 51.

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3: Violations of the Laws or Customs of War
The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 4: Genocide
1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;
(e) complicity in genocide.

Article 5: Crimes against Humanity
The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts."

It is important to realize that these provisions determine the scope of the jurisdiction of the Tribunal, they do not define, let alone alter, the substantive law which the Tribunal is required to apply. The Report of the Secretary-General on the establishment of an international criminal tribunal made clear that there was no intention that the Security Council should create or purport to "legislate" the law to be applied but that the Tribunal should apply the existing international humanitarian law.[47] The Statute, therefore, neither renders conduct unlawful which was previously lawful under international law nor creates individual criminal responsibility under international law for acts in respect of which such responsibility did not previously exist. The principle that the Statute does not create new offences or alter the definition of the existing offences under international humanitarian law has been reaffirmed by the Tribunal in the Case of *Delalic*.[48]

Consequently, there are three questions which the Tribunal has to examine in each case. First, is the conduct of which the defendant is accused unlawful under the applicable rules of international humanitarian law (the question of legality)? Secondly, if so, does that conduct involve individual

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47 Doc. S/25704, para. 29. Indeed, the Secretary-General considered that the principle *nullum crimen sine lege* required that the Tribunal should have jurisdiction only in respect of crimes well established in *customary* international law, para. 34.

48 Case IT-96-21-AR72.5, Decision of the bench of the Appeals Chamber, 15 October 1996.

criminal responsibility under international law (the question of criminality)? Thirdly, if so is this offence one in respect of which the Tribunal has jurisdiction (the question of jurisdiction)? Only the third of these questions can be answered by reference to the Statute, the answers to the other two must be sought elsewhere. It is for that reason that the Trial Chamber erred in *Tadic (Jurisdiction)* in holding that the Defendant could be tried on charges of grave breaches of the Geneva Conventions under article 2 of the Statute irrespective of whether his acts had been performed in an internal or an international armed conflict.[49] Although article 2 makes no reference to the type of conflict, the substantive law which it empowers the Tribunal to apply, namely the Geneva Conventions of 1949, is what determines the content of the concept of grave breaches. As the Appeals Chamber held, the Conventions link the concept of grave breaches to that of protected persons, a concept which they define in such a way that it can exist only in an international armed conflict.[50]

One final aspect of the jurisdiction of the tribunal which requires comment is that the Statute specifically provides that an accused person has a right to be tried in his presence,[51] thus specifically excluding the possibility of trials *in absentia*.[52] Nevertheless, the Tribunal devised, in its Rules of Procedure and Evidence, a procedure which has some of the features of a trial *in absentia*. Under Rule 61 of the Rules, where the Tribunal's Prosecutor has issued an indictment against a person but it has proved impossible to serve the indictment and arrest the accused, a Judge can order that the indictment be referred to a Trial Chamber for review. The Trial Chamber will then hear evidence brought by the Prosecutor and determine whether there are reasonable grounds for believing that the defendant has committed (with the requisite state of mind) the acts of which he is accused and whether those acts, if proved, would amount to an offence within the jurisdiction of the Tribunal. If the Trial Chamber

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49 *ILR* 105 (1997), 419 (Decision of 10 August 1995), paras 46–56.

50 Decision of the Appeals Chamber of 2 October 1995, *ILR* 105 (1997), 419, (453), paras 79–85. Judge Abi-Saab dissented on this point, *ILR* 105 (1997), 534–538. For further discussion of this point, see below, p. 126–127. On the relationship between the Statute and the substantive law, see also the discussion of crimes against humanity in Part VI, below.

51 Article 21 para. 4, lit. c.

52 The Secretary-General maintained that trials *in absentia* would be contrary to article 14 of the International Covenant on Civil and Political Rights; Secretary-General's Report, Doc. S/25704, para. 101. The rejection of trials *in absentia* has been criticised by A. Pellet, "Le Tribunal criminel pour l'ex-Yougoslavie. Poudre aux yeux ou avancée décisive?" *RGDIP* 98 (1994), 7 et seq., and Tavernier, see note 33.

concludes that this test is satisfied, it confirms the indictment and issues an international arrest warrant which is then sent to all States and to the SFOR. The Tribunal's Rule 61 decisions contain several important statements about the law of armed conflict. It must, however, be emphasised that these decisions are of a provisional character. A Trial Chamber (and *a fortiori* the Appeals Chamber) remains free to take a different position on the law once it has heard argument from both sides.

III. The Nature and Extent of the Armed Conflicts in the Former Yugoslavia

One of the most important aspects of the jurisprudence of the Tribunal to date is its treatment of the concept of armed conflict and, in particular, its analysis of whether the different conflicts in the former Yugoslavia possessed an internal or international character. Much of the substantive law which the Tribunal is empowered to apply is applicable only in an armed conflict,[53] while article 5 gives jurisdiction over crimes against humanity only if there is a nexus between the crime and an armed conflict.[54] Moreover, the law applicable to internal armed conflicts differs from that which applies in international conflicts, so that the characterisation of the conflict becomes a matter of great importance.

In *Prosecutor v. Tadic (Jurisdiction)*,[55] the Appeals Chamber considered at length whether there was an armed conflict taking place in the Prijedor region of Bosnia-Herzegovina at the time of the alleged offences and, if so, whether that conflict was of an internal or international character. Whereas the defendant's submission to the Trial Chamber was that there had been no international armed conflict, on appeal he sought to argue that there had been no armed conflict of any kind in Prijedor at the relevant time. Instead, he maintained that the Serb inhabitants had assumed authority in the region without active resistance on the part of the Muslim and Croat inhabitants, so that, whatever the position may have been in other parts of Bosnia-Herzegovina, there had been neither an internal nor an international armed conflict in Prijedor.

This argument, which assumes that an armed conflict exists only in those parts of a State (or States) where actual fighting is taking place at the

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53 This is true of the law regarding grave breaches under article 2 of the Statute and war crimes under article 3.

54 See Part VI, below.

55 *ILR* 105 (1997), 419 (453). For comment, see C. Greenwood, "International Humanitarian Law and the *Tadic* case," *EJIL* 7 (1996), 265 et seq.

relevant time, has no basis in international law. There is nothing in the Geneva Conventions or other rules of humanitarian law to justify such an assumption, let alone the conclusion which the defendant apparently sought to draw from it, namely that the conditions of detention of prisoners detained away from the scene of the fighting would not be subject to humanitarian law. On the contrary, many provisions of humanitarian law are expressly intended to apply away from the scene of the fighting or after active hostilities have ceased. The Appeals Chamber rejected the Defendant's argument, although it accepted that there had to be a nexus between the offence charged and the armed conflict. The Appeals Chamber stated that:

> "... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."[56]

On this basis, the situation in Bosnia-Herzegovina had clearly reached the level of an armed conflict by May 1992 and the acts alleged in the indictment were sufficiently connected to that conflict to be subject to the rules of humanitarian law, irrespective of whether there was any fighting in the Prijedor region itself.

The definitions of international and internal armed conflicts are of considerable importance. Neither term is defined in the Geneva Conventions or other applicable agreements. Whereas there is an extensive literature on the definition of "war" in international law,[57] armed conflict has always been considered a purely factual notion and there have been few attempts to define or even describe it. The approach taken in the International Red Cross Commentary on the Geneva Conventions is that "any difference arising between two States and leading to the intervention of

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56 Decision of 2 October 1995, *ILR* 105 (1997), 419 (453), para. 70.

57 For a review of that literature and the State practice on the subject, see C. Greenwood, "The Concept of War in Modern International Law", *ICLQ* 36 (1987), 283 et seq.

members of the armed forces is an armed conflict within the meaning of Article 2 [common to the four Geneva Conventions]".[58] This approach has received some support in State practice,[59] although it is open to question whether all States have treated the threshold for armed conflict as being so low. The decision in *Tadic (Jurisdiction)* provides further support for this very expansive approach to the meaning of armed conflict. Even more significant is the attempt to define internal armed conflict, which rejects the notion that isolated or sporadic acts of violence within a State can amount to an armed conflict for the purposes of common article 3 of the Geneva Conventions while avoiding the very high threshold established for the application of Additional Protocol II to those Conventions.[60]

The Appeals Chamber did not accept that the situation in the former Yugoslavia should automatically be regarded as a single armed conflict, which was wholly international in character. Instead, it held that the conflict (or, rather, the conflicts) had both internal and international characteristics.[61] The Appeals Chamber considered that:

> "To the extent that the conflicts had been limited to clashes between the Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia and Montenegro) could be proven."[62]

In this respect, the decision swims against the tide of much of the literature on the conflicts in the former Yugoslavia, which has tended to treat the entirety of the conflicts as a single entity and as international in character.[63] It also departs from the conclusion of the Commission of Experts established by Security Council resolution 780 (1992), which considered that

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58 J. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, 1958, 20.

59 See, e.g., the claim by the United States that the act of Syria in shooting down a US aircraft over Lebanon and taking the pilot prisoner created an armed conflict between Syria and the United States, thus making the pilot a prisoner of war, *Digest of United States Practice in International Law* 1981–88, Vol. III, 3456.

60 See Additional Protocol II, 1977, to the Geneva Conventions, article 1.

61 *ILR* 105 (1997), 419 et seq., para. 77.

62 *Ibid.*, para. 72.

63 See, in particular, the important and highly influential article by T. Meron, "International Criminalization of Internal Atrocities", *AJIL* 89 (1995), 554 et seq., (556).

> "... the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia."[64]

There were, however, good reasons for the Appeals Chamber to adopt the view that it did.

First, the Appeals Chamber was right to reject the argument that the Security Council had, in effect, already determined that the totality of the conflicts in the former Yugoslavia were to be treated as international in character. There is no indication in the text of S/RES/827 (1993) of 25 May 1993, establishing the Tribunal, in the Statute of the Tribunal, which was annexed to that resolution, or in the Report of the Secretary-General,[65] on which the Security Council acted in adopting that resolution, that the character of the conflict had already been determined. Yet since the law applicable to international armed conflicts is markedly different from that which applies to internal conflicts, such a determination would have been of the utmost importance, as it would have played a central role in ascertaining the substantive law against which a particular accused would have been judged and, in some cases, therefore have determined whether or not he was guilty of an offence against international law. In view of the importance attached by the Security Council to the principle that the Tribunal should apply the existing international law and that the Council should not be seen as a legislature, if the Council had intended to determine such an important issue it would have needed to make a very clear statement to that effect.

The approach of the Security Council to the conflicts in the former Yugoslavia is, of course, an important piece of international practice which should be given considerable weight. That practice, especially when contrasted with the Council's treatment of what was clearly an internal conflict in Rwanda,[66] shows that the Council undoubtedly considered that there was an international armed conflict (or conflicts) taking place in the former Yugoslavia. The references in some of those resolutions to provisions of the Geneva Conventions which apply only to international armed con-

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64 1st interim report of the Commission, 10 February 1993; Doc. S/25274, para. 45. The Commission expressed the same view in its final report of May 1994, Doc. S/1994/674, para. 44.

65 Doc. S/25704.

66 See Meron, see note 63.

flicts makes that much clear.[67] That does not amount, however, to saying that the Council viewed the network of conflicts in the former Yugoslavia as being wholly international in character. On the contrary, there are several indications that it treated those conflicts as having both internal and international aspects.[68] The Report of the Secretary-General on the establishment of a tribunal for the former Yugoslavia, for example, states, in its comment on the choice of date for the commencement of the Tribunal's temporal jurisdiction, that 1 January 1991 had been chosen as "a neutral date which is not tied to any specific event and is clearly intended to convey the notion that no judgement as to the international or internal character of the conflict is being exercised."[69]

Secondly, there is nothing intrinsically illogical or novel in characterising some aspects of a particular set of hostilities as an international armed conflict while others possess an internal character. Conflicts have been treated as having such a dual aspect where a Government is simultaneously engaged in hostilities with a rebel movement and with another State which backs that movement. The International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* stated that:

> "The conflict between the *contras'* forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts."[70]

A similar view has been taken by the International Committee of the Red Cross and by writers in respect of other armed conflicts.[71]

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67 See especially, resolutions 764 (1992), 771 (1992), 780 (1992) and 787 (1992).

68 See C. Gray, "Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterization and Consequences", *BYIL* 67 (1996), 155 et seq. which, though concerned primarily with considerations of *jus in bello*, offers a penetrating and very thorough analysis.

69 Doc. S/25704, para. 62.

70 ICJ Reports 1986, 14 et seq., (114); *ILR* 76 (1988), 1 et seq., (448).

71 For example, the ICRC Annual Report for 1988 treats the armed conflict in Angola as an international armed conflict in so far as it involved South Africa but as an internal conflict in other respects; pp. 16–17. See also H.P. Gasser, "International Non-International Armed Conflicts", *Am.U.L. Rev.* 31 (1982), 911.

Thirdly, the complexity of the situation in Bosnia-Herzegovina itself since May 1992 suggests that the conflicts taking place there should not be treated as a single, international armed conflict, but must rather be regarded as possessing both internal and international aspects. Thus, the hostilities between the Bosnian Government forces and troops from Croatia and the Federal Republic of Yugoslavia, Serbia/Montenegro, ("the FRY") were clearly international in character, once Bosnia-Herzegovina had become an independent State.[72] At the other end of the spectrum, it is difficult to see how the hostilities between the Bosnian Government forces and dissident Muslim forces in Bihac can be regarded as anything other than an internal conflict. The fighting between the Bosnian Government forces and Bosnian Serb forces after the Federal Yugoslav Army ("the JNA") officially withdrew from Bosnia-Herzegovina in May 1992 is admittedly more difficult to characterise, especially since there is a sharp conflict of views regarding the degree of continuing involvement by the JNA after its formal withdrawal. Nevertheless, as the Appeals Chamber pointed out, the agreement concluded on 22 May 1992, under the auspices of the International Committee of the Red Cross, between the warring parties in Bosnia-Herzegovina suggests that those parties themselves treated that conflict as having an internal character. That agreement, in contrast to an earlier agreement of November 1991 regarding the fighting in Croatia,[73] provided for the application of parts of the Geneva Conventions to the fighting in Bosnia-Herzegovina. Yet if the conflict had been an international one in all its dimensions, such an agreement would have been invalid, since the Conventions would automatically have been applicable in their entirety and the Conventions preclude the parties to a conflict restricting the rights of protected persons by special agreement.[74]

The distinction between internal and international armed conflicts has been the subject of further discussion by the Trial Chambers in a number

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72 The Arbitration Commission of the International Conference on the Former Yugoslavia fixed the date on which Bosnia-Herzegovina became a State as 6 March 1992, the date on which the result of the referendum on independence was announced; *Opinion No. 11*, *ILR* 96 (1994), 719. Possible alternative dates are the date of recognition by the European Community Member States, 6 April 1992, or the date on which Bosnia-Herzegovina became a member of the United Nations, 22 May 1992. The acts alleged to have been committed by the defendant in *Tadic* occurred after all these dates.

73 The November 1991 agreement is summarized in: *Int. Rev. of the Red Cross* 31 (1991), 610.

74 Article 6, Conventions I, II and III; article 7, Convention IV. Appeals Chamber Decision, para. 73.

of subsequent cases. In *Nikolic*, the Trial Chamber made a provisional finding, on the strength of the prosecution evidence, that in the part of Bosnia-Herzegovina in which the offences charged were said to have occurred, the JNA had been directly involved on the side of the Bosnian Serbs and the conflict was accordingly an international one.[75] Similarly, the Trial Chamber in *Mrksic* found that the capture of Vukovar in Croatia in 1991 had been accomplished by JNA and Croatian Serb forces acting together. The decision in this case was not difficult to justify, since the defendants in that case were officers in the JNA.[76] In *Karadzic and Mladic*, however, the Trial Chamber went further and, indeed, came close to repudiating the approach taken by the Appeals Chamber in *Tadic*, holding that JNA involvement on the side of the Bosnian Serbs in the fighting in Bosnia-Herzegovina in general was on such a scale and continued for such a duration that the conflict between Bosnian Serb forces and the Bosnian Government should be regarded in its entirety as an international armed conflict.[77]

A particularly interesting discussion of this issue is to be found in the *Rajic* Case, which concerned the hostilities between the Bosnian Croats, backed by the Republic of Croatia, and the Government of Bosnia-Herzegovina between 1993 and 1994.[78] The Trial Chamber in *Rajic* held that the direct involvement of another State, which would have been necessary in order to internationalize this conflict, could be established either by showing that there was significant and continuous military intervention by the armed forces of Croatia in the fighting in Bosnia-Herzegovina, or by demonstrating that the Republic of Croatia exercised a degree of control over the Bosnian Croat forces ("the HVO") sufficient to make the HVO the agents of the Republic of Croatia. The Trial Chamber concluded that both tests appeared to be satisfied. There was considerable evidence of direct participation in the fighting by the Croatian regular army. In addition, the evidence adduced by the Prosecutor suggested that the HVO and the political machinery of the Bosnian Croats were under the general

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75 Case IT-94-2-R61, *ILR* 108 (1998), 21 (Decision of 20 October 1995), para. 30. For comment on this decision, see R. Maison, "La décision de la Chambre de premiere instance no. 1 du Tribunal pénal international pour l'exYougoslavie dans l'affaire Nikolic", *EJIL* 7 (1996), 284 et seq.

76 Case IT-95-13-R61, *ILR* 108 (1998), 53 (Decision of 3 April 1996), paras 22–25. In 1997, however, a fourth defendant, Dokmanovic, a Croatian Serb, was charged in respect of the same offences.

77 Cases IT-95-5-R61 and IT-95-18-R61, *ILR* 108 (1998), 85 (Decision of 11 July 1996), para. 88.

78 Case IT-95-12-R61, *ILR* 108 (1998),141 (Decision of 5 July 1996). For comment, see O. Swaak-Goldman, *AJIL* 91 (1997), 523 et seq.

control and direction of the Republic of Croatia. The Trial Chamber held that, since it was concerned with the links between the HVO and the Republic of Croatia only for the purposes of determining whether the conflict was an international one and not for the purpose of holding Croatia responsible in international law for specific actions of the HVO, it was not necessary to establish the high degree of control over particular actions which the International Court of Justice had required in the *Nicaragua* Case, where the issue had been whether the United States could be held responsible for individual acts of the *contras* in Nicaragua.

The decision of the Trial Chamber on this latter point, it is submitted, is correct, since the purpose of international humanitarian law is quite different from that of the law attributing responsibility to a State. As the Appeals Chamber held in *Tadic (Jurisdiction)*, most of the provisions of the Geneva Conventions of 1949 apply only in an international armed conflict. It would be wholly undesirable to make the applicability of the protections afforded by those provisions contingent upon a decision regarding the difficult issue of the responsibility of a State for the acts of persons or organizations which are not directly part of the organs of that State. Nor is it necessary to do so. In order to characterise a conflict as an international armed conflict, it is necessary only to show that there are hostilities between two or more States. It is not necessary that all the acts occurring in that conflict should be imputable to one or another of these states.

Nevertheless, the decision in *Rajic* sits somewhat uneasily beside the decision of the same Trial Chamber in *Tadic (Trial)*.[79] The Appeals Chamber in *Tadic (Jurisdiction)* did not determine whether the armed conflict in which Tadic's alleged offences were committed was internal or international in character. That question was left to be decided by the Trial Chamber at the trial. In view of the Appeals Chamber's decision that the charges of grave breaches could not stand unless there had been an international armed conflict, it might be thought that the Trial Chamber would have had to pronounce upon this matter. In the event, the majority of the Trial Chamber (Judges Stephen and Vohrah, with a powerful dissenting opinion from Judge McDonald) held that there was an international conflict between Bosnia and the FRY after 19 May 1992 but dismissed the grave breaches charges[80] on the ground that the acts of the

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79 Case IT-94-1-T, Decision of 7 May 1997. This decision will be reported in Vol. 112 of the *ILR*. Compare also the decision of the Supreme Court of Bavaria in the case of Djajic, 23 May 1997, *NJW* 51 (1998), 392.

80 See Part IV, below.

Bosnian Serbs in the particular case were not imputable to the Federal Republic of Yugoslavia.[81]

The approach of the majority involves a strict application of the principles of State responsibility to the question of determining the character of the conflict and the question whether Tadic's victims could be regarded as protected persons. This approach is open to question on two grounds. First, for the reasons already given, the standards of State responsibility are inappropriate to the determination of these questions. In contrast to the *Nicaragua* Case, which concerned the responsibility of the United States for the acts of the *contra* rebels, the responsibility of the Federal Republic of Yugoslavia was not in issue in the *Tadic* Case. What was at issue was the law applicable to the fighting between Bosnian Serbs and the Bosnian Government in a confused context in which some fighting was still taking place between forces of the Bosnian Government and the Federal Republic of Yugoslavia only a short time after the formal "withdrawal" of the JNA from Bosnia. In a situation of this kind, to make the characterization of the conflict dependent upon a strict application of the principles of State responsibility injects into the law a thoroughly undesirable element of uncertainty, for the exact connection between the outside forces and their internal allies in a conflict of this kind is usually controversial and frequently cannot be determined until long after the fighting has ceased. Secondly, most of the majority's findings of fact regarding the connection between the Bosnian Serb forces and the JNA and the Government of the Federal Republic point to the conclusion that even if the correct test to apply is that identified by the majority, the connection was sufficient to render the acts of the Bosnian Serb forces imputable to the Federal Republic at that stage in the conflict.[82] At the time of writing the Prosecutor had appealed against the decision of the Trial Chamber on this point.

None of the decisions to date have directly addressed the difficult question whether there was an armed conflict between the United Nations (through UNPROFOR), or the NATO States which provided air support, and the Bosnian Serbs. The indictment against Karadzic and Mladic includes charges relating to taking UNPROFOR personnel hostage and

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81 See paras 118–120 and 577–608 of the majority opinion and paras 5–34 of Judge McDonald's Dissenting Opinion.

82 See especially para. 115, where the majority noted that the Government of the FRY provided the supplies for the Bosnian Serb forces which had been formed from units of the JNA. Compare the decision of the European Court of Human Rights in *Loizidou* v. *Turkey (Merits)*, 1996, *ILR* 108 (1998), 443, holding that Turkey was responsible for the acts of the unrecognized "Turkish Republic of Northern Cyprus".

using them as human shields in the aftermath of NATO air attacks on Bosnian Serb positions in May and June 1995. The treatment of the UNPROFOR personnel is charged as grave breaches of the Geneva Conventions and war crimes. If there had been an armed conflict between the United Nations and the Bosnian Serbs, the act of detaining the UNPROFOR personnel could not itself have amounted to a grave breach or a war crime (though their subsequent treatment as "human shields" would have done so). The Trial Chamber in the Rule 61 proceedings, without any detailed discussion of the issue, confirmed the counts of the indictment relating to the UNPROFOR personnel.[83] This approach suggests that at this stage the Trial Chamber did not consider that UNPROFOR was a direct participant in an armed conflict or that its members could be regarded as combatants. It must, however, be remembered that the *ex parte* nature of Rule 61 proceedings means that this point was not fully argued and that, in any event, Rule 61 decisions involve only provisional conclusions. Moreover, the decision does not concern the NATO air personnel but only members of UNPROFOR.[84]

IV. The Law Applicable to the Conduct of Hostilities in International Armed Conflicts

The majority of the cases which have so far come before the Tribunal concern facts (or allegations in the case of the Rule 61 decisions) which involve clear violations of the law of armed conflict whether they occurred in an internal or an international armed conflict.[85] Decisions in such cases are unlikely to contribute much to the development of international humanitarian law. Nevertheless, a number of cases do contain rulings of considerable importance.

An interesting discussion of the law on the conduct of hostilities in an international armed conflict is to be found in *Martic*, where the indictment

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83 *ILR* 108 (1998), 85.

84 On this subject, see C. Greenwood, "International Humanitarian Law and United Nations Military Operations", to be published in Vol. 1 (1998) of the *Yearbook of International Humanitarian Law*.

85 That is true, for example, in *Tadic*, where the Defendant is accused of the torture and ill treatment of detainees and *Erdemovic* (Case IT-96-22-T), Decision of the Trial Chamber of 29 November 1996, *ILR* 108 (1998), 180, and Case IT-96-22- A, Decision of the Appeals Chamber of 7 October 1997, to be published in Vol. 111 of the *ILR* (1998), which concerns the massacre of prisoners following the fall of Srebrenica in eastern Bosnia.

relates to the bombardment of the Croatian capital of Zagreb by the Croatian Serbs in May 1995.[86] The Prosecutor alleged that, following a Croatian Government offensive in the Krajina region of Croatia, an area formerly held by the Croatian Serbs, the Croatian Serbs had bombarded the city with Orkan rockets delivering cluster bombs which killed and injured a number of civilians and that the attack had been deliberately targeted against civilians and civilian objects. Although the Trial Chamber did not determine that the bombardment had occurred during an international conflict,[87] its ruling in the Rule 61 proceedings reviewed the law applicable to bombardment of a population centre in both internal and international conflicts.

The Trial Chamber considered that in the case of an international conflict the prohibition of deliberate attacks upon civilians was well established both in Additional Protocol I and in customary international law. The Trial Chamber also reaffirmed the well-established principle of proportionality, i.e. that even where attacks are directed against legitimate military targets, they will be unlawful if they are conducted using indiscriminate methods or means of warfare or in such a way as to cause disproportionate harm to the civilian population. These principles are, of course, explicitly stated in article 51 of Additional Protocol I. Their acceptance as part of customary international law is also quite clear.[88] The Trial Chamber's ruling on these points is uncontroversial.

The same is not true, however, of the Chamber's comments on the subject of reprisals. This issue is potentially important in *Martic*, because the missile attacks on Zagreb were expressly stated by the Krajina Serb leadership to be in retaliation for the Croatian offensive against the Krajina in May 1995, after a period when there had been very little fighting in Croatia. The Chamber held that attacks upon civilians could never be justified on grounds of reprisals. Attacks on civilians by way of reprisal are, of course, prohibited by article 51 para. 6 of Additional Protocol I.[89] The Trial Chamber did not, however, base its conclusions exclusively on that provision but held that this prohibition is also "an integral part of customary international law". It justified this conclusion partly by reference to article 1 of the Geneva Conventions, under which the High Contracting Parties undertake to "respect and to ensure respect for the [Conventions] in all circumstances." The Trial Chamber held that this provision excluded the application of the principle of reprisals in the case

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86 *ILR* 108 (1998), 39.

87 See above, p. 113 et seq.

88 See, e.g., A.P.V. Rogers, *Law on the Battlefield*, 1996, 9–17.

89 See also arts. 52 para. 1, 53 lit. (c), 54 para. 4, 55 para. 2 and 56 para. 4.

of fundamental humanitarian norms such as the prohibition of attacks on civilians.[90]

This conclusion is open to criticism on several grounds. First, article 1 of the Geneva Conventions requires the parties to respect and ensure respect only for norms to be found in those conventions. The Fourth Convention (which is the only one relevant for these purposes) does not contain a prohibition of attacks on civilians unless those civilians are protected persons under the Convention, which will be the case only if they are "in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[91] That was not the case with the inhabitants of Zagreb, who could not have been regarded as being "in the hands of" the Croatian Serb forces. Article 1 of the Fourth Convention therefore has nothing to do with the legality of reprisals against civilians who are not protected persons.

Secondly, to infer any kind of prohibition of reprisals from the very general provisions of article 1 is unjustified. As Professor Roberts has shown, in a recent study prepared for the Commission of the European Communities, neither the *travaux préparatoires* nor State practice support the extensive interpretations which have recently been placed upon article 1 by some writers. Article 1 appears to have been intended — and to have been taken by States — as little more than a requirement that States ensure that those subject to their authority comply with the provisions of the Conventions and, more recently, as providing a basis on which a neutral State may make representations to belligerents regarding their conduct.[92] The fact that each of the four Geneva Conventions contains a specific provision on reprisals makes the Trial Chamber's reliance on common article 1 even more difficult to justify, since such provisions would be superfluous if article 1 carried such a broad meaning.

Finally, quite apart from the mistaken reliance upon article 1 of the Geneva Conventions, the conclusion by the Trial Chamber that all reprisals against the civilian population are prohibited by customary international law is unwarranted. No State practice was cited in support (in

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90 For an eloquent argument regarding the significance of article 1, see L. Condorelli and L. Boisson de Chazournes, "Quelques remarques à propos de l'obligation des Etats de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances", in: C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles*, 1984, 17 et seq.

91 Article 4 para. 1. See also the discussion of this requirement in *Rajic*.

92 A. Roberts, "The Laws of War: Problems of Implementation", in: European Commission, *Law in Humanitarian Crises*, 1996, Vol. I, p. 13, (30–32).

contrast to the detailed references to State practice in the Appeals Chamber's decision in *Tadic*) and there was only the most general reference to "the majority of legal authorities". Yet the proposition that reprisal attacks on the enemy's civilian population are prohibited in all circumstances is extremely controversial, by no means commands universal acceptance in the literature and was contested in the debates on Additional Protocol I.[93] In the recent proceedings before the International Court of Justice regarding nuclear weapons (where the existence of such a prohibition on reprisals would have been particularly significant), a number of States argued that there were circumstances in which reprisals against the enemy's civilian population were not prohibited by customary or conventional law.[94] The Court, in its Advisory Opinion, did not discuss the question of belligerent reprisals.[95]

Given the fact that these were Rule 61 proceedings, it would have been better for the Trial Chamber to have avoided the question of reprisals altogether and held that this matter would have to be the subject of full argument if the Defendant was ever brought to trial. If comment on reprisals really was necessary, then a clearer distinction should have been drawn between belligerent reprisals, where one party to a conflict retaliates for violations of humanitarian law by its adversary, and reprisals for the very fact of resort to force by the adverse party. The latter concept is universally rejected in international law, while the former is not. The circumstances of the bombardment of Zagreb suggest that it was a retaliation for the resort to force by Croatia rather than for any alleged violation of humanitarian law.

Although a number of the other Rule 61 decisions contain brief discussions of the question of who are protected persons under the various Geneva Conventions, it is *Rajic* which is the most interesting in this regard.[96] The charges in *Rajic* related to the killing of civilians and the

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93 The issue is discussed in greater detail by F. Kalshoven, *Belligerent Reprisals*, 1973. See also C. Greenwood, "The Twilight of the Law of Belligerent Reprisals", *NYIL* 20 (1989), 35 et seq. and Rogers, see note 88, 11 and 14.

94 See, e.g., the written statements on the General Assembly's request by the United Kingdom (at pp. 58–60), the United States (at pp. 30–31) and the Netherlands (at para. 29). While these views were challenged by a number of other States, the differences on this issue undermine the theory that there is a well established principle of customary law prohibiting such reprisals, since the State practice lacks the requisite consistency.

95 Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, ICJ Reports, 1996, 226 et seq. See para. 46 of the Opinion.

96 *ILR* 108 (1998),141.

devastation of civilian property in the Muslim village of Stupni Do when it was attacked by Croat forces in 1993. The Trial Chamber held that the civilian inhabitants of the village were protected persons within the Fourth Geneva Convention. The requirement that persons had to be "in the hands of a Party to the conflict or Occupying Power of which they are not nationals" was given a broad construction. The Chamber found that the area around Stupni Do was controlled by the HVO, which it had already held to be an agent of the Republic of Croatia, and that the inhabitants of the village, which was virtually defenceless, could therefore be regarded as being "constructively" in the hands of Croatia.[97] The Chamber also held that the wanton destruction of the village was a violation of article 53 of the Fourth Convention on the ground that as soon as the village was captured by the HVO it became occupied territory. This approach to the concept of belligerent occupation is certainly a broad one but it makes sense in that it helps to avoid any question of there being a gap between the law relating to combat and the law of occupation.

Once again, however, it is the *Tadic* Case which casts the longest shadow. In its consideration of whether Tadic's victims were protected persons, the Trial Chamber dwelt at length on the requirement in the Fourth Convention that protected persons must be "in the hands of a party to the conflict or Occupying Power of which they are not nationals." Having held that the Bosnian Serbs were allies, not agents, of the Federal Republic of Yugoslavia,[98] the majority concluded that a Bosnian Muslim or Croat held prisoner by Bosnian Serb forces was not in the hands of a party to the conflict of which he or she was not a national, since all were nationals of Bosnia-Herzegovina.[99]

This aspect of the Trial Chamber's decision was clearly foreshadowed by the Appeals Chamber in the Jurisdiction phase of the case. The Appeals Chamber's decision contains some unfortunate and unnecessary comments that the Bosnian Serbs, Bosnian Croats and Bosnian Muslims all became nationals of Bosnia-Herzegovina upon that State achieving inde-

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97 This aspect of the decision has to be seen in the light of its own particular facts and should not be taken as suggesting that the civilian population of a town or village under attack are always to be regarded as protected persons. Stupni Do was surrounded by territory held by the HVO and could be subdued at will. The case of the civilian population of a town bombarded from a distance or defended by a substantial garrison is quite different.

98 Decision of the Trial Chamber of 7 May 1997, para. 606.

99 *Ibid.*, para. 607.

pendence in March 1992.[100] When a State breaks up into a number of new States as a result of the secession of parts of its territory and that secession is opposed by force of arms so that an armed conflict results between the old State and a seceding entity, or between the various successor States to the old State, it should not be assumed, at least for the purposes of humanitarian law, that all residents of one of the seceding territories automatically take the nationality of the State created by that secession, irrespective of their wishes (perhaps violently expressed) to remain part of the old State or to become part of one of the other successors. Did persons of West Pakistan ethnic origin living in the old East Pakistan automatically acquire Bangladesh nationality in 1972, so that they could not be regarded as protected persons *vis-à-vis* the Bangladesh forces while the conflict there lasted? In the case of Bosnia-Herzegovina, before it became an independent State all members of the Bosnian population were citizens of Yugoslavia. It is far from clear that on independence members of the Serb community who opposed that independence should be regarded as having become nationals of Bosnia-Herzegovina, rather than retaining some form of Yugoslav (or perhaps Serbian) citizenship. Such a possibility was, in fact, expressly mooted by the Arbitration Commission of the International Conference for the Former Yugoslavia as early as January 1992.[101] Since the Appeals Chamber has recognized that some aspects of the fighting in Bosnia-Herzegovina were an international armed conflict, it is, to say the least, unfortunate that it has suggested that Bosnian Serb civilians caught up in part of the hostilities which are international in character cannot be protected persons under the Fourth Convention, the more so since this suggestion was not necessary for the decision in the *Tadic* Case and the matter appears not to have been fully argued before the Appeals Chamber.

Moreover, for the reasons given in Part III., above, the present writer considers that the Trial Chamber should have found that the Bosnian Serbs enjoyed so close a relationship at the relevant time with the Federal Republic of Yugoslavia that anyone in the hands of the Bosnian Serb forces should have been regarded as being in the hands of the Federal Republic and thus as a protected person unless they actually possessed the nationality of the Federal Republic.

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100 Appeals Chamber Decision, para. 76; for criticism see *EJIL* 7 (1996), 265 et seq., (272-4).

101 *Opinion No. 2*, *ILR* 92 (1993), 167.

V. The Law Applicable to the Conduct of Hostilities in Internal Armed Conflicts

The treaty law on the conduct of internal armed conflicts is skeletal, to say the least. The Appeals Chamber in *Tadic* therefore conducted an extensive examination of the customary law on this subject. Its decision is of great importance in developing the law in this area. The Appeals Chamber in the Jurisdiction phase of the case discussed at length the evolution of customary international law rules relating to the conduct of hostilities (the sphere of what is traditionally known as "Hague Law") in internal conflicts, notwithstanding that this body of substantive law was not relevant to the *Tadic* case.[102]

This part of the decision examined State practice in a number of cases, including, in particular, the Spanish Civil War, the "Biafra conflict" in Nigeria and the international reaction to the allegations that Iraq used chemical weapons against Kurdish insurgents during the 1980s. It also considered certain General Assembly resolutions, especially A/RES/2444 (XXIII) of 19 December 1968 and A/RES/2675 (XXV) of 9 December 1970, which it regarded as applicable to internal as well as international armed conflicts and as being declaratory of customary law. On the basis of this review, the Chamber concluded that there had developed a body of customary international law regulating the conduct of hostilities in internal armed conflicts, the principal features of which were:

- rules for the protection of civilians and civilian objects against direct attack; i.e. rules requiring the parties to confine their attacks to military objectives;
- a general duty to avoid unnecessary harm to civilians and civilian objects;
- certain rules on the methods and means of warfare, in particular a ban on the use of chemical weapons and perfidious methods of warfare;
- protection for certain objects, such as cultural property.

The Appeals Chamber denied that in identifying the existence of these rules it was effectively holding that internal armed conflicts were subject to the same rules as those applicable to the conduct of hostilities in international armed conflicts.[103] It considered that the law applicable to internal conflicts was more limited in two respects:

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[102] Appeals Chamber Decision, paras 96–127; ILR 105 (1997), 419 et seq., (504–520).

[103] Professor Rowe, in an article coauthored with Professor Warbrick, finds this denial unconvincing, *ICLQ* 45 (1996), 691 et seq., (701).

> "(i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and
> (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."[104]

Nevertheless, the list of principles and rules identified in the decision of the Appeals Chamber, albeit in broad outline rather than in detail, goes beyond the treaty rules contained in Additional Protocol II (many of which have not been regarded as declaratory of customary international law)[105] and begins to resemble the main provisions of Additional Protocol I, together with some of the provisions of the weaponry agreements.

The Appeals Chamber's comments on this subject are, of course, *obiter dicta*, since they were not necessary for the ruling on the issues in the *Tadic* Case. It is open to question whether the Appeals Chamber was wise to raise such an important matter in this way, rather than waiting for a case which actually required a decision on the content of this part of humanitarian law. It is also doubtful whether the practice discussed in this part of the decision really sustains some of the inferences drawn from it. There is likely to be broad agreement that the law of internal conflicts includes principles regarding the protection of the civilian population. On the other hand, the suggestion that feigning civilian status in an internal conflict constitutes perfidy appears to be based solely on the decision of the Nigerian Supreme Court in *Pius Nwaoga* v. *The State*,[106] a decision which does not really sustain such a conclusion since it was a trial for murder under Nigerian law, rather than for a war crime as such, and the consideration of the significance of the defendants' disguise was peripheral to the decision. It is also noteworthy that the Appeals Chamber has gone further than other bodies by determining that there are rules applicable to internal armed conflicts which are not based upon either common article 3 or Additional Protocol II. The Statute of the Rwanda Tribunal, adopted by the Security Council in resolution 955 (1994) of 8 November 1994, to deal with crimes committed in what is clearly an internal armed conflict, confers

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104 *Ibid.* para. 126.

105 On this subject, see A. Cassese, "The Geneva Protocols of 1977 and Customary International Law", *UCLA Pac. Basin L.J.* 3 (1984), 55 and C. Greenwood, "Customary Law Status of the 1977 Additional Protocols", in: A.J.M. Delissen and G. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead*, 1991, 93.

106 *ILR* 52 (1979), 494.

jurisdiction over war crimes only in respect of breaches of common article 3 and Additional Protocol II.[107] Similarly, the Commission of Experts appointed to investigate violations of humanitarian law in the former Yugoslavia, suggested in its final report that:

> "The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in common article 3 of the Geneva Conventions, Additional Protocol II, and article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in these treaty provisions".[108]

Nevertheless, the confirmation by the Appeals Chamber of the existence of a body of customary, Hague law regarding internal armed conflicts is of the greatest importance and is likely to be seen in the future as a major contribution to the development of international humanitarian law. While the content of those customary rules will undoubtedly be the subject of much argument in future cases, the *Tadic* decision has established that the International Tribunal will apply principles derived from (though possibly not identical in content to) those applicable to the conduct of hostilities in international armed conflicts. That is a development which is bound to influence any future consideration of the law of internal armed conflicts.

The same is true of the Appeals Chamber's unequivocal affirmation that an individual who violates the law of internal armed conflicts — including both common article 3 and the customary rules outlined by the Chamber — can incur individual criminal responsibility under international law.[109] That proposition had been questioned in two different, yet closely related, respects. First, it has sometimes been argued that violation of those provisions of the Geneva Conventions and Additional Protocols which are not "grave breaches provisions" involves the international responsibility of the State concerned but does not amount to a crime under international law on the part of the individuals committing the violation.[110] Such a view,

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107 Rwanda Statute, article 4.

108 Doc. S/1994/674, para. 52.

109 On this subject, see L.G. Maresca, "Prosecutor v. Tadic: the Appellate Decision of the ICTY and Internal Violations of Humanitarian Law as International Crimes", *LJIL* 9 (1996), 219 et seq.

110 See, e.g., E. Kussbach, "The International Humanitarian Fact-finding Commission", *ICLQ* 43 (1994), 174 et seq., (177) and D. Plattner, "The Penal Repression of Violations of International Humanitarian Law applicable in non-international armed conflicts", *Int. Rev. of the Red Cross* 30 (1990), 409, (410).

however, seems to be based upon a confusion between the question of criminality and the question of jurisdiction. It is true that violations of the Geneva Conventions which are not grave breaches are not subject to the jurisdictional provisions prescribed by the Conventions, in particular the requirement that all States (belligerent or neutral) should either exercise jurisdiction or surrender suspects for trial elsewhere. That does not mean, however, that such violations do not involve individual criminal responsibility. Indeed, there are instances of conduct which would nowadays amount to a violation (but not a grave breach) of the Conventions being prosecuted as a war crime before 1949.[111] The better view, it is submitted, is that set out in the British *Manual of Military Law*, which states that "all other violations of the Conventions, not amounting to 'grave breaches', are also war crimes".[112] This is also the view taken in the International Law Commission's Commentary on the Draft Statute of the International Criminal Court.[113]

Secondly, it has been more widely contended that, whatever may be the position regarding violations of other provisions of the Geneva Conventions, violations of common article 3 have never been treated as crimes under international law, although such conduct may amount to a crime under the criminal law of most States. Thus, Ms Plattner has suggested that "international humanitarian law applicable to non-international armed conflicts does not provide for international penal responsibility".[114] The International Committee of the Red Cross, in its comments on the proposal to establish the International Tribunal, stated that "according to international humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflict."[115] A similar view was expressed by the Commission of Experts.[116] It is true that the Rwanda Statute expressly confers jurisdiction over individuals accused of violating

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111 Thus, exposing prisoners of war to humiliation and insults would be a violation of article 13 para. 2 of the Third Convention but would not amount to a grave breach. In T. Maelzer, *AD* 13 (1946), 289 a US Military Commission convicted the German commander of Rome of a war crime for an act of this kind.

112 *Manual of Military Law, Part III*, 1958, para. 626. The United States *Field Manual*, 1956, paras 499 and 506 and the Canadian *Draft Manual of the Law of Armed Conflict*, 1988, para. 1704, take a similar position.

113 Doc. A/49/10, pp. 70–79.

114 See note 110, 414.

115 Preliminary Remarks of the ICRC, 25 March 1993, unpublished.

116 Final Report, see note 108, para. 52.

common article 3 but this was described by the Secretary-General as an innovation, which "for the first time criminalises common Article 3".[117]

Against this view, however, may be set the fact that when the Security Council established the Rwanda Tribunal and adopted its Statute, it considered that it was complying with the principle *nullum crimen sine lege*, which would not have been the case if violations of common article 3 had not been criminal under international law. Similarly, the statement by the United States representative at the time of adoption of Resolution 827, regarding the interpretation of article 3 of the Yugoslav Statute, assumes that violations of common article 3 were criminal under international law. Moreover, as Professor Meron has shown, there are good reasons why this should be so.[118] If violations of the international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why, once those laws came to be extended (albeit in an attenuated form) to the context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of a clear indication to the contrary.

The *Tadic* decision nevertheless breaks new ground to the extent that the criminality under international law of violations of the laws of internal armed conflict had not previously been asserted by an international tribunal, or, so far as this writer is aware, by an unequivocal decision of a national court in a State other than that in which the conflict has taken place. The International Law Commission appears deliberately to have left open the question whether "serious violations of the laws and customs applicable in armed conflict" in Article 20 of the Draft Statute of the International Criminal Court extends to violations committed in internal armed conflicts,[119] and some States evidently consider that it should not do so.[120] Does the decision, therefore, offend against the principle *nullum crimen sine lege*, on the ground that to comply with that principle, it is not sufficient that conduct should be prohibited under international law, it should be criminal as well? In the opinion of this writer, there is no violation of the *nullum crimen* principle. That principle does not preclude all development of criminal law through the jurisprudence of courts and tribunals, so long as those developments do not criminalise conduct which, at the time it was committed, could reasonably have been regarded as legitimate. That principle is not infringed where the conduct in question would universally be acknowledged as wrongful and there was doubt only

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117 Doc. S/1995/134, para. 12.

118 Meron, see note 63.

119 See note 113.

120 Report of the *ad hoc* Committee on the Establishment of an International Criminal Court, GAOR 50/22, para. 74.

in respect of whether it constituted a crime under a particular system of law.[121] The conduct alleged in the *Tadic* indictment manifestly comes within that category.

The decision in *Tadic* that violations of the law of internal armed conflict can lead to individual criminal responsibility is likely to be of considerable influence. Not only will it clearly have an important effect upon future proceedings in the Tribunal but there are signs that it will be reflected in the debates on the International Law Commission's proposals for an International Criminal Court. The International Committee of the Red Cross, whose statements on this subject have undergone a considerable change since 1993, has already called for the Criminal Court to have jurisdiction over such offences.[122]

Also of importance is the decision of the Trial Chamber in *Martic*.[123] The Trial Chamber having declined to rule on whether the conflict between the Croatian Government and the Croatian Serbs in 1995 was internal or international in character, reached the provisional conclusion that the bombardment of Zagreb with weapons which it classified as indiscriminate would be unlawful whatever the characterization of the conflict. It also concluded that the doctrine of reprisals would offer no defence if the conflict had been of an internal character.

VI. Crimes against Humanity and Genocide

The Tribunal has also given a number of decisions regarding crimes against humanity and genocide. With regard to genocide the cases say very little. Genocide is, of course, a crime of ulterior intent, since the acts in question must be carried out with the "intent to destroy, in whole or in part, a

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121 That was the approach taken by the courts in the United Kingdom when they decided that a husband could be convicted of raping his wife, *Regina* v. *R.* [1992] 1 AC 599 (House of Lords). The European Court of Human Rights rejected a complaint against the United Kingdom in respect of this change in the criminal law, *SW* v. *United Kingdom*, Decision of 27 November 1995, ECHR Reports, Series A, Vol. 335-B. See also Meron, see note 63.

122 Statement to the Sixth Committee of the General Assembly, 1 November 1995, p. 3.

123 *ILR* 108 (1998), 39.

national, ethnical, racial or religious group, as such."[124] The only one of the cases under review in which charges of genocide were brought is *Karadzic and Mladic*, probably because of the difficulty of proving the necessary intention. The Trial Chamber in that case suggested that the Prosecutor widen the scope of the indictment to include acts other than the ill-treatment and killing of detainees. It held that the intent necessary for genocide need not be clearly expressed but could be inferred from surrounding circumstances, stating in the case of the Bosnian Serb leaders that:

> "This intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group. The national Bosnian, Bosnian Croat and, especially, Bosnian Muslim national groups, are the target of those acts."[125]

In *Nikolic* the Trial Chamber invited the Prosecutor to consider amending the indictment to include a charge of genocide on the basis that there was evidence relating to the Defendant's conduct of the camp of which he was the commander from which it might be inferred that he intended to destroy a racial group in whole or in part. In both cases the Trial Chamber commented on "ethnic cleansing" as a practice which could amount to the *actus reus* of genocide.

With regard to crimes against humanity, article 5 of the Statute is drafted in a way which is in some respects more restrictive than customary law but at the same time omits reference to some of the requirements of crimes against humanity. The result is that in dealing with the questions of illegality and criminality,[126] the Tribunal has been required to identify in the customary international law those requirements which limit the scope of the offence. At the same time, in addressing the question of jurisdiction, it has had to concede that article 5 does not give the Tribunal jurisdiction in respect of all crimes against humanity committed within the territory of the former Yugoslavia since 1 January 1991.

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124 Article 4 para. 2. See also the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, article II. For discussion of this requirement of the offence, see the Advisory Opinion of the ICJ in the *Nuclear Weapons* Case, ICJ Reports 1996, 226 et seq., at para. 26.

125 *ILR* 108 (1998), 85, para. 95. It must be emphasised, of course, that this is only a provisional conclusion.

126 See above p. 111–112.

Thus, although there is no mention of such a requirement in article 5,[127] the Tribunal has repeatedly insisted that conduct can amount to a crime against humanity only if it is directed against a civilian population and occurs as part of a widespread or systematic attack upon that population.[128] Thus, the Trial Chamber in *Mrksic* stated that:

> "Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above."[129]

This ruling is particularly important in relation to sexual assaults, where the Trial Chambers have found that individual acts of rape or sexual abuse could and should be seen as part of a systematic pattern of using sexual abuse as a weapon to intimidate and degrade the civilian population of an adversary.

The Trial Chamber in *Tadic (Trial)* also rightly held that an essential element of the substantive law of crimes against humanity was that they had to be committed with discriminatory intent, that is to say "on national, political, ethnic, racial or religious grounds".[130] This requirement, although not mentioned in the Statute, featured in the Report of the Secre-

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127 This is in contrast to the corresponding provision of the Statute of the Rwanda Tribunal, which stipulates that that Tribunal has jurisdiction over crimes against humanity only if they are committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" (Rwanda Statute, article 3). In this respect, the jurisdictional provisions of the Rwanda Statute are closer to the substantive law on crimes against humanity than are those of the Yugoslav Tribunal.

128 The Secretary-General's Report on the establishment of the Tribunal (see note 34, para. 48) recognised this requirement of a widespread and systematic attack but it was not expressly incorporated into article 5 of the Statute. Contrast the express provision in article 3 of the Statute for the International Tribunal on Rwanda, adopted by the Security Council in 1994.

129 *ILR* 108 (1998), 53, para. 30. See also the Decision of the Trial Chamber in *Tadic (Trial)*, decision of 7 May 1997, para. 649.

130 *Ibid.*, para. 652.

tary-General[131] as well as being included in the Statute of the Rwanda Tribunal.

The Trial Chamber in *Mrksic* also recognised that, as the French courts had held in the *Klaus Barbie* Case,[132] there is a degree of overlap between war crimes and crimes against humanity. In particular, the Trial Chamber held that, although combatants could not be victims of crimes against humanity, the mere fact that, at particular points in time, a person or persons "carried out acts of resistance" does not deprive them of their character as members of the civilian population for the purposes of the law on crimes against humanity.[133] The fact that the jurisdictional requirements of the Statute included no reference to the elements of widespread or systematic attack and discrimination did not affect the obligation of the Tribunal to apply them as part of the substantive law.

Conversely, the Statute of the Yugoslav Tribunal is more limiting than the customary law in one respect — it confers jurisdiction over crimes against humanity only if they are committed in the course of an armed conflict, internal or international. Although the Nuremberg Tribunal had interpreted the provision of its Charter regarding crimes against humanity as confined to crimes committed in connection with an international armed conflict, the Appeals Chamber in *Tadic (Jurisdiction)* held that the Tribunal's jurisdiction in respect of crimes against humanity was not so confined.[134] The Appeals Chamber concluded that the limitation on the scope of crimes against humanity which was recognized by the Nuremberg Tribunal did not reflect contemporary international law. No nexus with war crimes or with an armed conflict of any character was required by modern international law as part of the definition of crimes against humanity, although the Tribunal would possess jurisdiction only if there was a nexus with a conflict of some sort. The Chamber's decision on the substantive law point is in accordance with most modern literature on crimes against humanity[135] and with the International Law Commission's proposed Statute for an International Criminal Court, which makes no mention of a nexus between crimes against humanity and armed conflict.[136] The limitation upon the Tribunal's jurisdiction is significant, nonetheless, since it would appear to exclude crimes against humanity which may have been committed in parts of the former Yugoslavia where there

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131 Doc. S/25704, para. 48.

132 *ILR* 78 (1988), 124.

133 *ILR* 108 (1998), 64, para. 29.

134 *ILR* 105 (1997), 419 at 453, paras 138-42.

135 See, e.g., R. Jennings and A. Watts, *Oppenheim's International Law*, Vol. I (9th edition), p. 996.

136 See note 113, at p. 76.

was no connection with any of the armed conflicts which took place. That was probably the case with some of the incidents which occurred in Kosovo prior to 1998. It seems likely, however, that there has been an armed conflict (of an internal character), within the definition in *Tadic*, taking place in Kosovo (a region of Serbia and thus part of the FRY) since March 1998.[137]

VII. Degrees of Criminal Responsibility

One final subject which requires comment is that several of the decisions address issues concerning the degrees of criminal responsibility under international law. This issue is addressed in article 7 of the Tribunal's Statute, which provides that:

> "(1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
>
> ...
>
> (3) The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

In its decision in *Tadic* (*Trial*), the Trial Chamber gave a broad interpretation to article 7 para. 1, holding that "aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present"[138] and concluding that:

> "the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participa-

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137 Thus, on 10 March 1998 the Prosecutor issued a press release to the effect that the jurisdiction of the Tribunal extended to "the current violence in Kosovo" (Press Release CC/PIO/302-E). On 31 March 1998 the Security Council adopted Resolution 1160, para. 17 of which urged the Prosecutor to "begin gathering information related to the violence in Kosovo that may fall within [the Tribunal's] jurisdiction."

138 Para. 689.

tion directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident."[139]

Article 7 envisages two different types of command responsibility. Under article 7 para. 1, a commander (which the Trial Chambers have held can include civilian political leaders such as Karadzic and Martic)[140] can be held criminally responsible for crimes which he ordered. Under article 7 para. 3, a commander who knew, *or ought to have known*, that offences were being committed or had been committed by those under his command can be held responsible for failing to prevent or punish such acts.[141]

In *Nikolic* and *Martic* the Trial Chamber held that there was a *prima facie* case under both heads of article 7.[142] In *Mrksic* the Trial Chamber found *prima facie* evidence that two of the defendants had been present at the Vukovar hospital when those who were to be killed were taken away but considered that the command responsibility provisions would be of great importance in relation to Colonel Mrksic himself, as he had overall command of the units which appeared to have been involved.[143] In *Rajic*, where there appeared to be no evidence that the defendant was physically present when the attack on Stupni Do took place, the Trial Chamber found that there was a *prima facie* case against the defendant on the basis of evidence (much of which came from UNPROFOR personnel) that the defendant commanded the units which had attacked the village and had personally ordered the attack.[144] Both types of command responsibility are at issue in the *Karadzic and Mladic* proceedings. The Trial Chamber in this case emphasised the positions of the two defendants and their overall responsibility for the acts of those under their command but also pointed to evidence of more direct involvement in the offences alleged in the indictment.[145] The most interesting discussion of command responsibility will come in the trial and preliminary motions in the case of *Blaskic*, the most senior defendant actually in custody, where the nature of criminal responsibility and the requisite *mens rea* under article 7 para. 3 is directly in issue. At the time of writing, this trial had not yet been completed.

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139 Para. 692.

140 Respectively the political leaders of the Bosnian and Croatian Serbs.

141 See the Decision of the Trial Chamber in *Prosecutor v. Blaskic*, (IT-95-14-T), 4 April 1997, paras 10–12.

142 *ILR* 108 (1998), 21, para. 24 and *ILR* 108 (1998), 39, para. 21.

143 *ILR* 108 (1998), 53, para. 17.

144 *ILR* 108 (1998), 141, paras 58–61.

145 *ILR* 108 (1998), 85, paras 81–85.

In addition, the decisions in *Erdemovic* contain an interesting discussion of the law on superior orders and duress.[146] Erdemovic pleaded guilty, so that the question whether superior orders or duress were defences which relieved a defendant of criminal responsibility did not strictly arise before the Trial Chamber. Moreover, article 7 para. 4 of the Statute expressly provides that superior orders is not a complete defence. Nevertheless, the Trial Chamber gave careful consideration to duress in the context of determining whether the plea of guilty could be accepted as valid and to duress and superior orders in determining their importance as mitigating factors. The Chamber concluded that duress was a defence completely excluding criminal responsibility provided that there was a real absence of moral choice on the part of the defendant. Moreover, it considered that this defence would be particularly difficult to establish in relation to a crime against humanity, because the "violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole."[147] The Trial Chamber held that the conditions for establishing a full defence of duress did not exist in Erdemovic's case but it took account of both duress and superior orders as mitigating factors, along with the defendant's cooperation with the Tribunal and sentenced him to ten years' imprisonment for participating, as a member of a firing squad, in the killing of prisoners after the fall of Srebrenica.

On appeal, Erdemovic argued that his plea of guilty had not been entered on the basis of a proper understanding of the charges against him. Part of his argument was that duress should be regarded as a complete defence to a charge of crimes against humanity. By a majority of 3 to 2, the Appeals Chamber rejected this argument (although it remitted the case to the Trial Chamber on other grounds). The majority considered, on the basis of a detailed examination of the case law on war crimes and the provisions of national law, that duress was not a complete defence to war crimes or crimes against humanity. President Cassese, however, gave a powerful dissenting judgment on this point, in which he emphasised that the decisions of the war crimes courts at the end of World War II were far from unanimous on this point.[148]

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146 Case IT-96-22-T (Sentencing), Decision of the Trial Chamber of 29 November 1996, *ILR* 108 (1998), 180 and Case IT-96-22-A, Decision of the Appeals Chamber of 7 October 1997, to be published in Vol. 111 of the *ILR* (1998).

147 *ILR* 108 (1998), 180, para. 19.

148 When the case was remitted to the Trial Chamber II, Erdemovic pleaded guilty to war crimes. On 5 March 1998 the Trial Chamber sentenced him to five years' imprisonment.

VIII. Conclusion

It is still far too early to say whether the International Criminal Tribunal for the Former Yugoslavia will prove effective in bringing to justice the perpetrators, especially the more senior perpetrators, of the appalling atrocities which have occurred in the conflicts in the former Yugoslavia, let alone whether, even if it does achieve this goal, it will make the contribution to international peace and security envisaged in resolution 827. Nevertheless, the decisions reviewed in this article will undoubtedly make an important contribution to the development of the laws of armed conflict. In some cases, as the criticisms made above indicate, this writer considers that the Tribunal has misunderstood the law and it is to be hoped that if the Rule 61 decisions are followed by trials, these mistakes will be corrected. On the whole, however, there is more to welcome than to criticise in this new body of case law on a subject where decisions of courts have been so rare.

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*197 FORCED MARRIAGE: RWANDA'S SECRET REVEALED

Monika Satya **Kalra** [FNa1]

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***198** INTRODUCTION

An estimated half million people died in the 1994 Rwanda genocide. [FN1] A selected group of powerful Hutu leaders carefully orchestrated the genocide to eliminate Tutsis from Rwanda. [FN2] Although most of the victims were Tutsis, the Hutu killed a number of dissenting Hutus as well. By the end of the one hundred days of killing, the Hutu had eliminated approximately three-quarters of the Tutsi population. [FN3]

The United Nations set up the International Criminal Tribunal for Rwanda (ICTR) in 1994 to prosecute key leaders of the genocide. [FN4] Initially, the Tribunal concentrated on crimes based on the killings. The ICTR's focus later expanded to include crimes of sexual violence, largely in response to great international pressure. [FN5] In 1998, four years after the establishment of the Tribunal, the ICTR found Jean-Paul Akayesu guilty of sexual violence crimes. [FN6] Despite taking steps to address these crimes, the ICTR's efforts are far from comprehensive. The ICTR has neglected various forms of sexual abuses suffered by Rwandan women during the 1994 genocide. Specifically, the Tribunal has not explored forced marriage.

This article addresses the need for the Office of the Prosecutor (OTP) of the ICTR to charge forced marriage as a crime of sexual violence. Part I explores the phenomenon of forced marriage in Rwanda. Part II addresses the importance of charging perpetrators with the crime of forced marriage. Part III discusses the legal framework

for prosecuting forced marriage, and Part IV offers recommendations for trying and investigating the crime.

I. FORCED MARRIAGE

A. Sexual Violence During the 1994 Genocide

Immediately following the Rwanda genocide, the international community confined its focus to the killing of Tutsi. Soon, however, investigators uncovered ***199** reports of widespread rapes committed by the perpetrators of the genocide. [FN7] During the genocide, perpetrators raped an estimated 250,000 women. [FN8] A detailed Hutu propaganda campaign in which Hutus specifically targeted Tutsi women contributed to the attacks on Tutsi women. [FN9] Specifically, the campaign resulted in widespread sexual violence directed at Tutsi women.

This sexual violence was based on various Hutu beliefs and ideologies. [FN10] Hutu men targeted Tutsi women partially because of their belief that these women would undermine and seduce them. [FN11] Hutu men also targeted Tutsi women as a means of destroying the Tutsi society by degrading, humiliating and overpowering its women. [FN12] Most Hutus killed Tutsi women after raping them; this fact reinforces the conclusion that Hutu's intended to degrade and humiliate the women. [FN13] Those women who did not die often became pregnant. [FN14] Because Rwanda is a patrilineal society, children carry their father's ethnicity. Therefore the forcibly impregnated Tutsi women were considered to be carrying Hutu children. Pregnancy resulting from rape often stigmatized women as "spoiled and unsuitable for marriage and family life." [FN15] The women's resulting isolation and humiliation thus accomplished larger genocidal goals.

In the 1998 landmark case, *Prosecutor v. Jean-Paul Akayesu*, the ICTR recognized sexual violence as a means of destroying the Tutsi population. [FN16] The ICTR found Akayesu guilty of genocide and crimes against humanity, including rape and ***200** sexual violence. [FN17] As the *bourgemestre* [FN18] of the Taba commune, Akayesu performed executive functions within the commune and was responsible for maintaining public order. [FN19] Within this role he helped to execute the genocide. During the genocide, for example, Tutsis sought refuge in the bureau communal office, which Akayesu controlled. [FN20] Hutu men repeatedly raped and sexually violated women at the bureau office and its surrounding areas. [FN21] Akayesu was aware of the ongoing rapes, [FN22] was often present during the commission of these crimes, and further encouraged the Hutu attackers to rape women. [FN23] The Trial Chamber found Akayesu guilty of genocide and crimes against humanity in a landmark decision rendering Akayesu the first man to be convicted of genocide by an international tribunal. Akayesu is also the first man to be found guilty of rape [FN24] and sexual violence as crimes of genocide. [FN25]

The Trial Chamber laid out broad parameters for the prosecution of sexual violence in the *Akayesu* decision. The chamber defined sexual violence as, "any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or physical contact." [FN26] The chamber thus found Akayesu guilty of committing sexual violence against witness KK whom he ordered to undress and perform gymnastics in a public courtyard. [FN27] Through this finding, the ICTR set a new legal precedent that broadened the definition of sexual violence to include a wide range of acts. The ICTR should use similarly broad parameters when addressing forced marriage.

***201** *B. The Specific Nature of Forced Marriage*

Historically, enemy fighters targeted and sexually attacked women during wartime. [FN28] Combatants used acts of sexual violence as weapons of war, including sexual slavery, forced impregnation and sexual violence. [FN29] In Rwanda, Hutu men crossed an additional boundary: they often forced Tutsi women to marry them. Instead of killing the women, the Hutu men would take them home and force them to perform household duties

and sexual acts. [FN30] Investigators from Human Rights Watch interviewed several Tutsi women who were forced into these "marriages." One woman described the actual wedding: "In a bizarre 'marriage ceremony,' [FN31] the militia leader officiated over four marriages of young girls between the ages of sixteen and nineteen years to members of his militia group." [FN32]

Many of the Hutu men who forced the women into marriage were members of the Interahamwe, the Hutus' trained youth militia. [FN33] While these men were not part of the official government, they usually acted under the Hutu leaders who instigated the genocide. An examination of the links between the Interahamwe and the Hutu leadership, the types of marriage ceremonies performed, and the pattern of the practice, may reveal an overriding policy of forced marriage. Such an examination would help clarify the specific nature of the crimes that the Hutus committed against Tutsi women.

From the evidence that does exist, it is apparent that the forced marriages had devastating effects on the Tutsi women. [FN34] Tutsi "wives" often served as second wives to Hutu men in Rwanda's polygamous society. Hutu men repeatedly raped ***202** their "wives" and often forced them to perform household chores. [FN35] After the genocide ended, many of these women remained with their "husbands" because they had nowhere else to turn. Many of their families had been killed, often at the hands of their "husbands." Because Rwandese national law does not allow women to inherit land, the murders forced the Tutsi women to depend on the Hutu men for survival. [FN36] In addition, fear of future attacks by the Hutu rebels led many Tutsi women to stay with their "husbands." Many Hutu who had fled to neighboring countries after the conclusion of the genocide later returned to terrorize Tutsi, particularly widowed women who had no protection. [FN37] "The women," one reporter wrote, "find notes on their doors: 'You're next' and 'If you we don't get 200,000 francs, you're dead.'" [FN38] For these reasons and perhaps others which may surface through investigations, many of these women remain with their Hutu "husbands."

C. Lasting Effects of Forced Marriage

The complexities of these marriages continue today. Many women are torn between conflicting realities: although Hutu men saved their lives by marrying them, those men are also responsible for sexual and other violence against them. During the 1997 trial of Jean-Paul Akayesu, one woman testified that a member of the Interahamwe, the Hutu militia group, spared her life by claiming her as his wife. The Interahamwe took this woman, witness NN, with a group of several hundred women and children to a hold near the bureau communal where they planned to kill them. Rafiki, a member of the Interahamwe, picked witness NN out of the group saying that she was his wife. [FN39] Although this act spared NN's life, it did not spare her from sexual violence. "Witness NN said that she was then taken by the younger brother of Rafiki back to his home," the Trial Chamber wrote in its judgment in *Akayesu*. "While she was there, she said she was locked up by Rafiki, who gave the key to other young men who came around and 'slept with' her." [FN40]

As with rape, the stigma attached to forced marriage may prevent women from coming forward. A victim's family may not accept the victim if they learn that she was raped, let alone that she became the wife of a Hutu man. One Tutsi woman described her family's reaction to her rape: "When she escaped and returned home, her family greeted her warmly. When her husband learned that she had been raped, he banished her from their home." [FN41]

***203** In addition to hostile reactions of families, Tutsi women often shouldered the community's judgments. By entering into forced marriages, the Tutsi women were allowed to live. This touches upon the belief, common among many Tutsi returning from neighboring countries, that surviving Tutsis collaborated with Hutus in order to survive the genocide. [FN42] Even though a woman had been forced into marriage, the fact that her husband was a Hutu further would have solidified this belief. For these reasons, Rwandan society has negated the gravity

of the criminal act that the members of the Hutu militia committed.

The prosecutor's office is aware of the existence of forced marriage during the 1994 genocide, yet it has not prosecuted the crime. In *Akayesu*, Witness NN clearly testified that Rafiki took her out of the group to be his wife. She also described the nature of her "marriage" and the sexual violence she endured therein. [FN43] The reasons for not prosecuting forced marriage are unknown but may be due to the OTP's lack of resources. Regardless of the reasons, the OTP has initial evidence of forced marriages and should conduct further investigations that could lead to its prosecution. The national courts in Rwanda have not prosecuted crimes of forced marriage either. The reasons the Rwandese society chooses not to address this issue are complex. Although the courts in Rwanda and at the ICTR may have legitimate constraints that make it difficult to charge forced marriage, it is time to overcome these obstacles and charge the crime.

II. WHY THE ICTR MUST INVESTIGATE AND CHARGE CRIMES OF FORCED MARRIAGE

The OTP's prosecution of forced marriage is imperative to ensure full recognition of the gravity of the crimes the Hutus committed against Tutsi women. There are several ways to use the law to address forced marriages. The ideal means of addressing forced marriage, however, would be to recognize it as a crime in and of itself by amending the ICTR statute. This would entail ICTR recognition of forced marriage as the *actus reus* requirement of crimes against humanity, genocide, and violations of Common Article III. Alternatively, the ICTR can interpret forced marriage as a crime of "sexual violence." The ICTR can do so in the same manner that it recognized forced nudity as sexual violence in *Akayesu*. [FN44] While the ICTR may, as a third alternative, try the individual component acts of forced marriage as separate crimes under existing statutory law, to do so would not provide the women who lived through the experience a direct international acknowledgment of the acts to which they were subjected.

Prosecuting forced marriage would give victims a voice to their suffering and would serve as an international acknowledgment of the crimes the Hutus committed against them. By not addressing forced marriage at all, the international ***204** community fails to provide a potential deterrent for future cases of forced marriages in other conflicts. It may in fact provide a loophole for combatants, who may claim women as wives, rape them, and submit them to various forms of physical and psychological violence with impunity. By not trying these crimes, the international community sends a message that these acts are acceptable as long as they are done under the guise of "marriage."

Although there are few clearly documented cases of similar "marriages" in previous conflicts, soldiers currently are coercing girls into marriages in Uganda [FN45] and in Sierra Leone. The Lord's Resistance Army (LRA), a rebel army in Uganda, not only abducts children to become child soldiers, but it also forces these abducted girls into marriages to become sexual slaves to older soldiers. [FN46] Amnesty International has reported that "the rape of girls in 'forced marriages' is fundamental to the organization of the LRA. They are allocated to boys and commanders as sexual rewards." [FN47]

Rebel groups are also forcing young girls and women into marriages in Sierra Leone. Amnesty International investigated crimes against girls and women in Sierra Leone and found widespread sexual violence. [FN48] The organization reported rapes and other forms of sexual violence committed by rebel forces, including members of the Armed Revolutionary Council (AFRC) and the Revolutionary United Front (RUF). [FN49] Particularly, they uncovered sexual slavery situations in which "girls and women are forced into 'marriage', domestic servitude or other forced labor that ultimately involves forced sexual activity, including rape by their captors." [FN50] These examples demonstrate the prevalence of forced marriage in current conflicts and indicate a likelihood that they will occur again in the future. The international community must therefore prosecute and take a firm stance against this crime. The International Criminal Tribunal for Rwanda must speak out against forced marriages and

set a precedent that will deter current and future cases of forced marriage.

A. The Role of the Office of the Prosecutor

The ICTR is now charging defendants with rape and sexual assault crimes. Initially, the international community criticized the OTP for not placing as much weight on sexual assault crimes as it does on other crimes that occurred during the ***205** genocide. Although the OTP has become more comprehensive in its prosecution of rape and sexual violence, it still has not explored the ongoing rapes and sexual violence that took place within forced marriages. Although this may reflect a lack of resources, the OTP is charged with the responsibility of investigating and prosecuting crimes such as forced marriage.

There are no clear estimates on the number of Tutsi women who were forced into marriages. Initial reports suggest that the practice was highly prevalent. Human Rights Watch, for example, reported several cases of forced marriages in its 1996 report on sexual violence, *Shattered Lives*. [FN51] Similarly, the non-governmental organization, African Rights reported numerous cases of forced marriage in its report on the Rwanda genocide, *Rwanda, Death, Despair, and Defiance*. [FN52] Another report cited the current government's awareness of the problem: "Ministry officials say an unknown number of women, estimated to be in the thousands, were forced into marriages or taken hostage by killers who fled to Tanzania or Zaire." [FN53] Despite these reports, not a single indictment to date charges or even specifically mentions forced marriage as a sexual assault crime.

In its landmark judgment finding Jean-Paul Akayesu guilty of sexual offenses, the ICTR Trial Chamber gave credence to the severe nature of sexual violence and rape. [FN54] Forced marriages encompass crimes of rape, forced impregnation, sexual slavery, and sexual violence. Moreover, forced marriage extends beyond these individual crimes, entailing prolonged psychological as well as physical cruelty. Rwandan women were forced not only to deal with the trauma of rape and other forms of sexual violence, but also to maintain an intimate "relationship" with their "husbands." The ICTR must bring to light the unique intricacies of this form of sexual violence.

III. LEGAL ANALYSIS

The OTP can bring charges of forced marriage under three articles of the Statute of the International Criminal Tribunal for Rwanda. These include: Article 2, which pertains to the crime of genocide; Article 3, which treats crimes against humanity; and Article 4, which relates to serious violations of common Article 3 [FN55] ***206** and Additional Protocol II of the 1949 Geneva Conventions. [FN56] Article 4 of the ICTR statute applies to non-international armed conflicts. [FN57]

The Prosecutor can charge the act of forced marriage as a distinct crime by amending the statute, but may also charge the individual elements of forced marriage as separate crimes. The court in *Akayesu* addressed the notion of convicting a person of different offenses stemming from the same act. [FN58] This is known as cumulative charging, and is permissible when the appropriate criteria are met. [FN59] In order to address fully and describe the intricacies of forced marriage, the OTP must either amend the current statute or bring cumulative charges.

A. Article 2: Genocide

Article 2 of the ICTR Statute proscribes genocide. Its definition of genocide tracks the language of the 1948 Genocide Convention. [FN60] Article 2 states:

> 1. Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such:

a. Killing members of the group; b. Causing serious bodily or mental harm to members of the group; ***207** c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d. Imposing measures to prevent births within a group; e. Forcibly transferring children of the group to another group. 2. The following acts shall be punishable:

a. Genocide; b. Conspiracy to commit genocide; c. Direct and public incitement to commit genocide; d. Attempt to commit genocide; e. Complicity to commit genocide. [FN61]

1. Legal Requirements

To secure a conviction for genocide, the prosecution must establish that the accused "committed one of the acts referred to under Article 2(2) of the Statute with the specific intent to destroy, in whole or in part, a particular protected group." [FN62] As is the case with rape and other acts of sexual violence, it is unlikely that the perpetrator will admit intent to commit genocide. Therefore, other indicators are necessary to establish intent. The Trial Chamber in *Akayesu* addressed this issue and concluded that in the absence of a confession, the accused's genocidal intent in a particular act can be inferred. [FN63] This can be done by looking at the general context of the perpetration of other culpable acts that are systematically directed against the same group. The chamber stated that these acts may be committed by the same offender or others. [FN64] The judgment identified factors to consider in determining intent to commit genocide. These include both the scale of atrocities committed and the deliberate and systematic targeting of victims, on account of their membership in a particular group, to the exclusion of members of other groups. [FN65]

Once intent is established, the prosecution must show that forced marriage conformed to the acts listed in Article 2(2). Within Article 2(2), the provisions that apply to the actual marriage are (b), "[c]ausing serious bodily or mental harm to members of the group," and (c), "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Section (d), "[i]mposing measures to prevent births within a group," is a result of forced marriage and may be charged as a separate count. Sections (a) "[k]illing ***208** members of the group" and (e), "[f]orcibly transferring children of the group to another group," may apply in specific instances but are not general to the crime.

Acts of Serious Harm. On January 26, 2000, the ICTR Trial Chamber found Alfred Musema, director of the Gisovu Tea Factory in Kibuye prefecture, guilty of crimes of genocide, including sexual violence. [FN66] The chamber took this opportunity to clarify the elements of genocide. It held that Article 2(2)(b)'s proscription of "serious bodily or mental harm" included, but is not limited to, "acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution." [FN67] In *Akayesu*, the Trial Chamber had previously defined sexual violence, which includes rape, as "any act of a sexual nature which is committed on a person under circumstances that are coercive." [FN68] The definition in *Akayesu* does not require that the act be physically coercive. For example, the Tribunal deemed armed conflict, or even the presence of military personnel, coercive. [FN69]

Deliberate Physical Destruction. ICTR Article 2(2)(c) requires deliberate infliction of conditions on a group calculated to bring about its physical destruction. In *Akayesu*, the chamber held that this provision should be construed to forbid "methods of destruction by which the perpetrator does not immediately kill the members of the group, but which ultimately seek their physical destruction." [FN70] The chamber provided examples of bringing about deliberate physical destruction, such as subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirements. [FN71]

Preventing births. Article 2(2)(d) refers to acts that prevent births within a group. Although the overriding

act of forced marriage does not fall within the category of Article 2(2)(d)'s ban on "preventing births within a group," [FN72] the article does address the result of many marriages: forced impregnation. In the absence of, or in addition to, an enumerated crime of forced marriage, the result of the forced marriage (forced impregnation) should be charged. A prohibition on forced pregnancy initially seems to contradict element (2)(d) of Article 2, which requires that the perpetrators imposed "measures intended to prevent births within the group." [FN73] The *Akayesu* chamber, however, found that forced impregnation did not contradict Article 2(2)(d). [FN74] The chamber reasoned that, in patriarchal societies, like Rwanda, the ethnicity is carried through the father. Therefore, the perpetrating father transfers his own ethnicity to the child, preventing the woman from giving birth to her own ethnicity. In this way, the perpetrators prevent births within the ***209** mother's group. [FN75] The crime of forced impregnation is separate from the charge of forced marriage, and yet it is likely that these charges will go hand in hand.

2. Application of Article 2 to Forced Marriages

Although forced marriages have not been investigated extensively, the facts that are available are helpful in assessing how the OTP can charge these crimes.

Act. The act of forced marriage requires further investigation to narrow its parameters. Although formal ceremonies were often held, many Hutu took Tutsi women to their homes and claimed them as their wives without a ceremony. The OTP must explore the temporal longevity of the marriage as well. Some women were married for a few days, while others continue to live with their "husbands" today. Regardless of whether or not a woman remains with her "husband," the mere act of the marriage itself constitutes a crime. Once investigators establish a pattern of practice, prosecutors can explore orders given by leaders and standard practices used during the genocide. This will determine whether the marriage falls within the scope of the ICTR Statute. Once the scope is established, Article 2 provides the prosecution with the legal framework to charge and convict the accused of forced marriage.

Intent. Since the OTP has not thoroughly investigated forced marriages, it is difficult to assess the evidence that will establish intent. Tutsi women were married to members of the Hutu militia, [FN76] which indicates that military leaders were involved in the process. Some military leaders gave Tutsi women as rewards to the Hutu men who had killed the most people. [FN77] Human Rights Watch reported, for example: "The head of the militia, Bonaventure Mutubazi, decreed that the four older girls would be given as wives to those militia who had killed a lot-as a prize." [FN78] The fact that this was a military practice implies that it was systematically implemented. The Hutus took only Tutsi women, indicating that these women were specifically targeted because of their ethnic group. The rationale used to show intent to rape or commit acts of sexual violence can also be applied here, since the forced marriages included prolonged rape and sexual violence. [FN79]

Act of Serious Harm. Forced marriage caused "serious bodily or mental harm to members of the group" [FN80] through acts of sexual violence. Forced marriage includes sexual violence in a prolonged manner. The very nature of marriage has sexual connotations, and the intimacy of such a relationship clearly falls within the requirement that a crime be of a sexual nature. [FN81] The coercive element was also ***210** clear-in many cases Hutu men abducted Tusi "wives." During their "marriages," Tutsi women were subjected to various forms of sexual violence, including rape.

In *Akayesu*, the ICTR established that sexual violence, like rape, can be a genocidal act. The ruling does not suffice to cover forced marriage. Although forced marriage arguably may fall within the parameters of sexual violence, sexual violence alone cannot encompass the emotional trauma that many of these women sustained. Therefore, the crime of sexual violence must specify the act of forced marriage. This may be done by either amending the ICTR statute or by judicial decision that recognizes forced marriage as a specific form of sexual

violence. Different forms of assault cannot be weighed against each other to measure trauma; rather, they must be recognized individually to convey their gravity. The psychological trauma from the ongoing torture, rape, and emotional abuse reinforces the need to acknowledge the gravity of the specific act of forced marriage. Although the Tutsi women hated the men to whom they were "married," they also knew that being married to these men kept them alive. One woman who was abducted and forced to marry a Hutu man described her trauma to a Human Rights Watch investigator: "I thought to be taken as a wife is a form of death. Rape is a crime worse than others. There's no death worse than that." [FN82]

Deliberate Physical Destruction. In several ways, forced marriage was a means of bringing about the physical destruction of the entire Tutsi population. By confining women and continually raping them, the Hutu men arguably inflicted conditions to bring about the physical destruction of these women. Considering the information gathered during investigations of rape survivors in Rwanda, it is almost certain that many of the women who were forced into marriages contracted HIV and other sexually transmitted diseases. [FN83] These diseases will inevitably lead to their physical destruction. Many of these women may have been mutilated as other rape survivors were. [FN84] According to Dr. Kelly Askin, an expert on sexual offenses and international law, the requirement that prosecutors prove that conditions of life calculated to bring about a group's physical destruction seems to entail a "material or tangible manifestation of circumstances or situations creating the potential demise of a group." [FN85] She elaborates that "an atmosphere of fear, terror, or depression caused by rape crimes, should ***211** constitute the requisite destructive and physically debilitating 'condition of life.'" [FN86] Furthermore, the *Akayesu* Trial Chamber gave examples of deliberate physical destruction and provided guidelines to assess whether forced marriage falls under this provision. Investigations will have to explore the particular circumstances under which the Hutus held the women captive. In line with Askin's assertion and the *Akayesu* findings, the fear, terror and depression caused by the forced marriage should be sufficient to satisfy this element.

Preventing birth. Many of the rapes during "marriage" resulted in Tutsi women giving birth to Hutu offspring. As Rwanda is a patriarchal society, the children of forced impregnation carry the ethnicity of their fathers and are considered Hutu babies. By "marrying" Hutu men, the Tutsi women were prevented from giving birth to Tutsi babies. [FN87] During the *Akayesu* trial, Witness KK referred to this theory of patrilineal transference of ethnicity as a commonly accepted idea in Rwanda, especially during the genocide. [FN88] By forcing Tutsi women to carry Hutu babies, the perpetrators committed acts of genocide by preventing the birth of Tutsi babies. Particularly in cases of forced marriages that continue to exist today, the "wives" are permanently prevented from giving birth to Tutsi children.

B. Article 3: Crimes Against Humanity

In addition to genocide crimes, the OTP can prosecute forced marriages as a crime against humanity, the elements of which are laid out in Article 3 of the Rwanda Tribunal Statute:

> Persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds: a. Murder;
>
> b. Extermination;
>
> c. Enslavement;
>
> d. Deportation;
>
> e. Imprisonment;

f. Torture;

g. Rape;

h. Persecutions on political, racial and religious grounds;

i. Other Inhumane Acts.

1. Legal Requirements

If forced marriage is not charged as a separate crime under Article 3, the OTP should bring charges under the existing, enumerated crimes against humanity. In ***212** *Akayesu*, the Trial Chamber laid out the following framework for securing a conviction for crimes against humanity. [FN89] The chamber held that the perpetrator must commit the *actus reus* as part of a widespread or systematic attack against a civilian population. [FN90] Further, the accused must commit the *actus reus* on one or more discriminatory grounds, and the act must be inhumane in nature and character, cause great suffering, or cause serious injury to body or to mental or physical health. [FN91] Once the prosecution establishes that the act was committed on these grounds, it must establish that the accused had the requisite intent.

In its judgment in the *Tadic* case, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) laid out two ways of meeting the burden of establishing the intent to commit a widespread or systematic attack. [FN92] By the first method, intent would be met if the perpetrator committed the act as part of a "policy of terror," and particularly if it was "organized and systematic." By the second method, intent would be met if the act was "directed against a multiplicity of victims." [FN93] *Akayesu*, in turn, defines widespread and systematic as "massive, frequent, large scale action carried out collectively with considerable seriousness against a multiplicity of victims." [FN94]

Assuming that the burden of establishing intent were met, the OTP could charge forced marriage through section (i) of Article 3, "[o]ther inhumane acts." In addition, sections (c) "[e]nslavement," (f) "[t]orture," and (g) "[r]ape, could be alleged as concurrent charges.

Other Inhumane Acts. The ICTR statute does not define "other inhumane acts" narrowly; rather, it provides a broad framework within which forced marriages can be placed. In its treatment of "other inhumane acts," the Chamber in the *Musema* decision referred to the Rome Statute of the proposed International Criminal Court, [FN95] which provides: "Other inhumane acts [are acts] of a similar character [to the other specified enumerated acts] intentionally causing great suffering, or serious injury to body or to mental or physical health." [FN96] The decision in Musema proceeded to specify the kinds of acts that would constitute "other inhumane acts," as follows: [FN97]

> ***213** An act or omission will fall within the ambit of "Other Inhumane Acts" ... provided the nature and character of such act or omission is similar in nature, character, gravity and seriousness to the other acts, as enumerated in sub-articles (a) to (h) of Article 3. [FN98] Arguably, if an overriding act, such as forced marriage, encompasses several of the acts enumerated in sections (a) through (h) of Article 3, the overriding act should constitute an "inhumane act." Applying such reasoning in *Akayesu*, the Trial Chamber held that sexual violence falls within the scope of "other inhumane acts" as defined in Article 3. [FN99]

Enslavement. The Prosecutor may also use Article 3(c), "[e]nslavement," as a vehicle for charging crimes of sexual slavery. The OTP has not charged any of its accused with enslavement. A recent ICTY decision, *Prosecutor v. Kunarac* [FN100] considered such a charge against two Bosnian Serb soldiers who had held

captive and sexually abused Muslim women. In a ground breaking ruling, the ICTY Trial Chamber held that the soldiers were guilty of enslavement as a crime against humanity. The chamber defined enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person." [FN101] The chamber further provided factors to consider when determining whether enslavement was committed:

> [c]ontrol of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. [FN102] Several "indications" of enslavement were enumerated in the decision. [FN103] The court specifically held, however, that the "acquisition" or "disposal" of a person is not an essential element of the crime of enslavement. [FN104]

***214** *Torture*. The ICTR Statute considers torture to be a crime against humanity as laid out in Article 3(f). The *Akayesu* chamber defined the essential elements of torture as the intentional infliction of severe physical or mental pain or suffering upon the victim for one or more of the following purposes:

> a. to obtain information or a confession from the victim or a third person; b. to punish the victim or a third person for an act committed or suspected of having been committed by either of them; c. for the purpose of intimidating or coercing the victim or the third person; d. for any reason based on discrimination of any kind. [FN105] The acts committed during the course of forced marriage may fall within the elements of torture. The Trial Chamber in *Akayesu* held rape to be a crime against humanity by comparing it to torture. The Chamber defined rape as a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive." [FN106] It then provided the parameters for determining coercion: "Threats, intimidation, extortion, and other forms of duress, prey on fear or desperation may constitute coercion." [FN107] However, coercion may also be inherent in certain circumstances. The chamber included examples such as "armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal." [FN108] The distinction between rape under the umbrella of the torture provision, versus rape under other provisions, is that rape under the torture provision must have been "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting within an official capacity." [FN109]

2. Application of Article 3 to Forced Marriage

The ideal recourse for prosecution of forced marriage is a separate charge that recognizes the gravity of the crime. A charge of forced marriage would recognize the overall act, not simply the individual elements of the crime. In the absence of such a charge, however, the elements of forced marriage may be charged under Article 3.

Intent. Tutsi women were targeted for forced marriage based on their membership in the Tutsi clan. [FN110] A number of reported cases of forced marriage allude to an established system of forced marriage. [FN111] This meets the multiplicity-of-victims requirement, and also implies an overriding, organized policy. Further evidence is necessary to support the widespread or systematic element. This can be ***215** determined when the OTP investigates the prevalence and similar characteristics of forced marriages.

Enumerated Acts. Forced marriage encompasses several of the individual acts that constitute crimes against humanity. These include enslavement, torture, and rape. Thus, the act of forced marriage is similar in nature to other acts which may be charged under broader provision of "other inhumane acts." Forced marriage goes beyond traditional sexual violence, which has already been established as a crime against humanity.

Enslavement. Forced marriage is analogous to a form of enslavement, namely sexual slavery. Hutu men often locked up their Tutsi "wives" and raped them whenever they wanted. [FN112] Human Rights Watch interviewed a woman who described her captivity: "He only came to rape me, he never brought any food. He would say, 'lie down or I'll kill you.'" [FN113] Although forced marriage is a form of enslavement, the marriage ceremony, or labelling a woman the wife of a Hutu, distinguishes the act of forced marriage. The prosecution may charge forced marriage as a form of enslavement; however, it must specify the act of forced marriage to give formal recognition to the specific suffering of these Tutsi "wives."

The captivity conditions for forced marriages are similar to the sexual enslavement conditions that the Muslim women described in ICTY's *Kunerac* decision. "[T]he girls had to perform household chores," [FN114] the decision stated. "They were frequently assaulted and [t]hey were beaten, threatened, psychologically oppressed and kept in constant fear." [FN115] The Hutu men held Tutsi women in conditions similar to the Muslim women and further added an element of forced intimacy through marriage. Like the defendants in *Kunerac*, Hutu men who forced Tutsi women into marriage should be found guilty of enslavement.

Torture and Rape. Forced marriage usually resulted in some form of torture. [FN116] The Hutu men who married the Tutsi women intentionally inflicted both physical and mental pain through the sexual violence committed during the marriage. One woman stated that her husband constantly threatened to kill her and kept a machete by the bed as he was raping her. [FN117] Torture also encompasses the non-sexual violence directed at these Tutsi women. Often the men who took Tutsi women as their wives had killed their families in front of them. [FN118] By doing so these men intentionally inflicted mental suffering upon these women. The purpose of intentionally inflicting mental suffering may combine two of the elements that the Chamber in *Akayesu* deemed sufficient for a finding of torture: section (c), coercion, and section (d), discrimination. [FN119] The ***216** investigations will likely demonstrate that the women were coerced into marriages, and were chosen to be "wives" on the basis of being Tutsi women. The Prosecutor can charge torture as a result of forced marriage. In the alternative, forced marriage may qualify as a form of torture.

The torture the women endured usually included rape. Often these women were forced to have sex or be killed. Rape may be charged both as a form of torture pursuant to Article 3(f), and as rape pursuant to Article 3(g). In order to meet the requirements of torture, an official must have ordered the rape. The important factor here is that the captors forced the women to have sex with them. Rape often occurred before and during the forced marriage. Indictments should therefore include both rape and forced marriage charges.

C. *Article 4: Violations of common Article 3 and Additional Protocol II to the 1949 Geneva Conventions*

According to the ICTR statute, these violations include, but are not limited to:

> a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation, or any form of corporal punishment; b. Collective punishments; c. Taking of hostages; d. Acts of terrorism; e. Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; f. Pillage; g. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; h. Threats to commit any of the foregoing acts. [FN120]

1. Legal Requirements

In addition to bringing charges under Articles 2 or 3, the OTP may bring charges under Article 4. In order to prove that someone is guilty of violating Article 4, the accused must have committed the crimes in his or her capacity as an official member of the government. [FN121] The Chamber laid out the specifics of the

requirement in *Akayesu*. It held that Akayesu was not guilty of violating common Article 3 because he had not acted as an "official" member of a government. [FN122] The Chamber limited the applicability of Article 4 of the ICTR Statute to "individuals ***217** of all ranks belonging to the armed forces under the military command expected, as public officials or agents or persons otherwise holding public authority or de facto, representing the Government to support or fulfill the war efforts." [FN123] The Trial Chamber in *Musema* announced a different standard, which relied on post-World War II decisions that had imposed "individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict." [FN124] The Chamber then held that the defendant, as director of the Gisovu Tea Factory, could fall in the class of individuals who could be found responsible for violations of Article 4. Nonetheless, it concluded that the prosecution had failed to establish that the defendant had been within this class. [FN125] The Musema Chamber further ruled that the perpetrator must have official status to be guilty of crimes under Article 4.

If the requisite official status were established, the Prosecutor could charge forced marriage as an outrage on personal dignity, in violation of section (e) of Article 4. The examples provided in this provision are "humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault." [FN126] The Trial Chamber in *Musema* addressed each element of Article 4(e) of the ICTR Statute, as follows:

> *a. Humiliating and degrading treatment*: Subjecting victims to treatment designed to subvert their self-regard. [T]hese offences may be regarded as lesser forms of torture; [o]nes in which the motives required for torture would not be required, nor would it be required that the acts be committed under state authority. *b. Rape*: The specific elements of rape are stated in Section 3.3 on Crime against Humanity in the Applicable Law. *c. Indecent Assault*: The accused caused the infliction of pain or injury by an act which was of a sexual nature and inflicted by means of coercion, force, threat or intimidation and was non-consensual. [FN127] Section (e)'s proscription on outrages on personal dignity, including all of the elements laid out by the *Musema* chamber, should provide a valuable tool in prosecuting forced marriages.

Forced marriage may also be analogized to enforced prostitution. This is a controversial comparison, because the term "prostitution" typically implies that a woman has given her body for some sort of monetary compensation. [FN128] Nonetheless, the fact that the prostitution is forced encompasses the element of coercion. During wartime, ***218** the compensation given can be mere survival. [FN129] During the 1971 conflict in Bangladesh, for example, soldiers often withheld food from women who would not submit to sex. [FN130] This was considered to be a form of enforced prostitution. [FN131]

Article 4(a) sets forth additional offenses that the OTP may charge as components of the overriding act of forced marriage. Specifically, Article 4(a) proscribes "[v]iolence to life, health, and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation, or any form of corporal punishment." Threats to commit any of these foregoing acts also are forbidden by dint of Article 4(h). [FN132] The Prosecutor could thus charge the component acts of forced marriage under the ambit of Article 4(a).

The Trial Chamber in *Musema* provided detailed definitions of torture and mutilation. Torture, it wrote, entails "[i]ntentionally inflicting severe pain or suffering, whether physical or mental, on a person for such purposes as obtaining from him or a third person information or a confession." [FN133] Torture also includes "[p]unishing him for an act he or a third person has committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind." [FN134] The pain or suffering must be "inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity." [FN135] Finally, the *Musema* Chamber held that mutilation consists of "causing severe physical

injury or damage to victims." [FN136] Forced marriages will likely often have included both torture and mutilation.

2. Application of Article 4 to Forced Marriage

At present, there is a dearth of information about the nature of forced marriage. Despite evidence on the existence of forced marriage, the OTP has not examined the specific nature of the crime. The evidence that is currently available, combined with the existing case law, provides a starting point for assessing how to prosecute this crime.

Individual Responsibility. It is unclear how a Trial Chamber would deal either with Interahamwe [FN137] members who forced Tutsi women into marriages or with the ***219** military leaders who performed the ceremonies. Although these Hutu men were not necessarily acting as government agents, they were members of the armed forces, and they supported the war efforts of the Interahamwe and Hutu leaders. In *Akayesu*, the ICTR treated a member of the Interahamwe in the same manner it treated a communal police officer; that is, both groups were held to be acting under the accused's authority. The ICTR reasoned that both were acting in the presence and authority of the accused who was the bourgmestre, or mayor. [FN138] However, if the order to take Tutsi women as wives came from a political leader whom the Tribunal decided was not acting under color of authority, the Chamber likely would not find that person guilty under Article 4.

Outrages on Dignity. Forced marriage included "humiliating and degrading treatment," a term that includes rape and indecent assault. [FN139] Rape and indecent assault were typical of forced marriages. [FN140] Beyond these acts, however, the perpetrators' purpose was to subvert the women's self-regard. [FN141] In exchange for submission to marriage, the Hutu men granted the Tutsi women their lives. By performing "wifely" duties, including sex and household chores, the women survived the genocide. The effects of such treatment will have to be explored; however, the very nature of these conditions was inevitably humiliating and degrading for the Tutsi women.

Enforced Prostitution. Enforced prostitution is a way to describe the act of forced marriage; however, it does not address the intimate nature of the captivity conditions. Enforced prostitution encompasses women who were kept in brothels for soldiers. Although enforced prostitution requires forceful acknowledgment from the international community, it cannot subsume the act of forced marriage. Nonetheless, if forced marriage is not charged as a crime in itself, a charge of enforced prostitution would capture the coercive nature of the act. Although the Tutsi women were not paid for the sexual acts the Hutus forced them to perform, they were compensated with their lives. The analogy between the two acts serves to show that since forced marriage is similar to enforced prostitution, it is the type of crime that can qualify as an example of indecent assault as required by Article 4(e).

Violence to the Person. Forced marriage invariably includes "violence to life, health and physical or mental well being." [FN142] The examples cited, torture and mutilation, are discussed above. Similarly, the very nature of the forced marriage included coercion and force. This was done through threats of death. In many cases the threats to the women were overt, but the women also reasonably could have inferred such threats when they watched their "husbands" kill their family members and other Tutsis. The threat that will likely be most prominent is the threat of violence to life; in particular, the threat of murder. In the absence of a forced ***220** marriage charge, each of these components may be charged to encompass the full scope of the crime.

IV. RECOMMENDATIONS

The ICTR, non-governmental organizations, and some day, the ICC, must acknowledge and address the crime of forced marriage. Such action is imperative to provide the women who suffered through forced

marriages with a voice to report their suffering. By voicing their suffering, the women will expose the crime to their local communities and to the international community. In doing so, they will relieve themselves of the secret burden that they carry. No form of redress can erase the trauma the Hutus inflicted on the Tutsi women. Recognition and prosecution may, however, help these women overcome the misplaced shame that survivors of sexual violence often carry. Legal action against the perpetrators enables communities to place the blame for the crime where it belongs. Action must provide both an affirmation of the crime as well as protection of women currently trapped in forced marriages.

The ICTR's Office of the Prosecutor has a duty to investigate and expose the crime of forced marriage. Recognition of forced marriage as a crime would shift the blame and stigma of "marriage" from the Tutsi women onto the perpetrators of the crime. These efforts would send a message to Rwandese nationals, family members, and fellow Tutsi who blame the women for entering the marriages. Bringing a charge of forced marriage would also expose the phenomenon to the international community, and this would give the community an opportunity to speak out and take measures to prevent these crimes from recurring. Recognition and prosecution are possible under the existing statute. Amending the ICTR statute to enumerate forced marriage, however, would show a stronger stance against the crime. Forced marriages were not unique to the Rwanda genocide. They continue in Uganda and Sierra Leone. Until the international community recognizes the existence of forced marriages, there is little hope that this practice will stop.

The International Criminal Court should recognize forced marriage as a crime when it begins operating. The ICC will adjudicate cases alleging war crimes, crimes against humanity, and crimes of genocide. [FN143] Within these categories are the crimes of apartheid and enforced disappearance of persons. [FN144] The future of prosecuting crimes such as forced marriage will lie in its hands. Although the ICC Statute has already been drafted and the elements of the crimes have been formulated, the statute may be amended. It should be amended to include forced marriage as a specific crime. In doing so, the elements of forced marriage should provide a clear definition that addresses the formal ceremonies and assumed marriages. If the elements of crimes included such a definition, the combatants would have no doubt that the Prosecutor of the ICC stood ready to punish perpetrators of forced marriage. ***221** Alternatively, the Prosecutor may charge the crime of forced marriage within the existing statute using the component crimes in a similar way to the one outlined in this article. ICC recognition of the crime of forced marriage would place pressure on its own OTP to investigate and charge these crimes with the same weight it charges other war crimes.

Non-governmental organizations also can provide a support system for women who are victims of forced marriages. Many women continue to live with their "husbands." [FN145] They do so in order to survive in face of economic pressures, familial and community rejection, and fear of future violence. Non-governmental organizations should lobby for national laws to provide women equal status, particularly in countries like Rwanda where women have few legal and economic rights. On an international level, non-governmental organizations can advocate amending the ICC and ICTR statutes. These organizations also can create safe shelters where women would be protected from future attacks. Finally, non-governmental organizations should use local nationals to educate communities on the trauma that victims of sexual violence suffer. Greater understanding of these experiences would help combat the familial and community misconceptions regarding the women's collaboration with the enemy. Education on these issues will also help these survivors of forced marriage to overcome their guilt and self-blame.

CONCLUSION

No one has yet documented the number of forced marriages that took place during the 1994 genocide in Rwanda. Nor has the impact that the crime had on Tutsi women and their communities been assessed

adequately. Initial reports suggest large numbers of forced marriages. [FN146] The mandate of International Criminal Tribunal for Rwanda calls for the tribunal to investigate and charge egregious crimes that were committed during the genocide. Forced marriage falls within that mandate; therefore, the OTP must investigate, charge, prosecute, and punish those who committed the crime. The mechanisms for trying these crimes are already in place under Articles 2, 3, and 4 of the ICTR Statute. Although the Articles fall short of a comprehensive approach and specific recognition of forced marriage, they provide at least some legal recourse. The time has come to utilize these mechanisms to bring justice to the Tutsi women and their families who suffered at the hands of their Hutu "husbands."

[FNa1]. Associate Legal Officer, UN International Criminal Tribunal for the former Yugoslavia. The author would like to thank Professor Diane Amann for her support and encouragement during the writing and publishing of this article. Thanks also to Dr. Kelly Askin and Erin Webster Main. The views expressed are solely those of the author and are not attributable to the UN, the ICTY or the Office of the Prosecutor.

[FN1]. Rwanda is generally composed of three ethnic groups: Hutu, Tutsi and Twa. The Hutu are the majority ethnic group who the Tutsi had ruled in past years. The Twa is the distinct minority. Rwanda has an estimated population of seven million. ALISON DES FORGES, HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 1 (1999).

[FN2]. Id.

[FN3]. Id.

[FN4]. The Security Council established the ICTR on November 8, 1994. U.N. Doc. S/RES/955 (1994).

[FN5]. For example, the indictment against Jean-Paul Akayesu was amended to include rape after a witness testified about sexual assault. This amendment resulted from pressure from Judge Pillay and human rights groups. Diane Marie Amann, *Prosecutor v. Akayesu*, 93 AM. J. INT'LL. 195 (1999).

[FN6]. Prosecutor v. Jean-Paul Akayesu, Judgment, No. ICTR-96-4-T (Sept. 2, 1998), http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm.

[FN7]. BINAIFER NOWROJEE, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH 18 (1996) at 24, *citing* United Nations, *Report on the Situation of Human Rights in Rwanda submitted by Mr. Rene Degni-Segui, Special Rapporteur on the Commission of Human Rights*, E/CN.4/1996/98, at 7 (1996). ("[R]ape was the rule and its absence the exception.")

[FN8]. Id.; *see also* Elizabeth Royte, *The Outcasts*, N.Y. TIMES MAG., Jan. 19, 1997, at 37.

[FN9]. See NOWROJEE, *supra* note 6, at 18.

[FN10]. It was also due in part to a propaganda campaign which targeted Tutsi women. Jane Goodwin, *Rwanda: Justice Denied*, ON THE ISSUES: THE PROGRESSIVE WOMAN'S Q., Oct. 31, 1997, vol. 6, no. 4, http://mosaic.echonyc.com/~onissues/f97rwanda.html (on file with the U.C. DAVIS J. INT'L L. & POL'Y) ("The gender violence was encouraged in part by propaganda that described Tutsi women as being tall and lithe, with Caucasian features. 'They were white women in black skin, who considered themselves too good to sleep with Hutu men,' it was frequently said. 'Because of their arrogance they need to be humiliated.'")

[FN11]. See NOWROJEE, *supra* note 6, at 18.

[FN12]. *Id.*

[FN13]. *Id.* at 1.

[FN14]. Id. at 3.

[FN15]. Sarnata Reynolds, *Deterring and Preventing Rape and Sexual Slavery During Periods of Armed Conflict*, 16 LAW & INEQ. 601, 606-607 (1998) (noting that "rape is an effective method of isolating and humiliating women and men of the same culture. This isolation achieves effective genocide as it impregnates women with the enemy's issue, and, in some cultures, may mark women as 'spoiled' and unsuitable for traditional marriage and family life.")

[FN16]. *Akayesu.*

[FN17]. *Id.*

[FN18]. A bourgemestre is similar to the mayor of a commune. *See Akayesu* atparas. 57-77. "In Rwanda, the bourgemestre is the most powerful figure in the commune. His *de facto* authority in the area is significantly greater than that which is conferred upon him *de jure*." *Id.* at 77.

[FN19]. *Id.* at para. 56.

[FN20]. *Id.* at para. 6 (Indictment para. 12A).

[FN21]. *Id.* at para. 449.

[FN22]. *Id.* at para. 452 ("[T]he Chamber finds beyond a reasonable doubt that the accused had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal, and that women were being taken away from the bureau communal and sexually violated.")

[FN23]. *Id.* at para. 452 (noting that before the Interahamwe took away Chantal, a woman whom the accused forced the Interahamwe to undress and parade around, he told them to, "make sure that you sleep with this girl." The chamber found this to be sufficient evidence that, "the Accused ordered and instigated sexual violence.")

[FN24]. The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. *Akayesu* at para. 688.

[FN25]. *Akayesu.*

[FN26]. *Id.* at para. 688.

[FN27]. *Id.*

[FN28]. Beth Stephens, *Humanitarian Law and Gender Violence: An end to centuries of neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87, 88 ("The utilization of rape and other violence against women during times of war has been the accepted rule. [W]omen have been raped, intentionally, as a tactic of war, in virtually all wars, by almost all military forces.")

[FN29]. Center for Reproductive Law and Policy (CRLP), Reproductive Freedom and Human Rights-*Rape and*

Forced Pregnancy in War and Conflict Situations, Apr. 1996, at 1. ("For millennia, rape, sexual slavery, and forced pregnancy have been used as weapons of war.")

[FN30]. NOWROJEE, *supra* note 5 at 58.

[FN31]. Forced marriages also encompassed situations in which the actual ceremony was not performed. For the purposes of this paper, the term "forced marriage" includes both situations in which a ceremony was performed as well as instances in which a Hutu man took a Tutsi woman and referred to her as his wife.

[FN32]. *Id.*

[FN33]. DES FORGES, *supra* note 1, at 4 ("By early 1992, Habyarimana had begun providing military training to the youth of his party, who were thus transformed into the militia known as the Interahamwe (Those Who Stand Together or Those Who Attack Together). Massacres of Tutsi and other crimes by the Interahamwe went unpunished, as did some attacks by other groups, thus fostering the sense that violence for political ends was 'normal.'")

[FN34]. NOWROJEE, *supra* note 6, at 59 ("I thought to be taken as a wife is a form of death. Rape is a crime worse than others. There's no death worse than that.")

[FN35]. *Id.* at 59. One woman described how her husband expected her to cook for him.

[FN36]. *See* Royte, *supra* note 7, at 38.

[FN37]. *Id.*

[FN38]. *Id.* at 39.

[FN39]. *Akayesu* at para. 435.

[FN40]. *Id.* at para. 436.

[FN41]. Kathy Chenault, *Misery Intensifies for Rwandan Women:Rape Epidemic Reported Amid Upheaval*, DALLAS MORNING NEWS, Apr. 7, 1995, available at 1995 WL 7484622.

[FN42]. NOWROJEE, *supra* note 5, at 59.

[FN43]. *Akayesu* atpara. 436.

[FN44]. *Id.* at para. 688.

[FN45]. *See* Amnesty International, *"Breaking God's Commands": The Destruction of Childhood by the Lord's Resistance Army* (1997), http:// www.amnesty.it/ailib/aipub/1997/AFR/15900197.htm (on file with the U.C. Davis J. Int'l L. & Pol'y).

[FN46]. *Id.*

[FN47]. *Id.*

[FN48]. *See* Amnesty International, *Sierra Leone: Rape and other forms of sexual violence against girls and women*, http:// www.web.amnesty.org/ai/nsf/index/AFR510352000 (on file with the U.C. Davis J. Int'l L. &

Pol'y).

[FN49]. *Id.*

[FN50]. *Id.*

[FN51]. *See generally* NOWROJEE, *supra* note 6.

[FN52]. AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR AND DEFIANCE 778 (1995).

[FN53]. Chenault, *supra* note 40.

[FN54]. *See Akayesu* atpara. 731. ("Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.")

[FN55]. Common Article 3 is the provision of the Geneva Conventions that applies to conflicts which are "not of an international character." Article 3 requires the contracting parties to treat "humanely" all persons who are "taking no active part in hostilities." It also prohibits "any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria." Common Article 3 explicitly prohibits:

a. violence to life and person, in particular all kinds of mutilation, cruel treatment and torture;
b. taking of hostages;
c. outrages against personal dignity, in particular, humiliating and degrading treatment;
d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized peoples.

[FN56]. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature June 8, 1977, 1125 U.N.T.S.

[FN57]. Statute for the International Tribunal for Rwanda, SC Res. 955, annex (Nov. 8, 1994), *reprinted in* 33 I.L.M 1602 (1994) [hereinafter ICTR Statute].

[FN58]. Akayesu at para. 468.

[FN59]. The chamber stated that the following criteria must be met in order to cumulatively charge a person for crimes stemming from the same act: (1) the offences must have different elements; or (2) the provisions creating the offenses protect different interests; or (3) it is necessary to record a conviction of both offences in order to fully describe what the accused did. However, the chamber found that it is not justifiable to convict an accused of two offences in relations to the same set of facts where one offence is a lesser included offence than the other. *Id.*

[FN60]. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. The Genocide Convention established genocide as a crime under international law in time of peace or war.

[FN61]. ICTR Statute, *supra* note 56, at art. 2. This paper only covers the elements of genocide. Issues of individual responsibility, conspiracy, complicity, and incitement are beyond the scope of this paper.

[FN62]. Prosecutor v. Musema, Judgment, No. ICTR-96-13-T, para. 164 (Jan. 26, 2000).

[FN63]. Akayesu atpara. 731.

[FN64]. *Id.*

[FN65]. *Id.*

[FN66]. *Musema* at para. 164 (Jan. 26, 2000).

[FN67]. *Id.* at para. 156.

[FN68]. *Akayesu* at para. 688.

[FN69]. *Id.* at para. 688.

[FN70]. *Id.* at para. 505.

[FN71]. *Id.*

[FN72]. ICTR Statute, *supra* note 56, at art. 2(2)(d).

[FN73]. *Id.*

[FN74]. *Akayesu* at para. 507.

[FN75]. *Akayesu* at para. 507.

[FN76]. NOWROJEE, *supra* note 6, at 1.

[FN77]. *Id.* at 59.

[FN78]. *Id.*

[FN79]. Establishing intent in this case will most likely become an issue of command responsibility. The elements of this charge are beyond the scope of this paper.

[FN80]. ICTR Statute, *supra* note 56, at art. 2(2)(b).

[FN81]. *See infra* Part III(A)(1) and n.35.

[FN82]. NOWROJEE, *supra* note 6, at 59.

[FN83]. Goodwin, *supra* note 9; Center for Reproductive Law and Policy (CRLP), *supra* note 28, at 2; NOWROJEE, *supra* note 6, at 3 ("According to Rwandan doctors, the most common problem they have encountered among raped women who have sought medical treatment has been sexually transmitted diseases, including HIV/AIDS.")

[FN84]. NOWROJEE, *supra* note 6, at 62. According to this report, often the rape of women was accompanied or followed by mutilation of the sexual organs or of features held to be characteristic of the Tutsi ethnic group. Sexual mutilations included the pouring of boiling water into the vagina; the opening of the womb to cut out an unborn child before killing the mother; cutting off breasts; slashing the pelvis area; and the mutilation of vaginas.

[FN85]. Kelly Askin, *The International Criminal Tribunal for Rwanda and Its Treatment of Crimes Against Women, in* INTERNATIONAL HUMANITARIAN LAW: ORIGINS, CHALLENGES & PROSPECS (John Carrey & John Pritchard eds., forthcoming 2001) (manuscript at 43, on file with author).

[FN86]. *Id.*

[FN87]. ICTR Statute, *supra* note 56, at art. 2(2)(d).

[FN88]. Akayesu at para. 429 ("Witness KK said that Tutsi women married to Hutu men were left alone because it is that these women deliver Hutu babies.")

[FN89]. *Id.* at para. 579 ("The Chamber considers that it is a prerequisite that the act must be committed as part of a widespread or systematic attack, not just a random act of violence. [It] need not be both.")

[FN90]. *Id.* at para. 582.

[FN91]. *Musema*, at para. 201.

[FN92]. Prosecutor v. Tadic, Judgment, No. IT-94-T (May 7, 1997), para. 648.

[FN93]. *Id.*

[FN94]. *Akayesu* at para. 580.

[FN95]. Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) [hereinafter ICC Statute].

[FN96]. *Musema* at para. 231 (bracketed material supplied by ICTR).

[FN97]. ICTR Statute, *supra* note 56, at art. 3(i).

[FN98]. *Musema* at para. 232.

[FN99]. *Akayesu* at para. 688.

[FN100]. Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Judgment, No. IT-96-23T & IT-96-23/1-T, www.un.org/icty/foca/trialc2/judgement/kun-tj010222e.pdf (on file with the U.C. Davis J.Int'lL. & Pol'y).

[FN101]. *Id.* at para 539.

[FN102]. *Id.* at para 543.

[FN103]. *Id.* at para 542. (noting that "indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat of use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions ... exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical

hardship; sex; prostitution; and human trafficking.")

[FN104]. *Id.* at para 542.

[FN105]. *Akayesu* at para. 594.

[FN106]. *Id.* at para. 598.

[FN107]. *Id.* at para. 688.

[FN108]. *Id.*

[FN109]. Id. at para. 597.

[FN110]. *See infra* Part III(A)(2).

[FN111]. NOWROJEE, *supra* note 6, at 56-62.

[FN112]. *Id.* at 58.

[FN113]. *Id.*

[FN114]. *Kunurac* at para 747.

[FN115]. *Id.*

[FN116]. NOWROJEE, *supra* note 6, at 56-62.

[FN117]. *Id.*

[FN118]. *Id.* at 61 ("The other militia told him that he had to kill her brothers in her presence before taking her. After killing her three brothers, he took her home.")

[FN119]. *See Akayesu* at para. 594, *quoted supra* §III (B)(1).

[FN120]. ICTR Statute, *supra* note 56, at art. 4.

[FN121]. Additional Protocol II of the Geneva Conventions, Art. 1.

[FN122]. *Akayesu* at para. 632. This holding has been appealed by the Prosecution. Akayesu, The Prosecutor's Appellant Brief July 10, 2000.

[FN123]. *Id.* at para. 631.

[FN124]. *Musema* at para. 274.

[FN125]. *Id.* at para. 275, §6.17.

[FN126]. ICTR Statute, *supra* note 56, at art. 4(e).

[FN127]. *Musema* at para. 285.

[FN128]. Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT'L L.J. 163, 194-195 (1994).

[FN129]. *See generally* Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 NOTRE DAME L. REV. 845 (1995).

[FN130]. *Id.* at 846, *quoting* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 115 (1975): "As the months wore on and the captives' spirit broken, the soldiers devised a simple quid pro quo. They withheld the daily ration of food until the girls had submitted to the full quota [of seven to ten men daily]."

[FN131]. *Id.*

[FN132]. ICTR Statute, *supra* note 56, at art. 4(a), (h).

[FN133]. *Musema* at para. 285.

[FN134]. *Id.*

[FN135]. *Id.*

[FN136]. *Id.*

[FN137]. Des Forges, *supra* note 1, at 4.

[FN138]. *Akayesu* at para. 679.

[FN139]. ICTR Statute, *supra* note 56, at art. 4(e).

[FN140]. NOWROJEE, *supra* note 6, at 56-61.

[FN141]. *Id.* at 60.

[FN142]. ICTR Statute, *supra* note 56, at art. 4(a).

[FN143]. *See* ICC Statute, *supra* note 94, at arts. 7(1)-(3).

[FN144]. *Id.*

[FN145]. NOWROJEE, *supra* note 6, at 61.

[FN146]. *Id.* at 56-62; African Rights, *supra* note 51, at 778 (1995); and Chenault, *supra* note 40.
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BY FORCE OF ARMS: RAPE, WAR AND MILITARY CULTURE

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*651 BY **FORCE** OF **ARMS**: RAPE, WAR AND MILITARY CULTURE

Madeline Morris [FNd1]

C1-2Table of Contents

*652 INTRODUCTION

Frequently throughout the history of warfare, widespread rape has been associated with war. [FN1] It has been alleged in recent years that rape and sexual assault by military personnel in peacetime also constitute problems of substantial magnitude. [FN2] This Article seeks to examine the relationship between sexual assault, combat, and military organizations. Toward that end, the Article first compares military rape rates with civilian rates in peace as well as in war. In the light of those crime-rate comparisons, the Article then offers policy analyses and proposals with a view to reducing the incidence of rape by military personnel.

*653 The research conducted for this Article indicates that the peacetime rates of rape [FN3] by American military personnel [FN4] are actually lower (controlling for age and gender) than civilian rates. However, the data also indicate that peacetime military rape rates are diminished from civilian rates far less than are military rates of other violent crime. A similar phenomenon is also reflected in the wartime data collected: Military rape rates in the combat theater studied climbed to several times civilian rates, while military rates of other violent crime were roughly equivalent to civilian rates. Thus, in both the wartime and the peacetime contexts studied, a rape differential exists: The ratio of military rape rates to civilian rape rates is substantially larger than the ratio of military rates to civilian rates of other violent crime.

The existence of a military rape differential in war and in peace suggests that it may be possible to reduce military rape rates, perhaps bringing them into line with military rates of other violent crime. This Article considers whether and how such a reduction in military rape rates might be achieved.

Part I examines peacetime and wartime data, which both reflect the rape differential. Part II then considers means of reducing military rape rates. It considers possible underlying causes of the rape differential and appropriate responses to those underlying factors. In particular, Section II(B) explores the hypothesis that the rape differential may result in part from certain aspects of military culture: Military organizations are composed of bonded groups of individuals who come to share a set of group norms--a culture. As is discussed, the norms currently prevalent within military organizations include a configuration of norms regarding masculinity, sexuality, and women that have been found to be conducive to rape. To the extent that such military cultural factors contribute*654 to the military rape differential, changing those normative aspects of military culture may foster a reduction in the incidence of rape by military personnel.

Part III attempts to identify policy choices that would facilitate the contemplated changes in the gender and sexual culture of the military. Contemplating such a fundamental change in military culture gives rise to a critical question: Can the gender and sexual norms of military organizations be changed without reducing military effectiveness? Or, put differently, are the norms in question--the gender culture of the military--integrally related to military effectiveness? That question is addressed in Part IV, which explores the functions of the gender culture of the military and considers the implications for military effectiveness of making changes in that culture. In identifying the existence and likely contributing causes of a rape differential within military organizations, the Article points to a set of previously unexamined considerations that should be taken into account in shaping military law and policy.

I. RAPE BY MILITARY PERSONNEL

Rape by military personnel occurs in the two very different contexts of war and peace. It is commonly

assumed that the pervasiveness of rape in war results in some way from the nature of war itself: "War is hell," and one of its concomitants is rape. [FN5] But ***656** this "c'est la guerre" view of rape in war may in fact hide more than it reveals. As is examined below, influences particular to military populations appear to affect the incidence of rape by military personnel in peacetime as well as in war.

To distinguish the effects of war on rape rates from the effects of military service on rape rates, we must examine not only rates of rape in war but also rates of rape by military personnel in the peacetime context. For that reason, this section compares the rape incidence of military and civilian populations using peacetime as well as wartime data.

A. *The Rape Differential*

Rape, sexual assault, and sexual harassment by military personnel has been a focus of increasing concern in recent years. Some claim that sexual assault, including rape, within the United States military is a problem of substantial proportions; [FN6] and some argue that sexual assault may be more pervasive among military personnel than among civilians. [FN7] Several witnesses at Senate hearings in 1992 alleged that the extent of sexual assault within the U.S. military is significantly underestimated because reporting is informally discouraged and because reports that are made are frequently swept aside. [FN8]

***657** Many have pointed to the events at the 1991 Tailhook convention as illustrative of a broader problem of sexual assault within the military. At that convention of Navy and Marine aviators, at least ninety people (eighty-three women and seven men) were sexually assaulted one or more times by U.S. military men. [FN9] The Department of Defense Inspector General's report on Tailhook '91 makes clear that these events were not an aberration. As the report states, "Our investigation disclosed that gauntlet-related indecent assaults dated back to at least Tailhook 88." [FN10] It has been widely suggested that the incidents of sexual assault at the 1991 Tailhook convention represent the small visible tip of an underlying iceberg of military sexual assault.

In fact, however, little is known about the actual extent of sexual assault by military personnel because little data on this issue has been collected. [FN11] A large-scale study of active duty military personnel conducted by the Defense Manpower Data Center in 1988 found that 5% of the female respondents and 1% of the ***658** male respondents stated that they had been the victims of actual or attempted rape or sexual assault during the previous year. [FN12] While that study indicates that the majority of perpetrators of all forms of sexual harassment reported were other military personnel, [FN13] the specific ratio of military to civilian perpetrators of rape/sexual assault is not stated. Because the purpose of the study was to measure *victimization* of military personnel, it did not seek to estimate rates of rape/sexual assault *perpetration* by military personnel. Thus, it did not examine, for example, rape/sexual assault of civilians, American or otherwise, by military personnel. [FN14]

In sum, rather little is known about the extent of rape or sexual assault by military personnel. This Article attempts to make some meaningful comparison of the rape incidence of military and civilian populations. Toward that end, this study compares the rates of offenses committed by male U.S. military personnel [FN15] and civilians in peacetime and during World War II (WWII). [FN16]

***659** As noted earlier, this Article focuses on the American military as a case study. [FN17] It is anticipated that the observations made may be in part generalizable to the armed forces of other countries. Further research will be required, however, to determine the actual extent of generalizability.

To provide a context in which the rape data may be viewed more meaningfully, data on violent crimes other than rape will be considered together with the rape rate comparisons. Thus, the crimes considered in both the peacetime and wartime studies are murder/nonnegligent manslaughter ("murder/nn.m"), aggravated assault, and

forcible rape. [FN18] The raw data for both the peacetime and wartime studies are drawn from the FBI's Uniform Crime Reports for civilian crime statistics and from the archives of each military service for military crime statistics. All crime rate comparisons are for males only, and control for the age structures of the civilian and military populations. [FN19]

1. *The Peacetime Study.* The results of the peacetime (1987-92) [FN20] study are as follows. First, the rates of violent crime are *lower,* controlling for age, among the male military than among the male civilian population. This is true of rape as well as of the other violent crimes studied. Second, however, the diminution***660** in military rape rates from civilian rape rates is less--*several times less*--than the diminution in the rates of the other violent crimes. In other words, military rape rates are reduced far less from civilian levels than are military rates of other violent crimes.

During the period 1987-1992, the military services' murder/nn.m, aggravated assault, and rape rates compared, on yearly average, [FN21] with civilian rates as shown in Table I. [FN22] The figures shown in the Table are military rates for each crime as a percentage of civilian rates for that crime (controlling for age and gender).

TABLE I

1987-1992 AVERAGE YEARLY MILITARY RATES OF MURDER/NN.M, AGGRAVATED ASSAULT, AND RAPE AS A PERCENTAGE OF U.S. MALE CIVILIAN RATES (controlling for age)FN [FN23]

	Army	Navy	Marine Corps	Air Force
Murder/nn.m	20	7FN [FN24]	13	5
Aggravated Assault	18	4	4	2
Rape	47	19	27	20

***661** It thus appears that active duty military populations' rates of murder/nn.m and aggravated assault are substantially lower than civilian rates of those crimes, but that the diminution in military *rape* rates from civilian

levels is much less significant. [FN25] To simplify presentation, I have combined the murder/nn.m and aggravated assault data into an index of "other-violent-crime." [FN26] Military populations' diminution of other-violent-crime rates from civilian levels can now usefully be compared with their diminution of rape rates from civilian levels.

Table III shows the extent to which military diminution in rates of other violent crime from civilian levels exceeds military diminution in rape rates from civilian levels.

TABLE III

THE
PEACETIME
RAPE

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FN [FN27]

	Army	Navy	Marine Corps	Air Force
Other-Violent-Crime Ratio[FN] [FN28]	.18	.04	.05	.02
Rape Ratio[FN] [FN29]	.47	.19	.20	.20
Rape Differential[FN] [FN30]	**2.62**	**4.95**	**5.63**	**10.74**

***662** Regression analyses performed on these peacetime data determined that, for each military service, the difference between the diminution of rape and diminution of other violent crime was statistically significant. [FN31] Thus, although the particulars differ among the different services, [FN32] all of the services show the same overall pattern of diminishing all violent crime rates, including rape, from civilian levels, but diminishing rape rates significantly *less* than the rates of other violent crime. [FN33]

***664** The fact that peacetime military rape rates are diminished much less from civilian levels than are military rates of other violent crime raises the question of whether peacetime military rape rates may be reduced to levels commensurate with the low peacetime military rates of other violent crime. Before examining possible approaches to reducing military rape rates, however, we shall examine military rates of rape and other violent crime in the wartime context.

2. *The Wartime Study.* Study of military and civilian crime rates during the WWII period provides a measurement of rape incidence in the combat context. The results of the WWII study suggest that a differential between military rates of rape and of other violent crime exists in war as well as in peace. In the war context, however, rather than military rape rates being less *diminished* from civilian levels than military rates of other violent crime, military rape rates in the combat theater studied rose far *above* civilian levels, while rates of other violent crime did not.

Comparisons with U.S. male civilian rape rates were made for U.S. Army [FN34] forces in the continental European Theater of Operations (ETO). [FN35] As in the peacetime study, all crime rate comparisons***665** are for males only and control for the age structures of the civilian and military populations. [FN36]

Because the circumstances of troops in the ETO varied from one phase of the war to another, the story of crime patterns in the ETO must be told chronologically over the course of the war. From the D-Day landing at Normandy (June 6, 1944) until late July, the Allied forces in the ETO were engaged in intense fighting--first on the beachhead and then for protracted weeks in the hedgerows of Normandy. [FN37] During that period, fighting was heavy, and troops' contact with civilians was extremely limited. In the words of Charles Whiting, "That summer, the weary, dirty, unshaven and very often frightened infantrymen lived, fought and died in those dugouts carved into the sides of the hedgerows." [FN38] "The tankers fought, cooked, slept, drank, and in many cases died in their 30-ton 400 hp-engined Shermans." [FN39] "[The troops] existed in a strange limbo, a world

cut off completely from civilian life, either back home or here in France." [FN40] In light of the intensive combat activity and minimal contact with civilians, it is not surprising that rape rates were very low during this period. Aggravated assault rates also were low, and murder/nn.m rates were minimal. [FN41]

The situation changed entirely during the two breakouts in the ETO, in France during August and September 1944 and in ***666** Germany during March and April 1945. During the breakouts, forward troop movement was fast because new ground was quickly occupied, [FN42] and fighting was lighter for most units than during the Normandy period or the winter period between breakouts. [FN43] Most importantly, there was extensive contact with civilians both as troops on duty liberated one village after another, leaving rear echelon personnel among the civilians, and as troops on leave "went to town." [FN44]

During the two breakout periods, the incidence of violent crime (murder/nn.m, aggravated assault, and rape) among ETO troops rose dramatically. [FN45] But the ETO rape rates increased *far* more than the rates of aggravated assault or murder/nn.m. Indeed, during the French breakout period, murder and aggravated assault rates for ETO troops remained below U.S. civilian rates, whereas ETO rape rates far surpassed U.S. civilian rates.

Specifically, during the breakout across France in August and September 1944, the average monthly ETO murder/nn.m rate was about half (47%) of the U.S. civilian rate, and the average monthly ETO aggravated assault rate was about one-sixth (18%) of the U.S. civilian rate. During the same period, the ETO rape rate was nearly three times (260%) the U.S. civilian rate. [FN46]

Describing the context in which rape of French women by American troops occurred, the official history of the Office of the Judge Advocate General for the ETO states:

> ***667** The French people welcomed their liberators, often giving them drink to show their appreciation. They spoke a strange tongue. The invading soldiers came fully armed. The people were grateful, but they had little or no protection. Many soldiers had the notion that French women generally were both attractive and free with their love. At any rate, whatever the operative factors, the number of violent sex crimes enormously increased with the arrival of our troops in France. Generally speaking, the rape cases of the French Phase fell into one broad pattern characterized by violence, though of different degrees. The use of firearms was common in perpetrating the offense. [FN47] One may find it dubious that the rates of murder/nn.m and aggravated assault in a combat theater would be lower than civilian rates. It seems likely that all three of the crimes examined in the present study--murder/nn.m, aggravated assault, and rape--would be substantially undercounted in official combat-theater statistics because of underreporting, informal handling, and slippages in central collection of crime records.

Undercounting presumably would be most extreme in cases involving non-American victims--civilian or prisoner--who might be less inclined or able to report crimes to American authorities, [FN48] and whose victimization might often be taken less seriously by American authorities. Indeed, the ETO Judge Advocate General's Report states that, in general courts martial of American troops for murder in the ETO, 48% of the victims were Americans, while only 27% of the victims were German (and 14% were French). [FN49] Such statistics may well reflect that murders of Americans were handled in such a way as to show up disproportionately in official murder statistics. [FN50]

***668** Undercounting of aggravated assault may have been even greater than undercounting of murder because assault is a less serious crime and, therefore, more likely to go unreported or to be handled informally. Rape is particularly likely to have been undercounted because it is less serious than murder, [FN51] it is

reputedly the most underreported violent crime even in the domestic context, [FN52] and it was perpetrated in the ETO virtually exclusively against non-Americans. [FN53]

German rape complainants would have faced a particularly difficult situation. In a section entitled "Mitigating Circumstances," the ETO Judge Advocate General's Report states:

> The unusual circumstances surrounding the cases of alleged rape under Article of War 92 where the complainants have been German nationals have presented a special and difficult clemency situation.... [T]his office, as well as the Staff Judge Advocates of the Theater, have exerted unremitting efforts to see justice done for the accused in these cases. An example of the results from such efforts is seen in [several cases] where, based on post trial investigation, the victimized accused had their convictions set aside. [FN54] ***669** In addition, the ETO Judge Advocate General's Report specifically observes with regard to rape that "an indeterminable number of [rape reports] were investigated by agencies other than [the Criminal Investigation Branch of the Provost Marshal's office], such as investigating officers appointed by commanders." [FN55] Reports handled by agencies other than the Criminal Investigations Branch of the Provost Marshal's office would not appear in official statistics of investigations.

Thus, in considering all of the ETO crime figures, we must bear in mind that they probably reflect substantial undercounting. There is no reason to believe, however, that rape statistics are more complete than those for murder or aggravated assault. (Indeed, as indicated, there are reasons to draw the opposite conclusion.) Therefore, even while acknowledging counting problems, we may still place some reliance on the official counts for purposes of comparing the *relative* patterns or incidence of the three offenses in the ETO.

The relative crime rate pattern during the breakout into Germany was very similar to the pattern during the breakout across France. The rates of all three types of crimes examined rose to even higher levels during the German breakout than during the French breakout. But the *relative* relationship of the three crime rates was strikingly similar in the two periods: In each instance, the increase in rape was far greater than the increase in either murder/nn.m or aggravated assault. During the period of the breakout across Germany (March and April 1945), the average monthly ETO murder/nn.m rate was essentially equivalent (102%) to the U.S. civilian rate, and the average monthly ETO aggravated assault rate was about one-quarter (27%) of the civilian rate. During the same period, the ETO rape rate was nearly four times (366%) the civilian rate. [FN56] As summarized in the Army's official history of the ETO Criminal Investigation Branch, "Crimes of violence, meanwhile, after holding more or less steady during most of the ***670** year, skyrocketed to tremendous proportions during the final drive through Germany in March and April 1945.... Predominant among the crimes of violence, especially during March and April, was rape ...." [FN57]

Describing the context in which rape of German women by American troops occurred, the official history of the Office of the Judge Advocate General for the ETO states:

> The pattern of German rape cases was quickly discernible. In the typical case, one or more armed soldiers entered a German house, either by force or by stratagem (such as a pretense of searching for German soldiers), and engaged in sexual intercourse with one or more of the female occupants. Sometimes the act was accomplished through the application of direct force, at other times by submission resulting from the occupants' fear for their lives. [FN58] Thus, during both breakout periods in the ETO, elevations in rape rates far exceeded elevations in rates of other violent crime. [FN59]

***671** During the period between breakouts (October 1944 through February 1945), U.S. troops in the ETO were fighting under conditions of strong resistance, slow gains, extreme cold and high snow, [FN60] and most

forward troops had little contact with civilians. [FN61] Not surprisingly, ETO rape rates during that period were very low compared with the breakout periods (on monthly average about half (54%) of the U.S. civilian rate). For this period, the ETO average monthly murder/nn.m rate was about two-thirds (64%) of the U.S. civilian rate, and the aggravated assault rate was about one-sixth (16%) of the U.S. civilian rate. [FN62] Figure I shows in graphic form the pattern of crime rates in the ETO.

***672** Not only were ETO rape rates much more highly elevated than rates of other violent crime during the breakout periods in the ETO, but the rape rates of U.S. military personnel in occupied Germany continued to be disproportionately elevated long after the end of the war. As stated in the Theater Provost Marshal's Report of Operations for July through September 1946 (over a year after V-E Day): "One of the lessons learned in regards [sic] to specific crimes was that the appalling continuation of rape here in Germany can be said to have been largely influenced by war psychology and propaganda on both sides. Time alone will be able to erase this curse." [FN63]

These data from the World War II period suggest that rape is not just "one atrocity among others," which results, like other violent***673** crime, from the character of combat. Rather, the pattern of rape in war (at least in the ETO of WWII) differs from that of murder/nn.m and aggravated assault, with the rape increase being starkly disproportionate to the increase of other violent crime in the peak crime periods and also after the cessation of hostilities. The differences between patterns of rape rates and other violent crime rates in the ETO are of sufficient magnitude to suggest--even accounting for inevitable distortions from reporting, processing, and record-keeping practices--that rape in war is a crime influenced by dynamics at least in part distinct from those influencing other violent crimes in war. If "war factors" such as diminished deterrents, foreign lands, chaos, violence, and terror [FN64] accounted for violent crimes in war homogeneously, then we would expect the rates of the various crimes such as rape, murder/nn.m, and aggravated assault to follow similar patterns. But they do not. Rather, rape is distinct from other crimes of violence in war, as is reflected in its far *greater* increase during peak-violent-crime periods.

A differential between military rape rates and rates of other violent crime thus exists both in peace and in war. In peacetime, military rape rates are reduced significantly less from civilian levels than are rates of other violent crime. In wartime, military rape rates are increased far more above civilian levels than are rates of other violent crime.

***674** II. THE RAPE DIFFERENTIAL: CAUSES AND CULTURE

A. *Causes*

The existence of the military rape differential suggests that it may be possible to reduce military rape rates in peace and in war, perhaps to levels commensurate with military rates of other violent crimes. This section considers *why* military rape rates should increase so disproportionately to other violent crime rates in war, and why, in peacetime, military service should correlate with a much lesser diminution in rape than in other violent crime. That causal analysis will then provide the basis for an examination of possible approaches to military rape reduction.

As discussed above, differences in the rape reporting patterns of military and civilian populations do not appear to account for the findings that military rape rates are diminished less from civilian levels (in peacetime) and increased more from civilian levels (in wartime) than are other violent crime rates. [FN65] Therefore, a substantive explanation is required. In this section, a number of possible causal factors contributing to the military rape differential will be explored.

In considering what factors may contribute to the rape differential, the first point to be acknowledged is that, while the peacetime and wartime studies conducted for this Article control for age and gender, additional demographic factors that are not controlled for here may account for part of the variance observed. Several additional variables that are often hypothesized to affect crime rates might usefully be controlled for in further studies. Those additional variables might include race, education, income, social disorganization, and geographic region. [FN66] The relevant question in connection with those additional variables would be whether any of them *differentially* affects rates of rape as compared with rates of other violent crime so as to account for the military rape differential. [FN67]

***675** Preliminary examination of the race variable suggests that it would *not* help to account for the military rape differential for the following reasons. African-Americans constitute a higher proportion of the American military population than of the civilian population. [FN68] For the period 1987-92, the rate of arrest for rape for African-Americans was 6.36 times that for whites. [FN69] During the same period, blacks' murder/nn.m arrest rate was 9.37 times that of whites. [FN70] Therefore, the fact that the military has a higher percentage of African-Americans than the civilian population would be expected to increase the military's murder rates somewhat more than its rape rates. Yet the finding to be accounted for is the opposite: Military murder/nn.m rates are *diminished* more than military rape rates. The aggravated assault arrest rate for blacks in 1987-92 was 5.04 times that of whites compared to a rape arrest rate 6.36 times that of whites. [FN71] A race variable thus might account for some, but very little, of the observed military rape differential with regard to aggravated assault. [FN72] This preliminary examination suggests that introduction of a race variable would contribute very little to an explanation of the observed military rape differential. [FN73]

No data comparable to the race data described above are available for the education, income, social disorganization, and geographic region variables. [FN74] Further research will therefore be required in order to offer even preliminary suggestions regarding ***676** the possible effects of those additional variables on the military rape differential.

One additional demographic factor, the percentage of population married, would be of particular relevance to a "sexual deprivation" theory of the military rape differential. The sexual deprivation theory would propose that military rape rates are elevated relative to military rates of other violent crime because, whereas military personnel have as much or more opportunity than civilians to express any *aggressive* impulses they might have (for instance, in combat practice), military personnel's sexual opportunities are more limited than those of civilians. Certainly, personnel on ships at sea or in other remote locations may have severely limited sexual opportunities. Moreover, men stationed on military bases on the American mainland--including those who live off base--may have more limited heterosexual opportunities than most male civilians, if only because the sex ratios of the base and surrounding areas are disproportionately male. [FN75] One might hypothesize that, for these reasons, military populations' rates of sexual aggression would be high relative to their rates of other forms of violent crime. [FN76] The suggestion here is not the simplistic one that "men must have sex" and will rape if "deprived" of sex. Rather, what is envisioned is a more complex dynamic in which sexual rejection may be more frequent for males in a sex-skewed environment such as would obtain, for instance, around some military bases, leading over time to frustration and anger, and to various undesirable outcomes, perhaps including rape. [FN77]

***677** This sexual-deprivation explanation for the rape differential may account for some of the variance observed, but it seems unlikely to contribute substantially to an explanation of the phenomenon for several reasons. First, the limited research that has been done on the subject does not indicate that skewed sex ratios affect rape rates. [FN78] That research, however, has not been extensive and certainly is not dispositive of the question. The research thus does not support but also cannot be taken to preclude a sexual-deprivation

explanation of some part of the military rape differential.

A second factor that detracts from the potential explanatory force of a sexual-deprivation explanation of the military rape differential is the ready availability of prostitution in the vicinity of military installations. [FN79] The easy access to prostitutes that is typical of the areas surrounding military installations means that an individual lacking other sexual opportunities would have a sexual outlet short of rape that would be preferable to rape both in ease of access and in safety from harsh legal consequences. Still, some proportion of men experiencing a scarcity of sexual opportunity presumably do not go to prostitutes--and some subset of that group may commit rape, for instance on a date.

A third reason that sexual deprivation seems wanting as a full explanation of the military rape differential is that, during the peacetime period studied, both the percentage of military personnel that are married (and so, presumably, have increased sexual opportunities) *and* military rape rates (but not military rates of other violent crimes) rose simultaneously. [FN80] If sexual scarcity were ***678** responsible for the military rape differential, then we would expect an increase in sexual opportunities to correlate with rape reduction, all other things being equal. Instead, an increase in the percentage of personnel married accompanied a rape rate increase.

Of course, all other things likely are not equal. It may be that an increase in percentage of personnel married does, because of increased sexual opportunity, tend to reduce military rape rates but that the minimizing effect of the greater percentage of personnel married was overwhelmed in the period studied by other factors raising rape rates. [FN81] Nevertheless, the simultaneous rise in the percentage of personnel married and military rape rates, together with the consistent availability of prostitution and the lack of support in the research on skewed sex ratios for a sexual deprivation theory of the rape differential, does suggest that some explanation other than or in addition to sexual deprivation is required to provide a full explanation for the military rape differential.

Another possible explanation for the military rape differential is that all-male groups (especially *young* all-male groups), military or otherwise, have a tendency toward rape proneness. The problem with this avenue of explanation is the apparent existence of counterexamples. There is no evidence that all or most boys' schools, men's clubs, or all-male seminaries and yeshivas have elevated rape rates. [FN82] While some genres of all-male group may exhibit an elevated tendency to rape (for example, some fraternities, gangs, and other groups, as discussed below), it does not appear that all do. Therefore, an adequate explanation of the pattern ***679** of military rape rates cannot be based solely on the fact that military organizations have been virtually all-male groups.

An alternative explanation for the pattern of military rape rates would focus on self-selection. The hypothesis here would be that those who self-select for military service are disproportionately rape prone. This hypothesis too would be flawed. First, it would not explain the patterns of military rape and other violent crime during WWII, when the army was largely conscripted. Second, it would require some elaboration of why individuals who choose to enter military service are disproportionately prone to commit rape as opposed to other violent crimes. Thus, if self-selection contributes at all to the explanation of patterns of military rape rates (a possibility to be explored further below), [FN83] it must be as part of a larger explanation.

Yet another explanation of the military rape differential would rest on the hypothesis that biological factors exert an upward pressure on rape rates but not (or not as much) on rates of other violent crime. The argument regarding military rape rates would be that, if there is a particular biological impetus to rape, then we might expect rape rates to be more amenable to increase (such as in war) and less amenable to reduction (such as in peacetime military service) than the rates of other violent crime.

Some sociobiologists do maintain that there is a sex-linked genetic disposition to rape among human males. [FN84] But sociobiological*680 theories of crime generally posit biological influences underlying a broad range of aggressive behaviors, including not only rape but also, for instance, homicide and assault. [FN85] Therefore, a view that biological forces reduce the malleability of rape rates *more* than the malleability of other violent crime rates would go beyond the claims currently made even by sociobiology and would be highly speculative at this time.

A related and intriguing avenue of possible explanation for the military rape differential is that there exists a psychosexual linkage--perhaps biologically based, perhaps not--between violence and sexuality, such that training in and focus on deployment of violence, as occur in the military, would tend to foster *sexual* aggression. [FN86] Again, the state of the science in this area makes this avenue of explanation necessarily speculative. [FN87] Nonetheless, biological or other psychosexual factors linking sexuality and violence might indeed account for some part of the phenomenon in question.

While biological or related psychosexual factors may account for some part of the military rape differential, it is undisputed that biology is, at most, only one contributing factor determining the rape incidence of individuals, groups, and societies. [FN88] Environmental factors bearing on individual psychology, group dynamics, and societal structure and culture all are widely recognized to be influential in determining the rape incidence of individuals, groups, and societies--notwithstanding the effects of possible biological influences. [FN89] While a biological approach may thus partly explain the military rape differential and may warrant further exploration, this *681 approach, like the other explanations discussed above, is unlikely to account for *all* of the variance observed.

A crucial aspect of an analysis of possible causes contributing to the rape differential is an examination of the law relating to rape by military personnel. If the legal deterrents to rape were different in the military and civilian contexts, then it would not be surprising if there were a resultant differential in the rape rates of those two populations. The following analysis explores whether differences between the domestic criminal justice system and the domestic military justice system or international criminal justice system may contribute to the military rape differential.

American military law governing the handling of rape by military personnel appears to be comparable to civilian law in its substantive aspects, but possibly less stringent than civilian law in its procedural requirements and actual implementation. Shortcomings in the relevant military procedures and enforcement provisions may be contributing factors in an explanation of the military rape differential. Measures to identify procedural flaws and to bolster enforcement practices are considered below.

The statute under which rapes are prosecuted within the military justice system is similar in its definition of rape to the rape statutes of most American civilian jurisdictions. The military statute provides that "[a]ny person ... who commits an act of sexual intercourse, by force and without consent, is guilty of rape." [FN90] The sentence provided for rape under the Uniform Code of Military Justice (UCMJ) is "death or such other punishment as a *682 court-martial may direct." [FN91] By regulation, that UCMJ provision is interpreted to mean *life imprisonment* or such other punishment as a court martial may direct for all rapes, except those in which the victim is under the age of twelve or in which the accused maimed or attempted to kill the victim; the death penalty may be imposed in those cases. [FN92] The substantive military law defining rape thus is comparable to civilian law on the subject, and the potential sentences are as severe or more severe than those applicable to civilians.

The procedural framework governing the handling of rape by military personnel may be somewhat more

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problematic. Reports of rape by military personnel are to be forwarded by the military personnel or agency receiving the report to the immediate commander of the suspect (or to a law enforcement or investigative agency if no suspect is identified). [FN93] That immediate commander is then required to make a preliminary inquiry into the alleged offense. [FN94] At this stage, the commander generally should refer the case to the service's criminal investigative department (CID) for investigation pursuant to a regulation stating that "in serious ... cases the commander should consider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation." [FN95] Assuming that a case is referred to CID, an investigative report is then sent back to the commander who, usually in consultation with Judge Advocate General Corps personnel,***683** decides whether to bring a charge of rape against the suspect. [FN96] An Article Thirty-Two investigation, the military analog to a grand jury proceeding, is then convened to determine whether there is sufficient evidence to warrant referring the charge to a court martial. [FN97]

Provisions intended to ensure adequate enforcement also are in place. Article Ninety-Eight of the UCMJ provides that "[a]ny person ... who (1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense ... shall be punished as a court-martial may direct." [FN98] The UCMJ also provides for the processing and redress of complaints by "[a]ny member of the armed forces who believes himself wronged by his commanding officer." [FN99] Such wrongs presumably would include failure to process a rape complaint properly.

Notwithstanding these provisions intended to ensure enforcement, there is anecdotal evidence of failure to enforce military rape laws, including failures to investigate, to keep records, and to preserve evidence. [FN100] Witnesses at Senate hearings in 1992 testified that such failures are common. [FN101] Other than anecdotal evidence, there are currently no data available to evaluate the nature or extent of failures to enforce military rape law (much less to compare military enforcement with civilian enforcement).

***684** Certainly, commanders have discretion in the processing of rape complaints, especially in the early stages of the process, such as the preliminary inquiry. That discretion could be misused to divert cases from prosecution or otherwise to extend inappropriate leniency. [FN102] If there is, in fact, a laxity in the enforcement of military laws against rape, then that weakness would be expected to reduce the efficacy of that law in deterring rape. [FN103] Such a lack of deterrence would be expected to increase military rape rates and therefore could constitute an important element contributing to the rape differential.

Implementation of a thoroughgoing system of record-keeping, tracking all military rape allegations from their initial report to final disposition and compiling those data in a central data bank, would be valuable both in encouraging enforcement and in allowing for identification of procedural flaws or enforcement problems in the handling of rape within the military justice system. Careful record-keeping and oversight both would tend to improve enforcement directly (simply by increasing the visibility of the handling of cases) and would assist in identification of any problems in enforcement procedures. [FN104] Legislation instituting such centralized record-keeping and oversight of military sexual misconduct cases has been proposed in the past, [FN105] but none has been adopted to date. [FN106]

***685** Domestic military law, then, appears to be comparable to civilian law in its substantive aspects but may be less stringent in its actual implementation. If military enforcement mechanisms are in fact comparatively weak, then a resulting reduction in deterrence might explain some part of the military rape differential. Improved oversight in this area is warranted in order to identify and correct any patterns of enforcement failure.

The other body of law governing rape by military personnel is international law. It appears that enforcement of the international laws against rape by military personnel may be even more lacking than enforcement of other

aspects of international law relating to military personnel. [FN107] Nevertheless, it seems unlikely that any feature of international justice contributes appreciably to the rape differential.

International law clearly criminalizes rape by military personnel. [FN108] There is, however, evidence that international law's prohibitions*686 of rape have been even less subject to enforcement than have other provisions of international criminal law. [FN109] Nonetheless,*687 to date, international criminal law relating to military personnel has been so rarely enforced--whether regarding rape, murder, assault, or otherwise [FN110]-- that it seems unlikely that *differential* enforcement of *international* provisions accounts for any significant part of the rape differential.

The proposition that underenforcement of international criminal law probably contributes little to an explanation of the rape differential should not be taken to suggest that international criminal law could not contribute in the future to a reduction of rape by military personnel. There are indications that the enforcement of international criminal law relating to military personnel may improve considerably in the coming years. Within the past three years, we have witnessed the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda, [FN111] and the establishment of a permanent International Criminal Court is becoming an ever more real possibility. [FN112] The establishment of *688 such tribunals for the adjudication of international crimes would be expected to contribute substantially to enforcement of international criminal law, including the enforcement of international law prohibiting rape. [FN113] Thus, international criminal law has the potential to become a real factor in the deterrence of crime, including rape, by military personnel. But the influences of international criminal justice probably contribute little to an explanation of the existing military rape differential.

In sum, flaws in the enforcement of domestic law governing rape by military personnel may account for some part of the rape differential and may require the remedial steps discussed above. In contrast, while international criminal law may contribute to future efforts to reduce rape by military personnel, its existing shortcomings probably do not contribute significantly to an explanation of the rape differential observed. [FN114]

*689 Finally, it is worth focusing on an additional avenue of explanation, concerning environmental factors, that appears promising in its potential to illuminate one important set of factors contributing to the military rape differential. A virtue of this avenue of explanation is that it carries significant implications for policymaking that may help to address the rape differential and thus to reduce further the incidence of rape by military personnel. [FN115]

*690 The avenue of explanation for the military rape differential that I intend now to pursue rests largely on an interpretation of military culture, as follows: There are conditions of military life and lifestyle that inhibit and diminish rates of violent crime including rape, but there are other conditions in military life that tend to re-elevate rape rates. The factors minimizing military violent crime would include a structured and controlled lifestyle, often with greater surveillance of one's activities than in civilian life; fewer opportunities for many kinds of crime (especially for personnel living on base); a population that excludes past felons; [FN116] a reduced incidence of drug abuse; [FN117] and a close knit social organization that generally imparts and enforces anti-crime norms. These factors would contribute to a diminution in violent crime by military personnel in peacetime and, to a lesser extent, even in the combat context.

What may explain the lesser minimizing effect of these factors on military *rape* rates is that, even while those crime-inhibiting pressures are being exerted on all violent crime including rape, *countervailing* factors in military culture tend to push the *rape* rate--but not the rates of other violent crime--back *up*. In brief, the cultural

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influences that may tend to re-elevate military rape rates are as follows. When a closely bonded group (a "primary group") shares group norms conducive to rape, the risk of rape by group members is increased. Norms conducive to rape include certain normative attitudes toward masculinity, toward sexuality, and toward women, and also include norms favoring deindividuation (described below) among group members. When primary group members with rape-conducive attitudes enter a deindividuated state, the risk of individual or group rape becomes significant, especially if external deterrents are minimal. The following section demonstrates that military units are primary groups, and examines evidence that military primary groups often share rape-conducive norms that may elevate the rape incidence of military organizations in war and in peace. [FN118] Thus, the hypothesis to ***691** be explored is that these military cultural factors tend to increase military rape rates but not military rates of other violent crime--and that these cultural factors may contribute significantly to the military rape differential.

B. *The Rape Differential and Military Culture*

1. *Primary Groups.* The "primary group" is a familiar feature of analyses in sociology. As defined by the author of the term, primary groups are

> characterized by intimate face-to-face association and cooperation. They are primary in several senses, but chiefly in that they are fundamental in forming the social nature and ideals of the individual. The result of intimate association, psychologically, is a certain fusion of individualities in a common whole, so that one's very self, for many purposes at least, is the common life and purpose of the group. Perhaps the simplest way of describing this wholeness is by saying that it is a "we"; it involves the sort of sympathy and mutual identification for which "we" is the natural expression. [FN119] Primary groups are particularly influential in shaping their members' attitudes and behaviors. [FN120]

Primary groups are distinguished from other forms of group association in that primary groups are emotionally central to the individual. [FN121] While the prototype of the primary group is the family, [FN122] other forms of primary group include close friendship groups, [FN123] fraternities and sororities, [FN124] religious orders, [FN125] religious***692** or psychotherapeutic "cults," [FN126] street gangs, [FN127] some sports teams, and the like. [FN128]

Primary groups involve personal affective relationships (often of a form replicating familial relationships); often require some form of renunciation or separation by members from other commitments and relationships; often have formal membership requirements and/or initiation rites; and frequently have some ideology or cause to which the group is committed. [FN129] Each of these characteristics of primary groups contributes to group cohesion.

Primary groups are powerful forces in the lives of their members because primary group relationships tap into the formative emotional and psychological structures that constitute the bases of the individual's personality or self. For this reason, primary groups profoundly affect individuals' inner emotional lives and, consequently, their attitudes and actions. [FN130] From a psychoanalytic perspective, primary groups "recreate primary ties originally formed in the family. They reactivate family identifications and make use of transference relationships to modify personality." [FN131] In sum, primary groups are potently influential.

Military units prominently feature the characteristics of primary groups. We would therefore expect the norms and attitudes engendered in the context of military units to have significant effects on the behavior of their members. After discussing the primary-group attributes of military units, we shall consider more specifically primary groups' influence on sexual attitudes and behavior, including rape.

2. *Primary Groups in Military Organizations.* The military unit is an institution with strong primary-group characteristics, [FN132] ***693** especially in the combat context. [FN133] These characteristics begin to develop as early as basic training. [FN134] A central goal of military unit preparation is the fostering of unit cohesion through the formation of primary group bonds. [FN135] As General Colin Powell put it, "Bonding begins on the first dayof boot camp." [FN136] The nature of the affective bonds of the military unit in combat is well reflected in the remarks of a wounded World War II veteran in 1944: "The men in my squad were my special friends.... If one man gets a letter from home ... the whole company reads it. Whatever belongs to me belongs to the whole outfit." [FN137] As in other primary groups, cohesion in military units is fostered by the cementing of affective ties within the group, by separation of members from outside emotional ties, by the presence of membership requirements and initiation rites, and by the presence of an ideology or cause to which the group is committed.

The affective bonds developed in primary groups of all sorts tend to replicate the primary ties originally formed in the family. [FN138] Not surprisingly, the psychological structures of the family are conspicuously replicated within the military unit from the time of its formation. [FN139] The drill instructor who leads the unit ***694** through basic training comes to occupy the role of a father. [FN140] As one Marine sergeant explained,

> [The recruits are] seeking discipline, they're seeking someone to take charge, 'cause at home they never got it... . [A]nd it's kind of like the father-and-son game, all the way through. They form a fatherly image of the DI [drill instructor] whether they want to or not. [FN141] In combat, the commanding officer as a paternal figure serves important functions. As one World War II veteran said, "About officers--everybody wants somebody to look up to when he's scared. It makes a lot of difference." [FN142] The competently protective and paternal leader has consistently been found to be an important basis of morale for primary groups in combat. [FN143]

Sigmund Freud discussed the replication of familial psychological structures in armies as well as in other "artificial groups" such as the church. As he stated,

> In a Church ... as well as in an army ... the same illusion holds good of there being a head--in the Catholic Church Christ, in an army its Commander-in-Chief--who loves all the individuals in the group with an equal love... . It is not without a deep reason that the similarity between the Christian community and a family is invoked, and that believers call themselves brothers in Christ, that is, brothers through the love which Christ has for them... . The like holds good of an army. The Commander-in-Chief is a father who loves all soldiers equally, and for that reason they are comrades among themselves... . Every captain is, ***695** as it were, the Commander-in-Chief and the father of his company, and so is every non-commissioned officer of his section. [FN144] Thus, military units, like other primary groups, feature affective bonds that are often reminiscent of family relationships. [FN145]

In addition to replicating family relationships, military groups, like other primary groups, also encourage separation by members from other commitments and relationships. From the time of basic training, military personnel are encouraged to effectuate, at least temporarily, some separation from outside emotional ties. This trend in military training toward separation from family or other outside bonds is based on an understanding that the solidarity or cohesion of the military unit can be undermined by the pull of competing loyalties. [FN146] For that reason, military personnel are encouraged to transfer their loyalties from any previous attachments to the military unit, at least as a temporary matter. [FN147] The comments of one Marine Corps captain regarding recruits' communication with people "outside" during basic training are illustrative:

> They're allowed to call home, so long as it doesn't get out of hand... . If it's a case of an emergency call coming in, then they're allowed to accept that call; if not, one of my staff will ***696** take the

message... . In some cases I'll get calls from parents who haven't quite gotten adjusted to the idea that their son had cut the strings... . The military provides them with an opportunity to leave home but they're still in a rather secure environment. [FN148] The emotional displacement of outside ties with unit bonds is pronounced during training, is generally more moderated in day-to-day peacetime military life, and is at its height in the combat context. Soldiers in combat frequently say that they are closer with their unit members than with their wives or families. [FN149] As one Vietnam veteran put it,

> [T]here's a love relationship that is nurtured in combat because the man next to you--you're depending on him for the most important thing you have, your life... . I'd say this bond is stronger than almost anything, with the exception of parent and child. It's a hell of a lot stronger than man and wife--your life is in his hands ... . [FN150] This replacement of family with the military unit as the emotional center of soldiers' lives, at least temporarily, is consistently reflected in solders' remarks and in the literature on the social psychology of combat. [FN151] As Arkin and Dobrofsky conclude,

> The interruption of intimate family relations which basic training accomplishes, the separation from family which basic training enforces, and the distance from one's family which the first enlistment tour encourages are all processes intended to ensure that ***697** the man is fully socialized (disciplined) by the military before reintroducing civilian and intimate influences of family. [FN152] In addition to the building of affective ties within the group, and the separation from affective ties outside the group, military units also share the formal membership requirements and initiation rites that are characteristic of primary groups. [FN153] As well as the threshold membership requirements for becoming a recruit (such as mental and physical testing, age, gender, and educational qualifications), various forms of initiation occur throughout basic training. Physical hardship and stern discipline must be undergone before one "becomes" a soldier, sailor, marine, or airman. The extraordinary challenge or ordeal from which one emerges as an initiate serves to create and to support a sense of group identity and solidarity. [FN154] The use of such formal and informal membership requirements and initiation rites is a characteristic mode of defining insiders and outsiders in primary groups.

Finally, as is common in primary groups, there is in the military an ideology or cause to which the group is committed: the defense and protection of a nation, or of a political system or way of life. A military organization's ideological basis, like that of other primary groups, may or may not actually be a primary motivation for membership or for group members' activities. [FN155] Nevertheless,***698** members' ulterior or additional motives notwithstanding, the military organization's ideological basis provides for group members a basis or ostensible basis for participation and identification.

Military units, then, are primary groups. [FN156] They share with other primary groups the central characteristic of personal, affective bonding, along with the frequent concomitants of separation from external bonds, initiation requirements, and ideological components. The primary group bonds of the military unit begin forming in basic training and are most intense in the combat context.

3. *Sexual Norms in Primary Groups.* Heightened rape incidence is associated with certain primary groups. Some street or motorcycle gangs, [FN157] fraternities, [FN158] and sports teams, [FN159] for instance, appear to be have elevated rape rates. Although less is known about rape in religious and therapeutic cults, the limited ***699** data available suggest that rape rates are elevated in some cults as well. [FN160]

The cause of the heightened rape incidence in such primary groups appears to lie, at least partly, in the groups' norms. [FN161] Certain gender and sexual norms and attitudes have been found to be conducive to rape. This section briefly considers the role of sexual and gender norms in primary groups, and then examines the set

of gender and sexual attitudes that has been found to be correlated with heightened rape propensity. The section concludes with an examination of the presence and role of rape-conducive norms in military culture.

The sets of norms developed in primary groups invariably include gender and sexual norms. Perhaps the prototype of sexual norms in primary groups is the incest taboo in families. [FN162] Some primary groups develop specialized sexual norms (such as celibacy or "free love") for reasons including avoidance of loyalties developed in sexual relationships that might compete with loyalties to the group; avoidance of disruptions to group cohesion caused by sexual jealousies or rejections within the group; control over members' intimate selves through control of sexuality; and desire by group members or leaders for norms consistent with their sexual preferences. [FN163] Sigmund Freud made explicit the analogous ***700** functions of such specialized sexual norms in religious organizations and military organizations:

> In the great artificial groups, the Church and the army, there is no room for woman as a sexual object. The love relation between men and women remains outside these organizations. Even in a person who has in other respects become absorbed in a group, the directly sexual impulsions preserve a little of his individual activity. If they become too strong they disintegrate every group formation. The Catholic Church had the best of motives for recommending its followers to remain unmarried and for imposing celibacy upon its priests. [FN164] The content of primary groups' sexual norms varies between groups and between types of groups. For example, religious cults typically gravitate toward norms of broad sexual access by group leaders but limited or leader-controlled sexual access for others, [FN165] whereas fraternities tend to favor broad sexual access--sometimes including coercive access--for all members. [FN166]

The sexual norms of some primary groups are conducive to rape. While the group norms conducive to rape in primary groups may on occasion be specialized sexual norms directly approving of rape, [FN167] rape-conducive group norms more often will consist of a set of normative attitudes toward sexuality and toward gender more broadly that enhances the attractions and reduces the aversions or inhibitions to rape.

***701** 4. *Rape-Conducive Sexual and Gender Attitudes.* Social science research conducted over several decades has identified a specific set of attitudes that appears to be conducive to rape. [FN168] This set includes certain attitudes toward masculinity, toward sexuality, and toward women.

Particular attitudes toward masculinity have been found to be related to heightened levels of rape propensity. [FN169] Standards of masculinity that emphasize dominance, assertiveness, aggressiveness, independence, self-sufficiency, and willingness to take risks, and that reject characteristics such as compassion, understanding, and sensitivity have been found to be correlated with rape propensity. Several different measures for this construct of masculinity have been used in the studies that have identified this correlation. These measures include "negative masculinity," meaning a posture of self-assertion and self-protection unalloyed with communion or concern with others; [FN170] "hypermasculinity," meaning stereotypic masculinity and interpersonal opportunism; [FN171] and nonfeminine "sex-typing," meaning personality or sex role constructs with minimal stereotypically feminine characteristics such as sensitivity or gentleness. [FN172] In essence, normative standards of masculinity that emphasize aggressiveness, dominance, and independence, and that minimize sensitivity, gentleness, and other stereotypically feminine ***702** characteristics have been found to be associated with heightened propensity to commit rape.

In addition to attitudes toward masculinity, certain attitudes toward sexuality also have been found to be associated with heightened rape propensity. "Adversarial sexual beliefs," the view that sexual relationships are inherently exploitative--that is, that each party seeks to benefit without regard for the other and will use

manipulation and deceit for that purpose [FN173]--are associated with heightened rape propensity. [FN174] "Sexual promiscuity," a high emphasis on sexuality and, in particular, a high number of sexual partners, also has been found to be correlated with high levels of sexual aggression. [FN175]

Numerous studies have found that "rape myth acceptance" also is associated with rape propensity. Rape myths are "prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists." [FN176] Examples of rape myths would include, for instance, the belief that women enjoy being raped. [FN177] Belief in rape myths has been shown consistently to be strongly associated with sexual aggression and with self-reported likelihood to rape. [FN178]

In addition to attitudes toward masculinity and sexuality, attitudes acceptant of violence against women also bear a relationship to rape propensity. Such an attitudinal construct, as described by Martha Burt, is "the notion that force and coercion are legitimate ways to gain compliance and specifically that they are legitimate in intimate and sexual relationships." [FN179] Not surprisingly, attitudes of ***703** this type have consistently been found to be highly correlated with sexual aggression and with rape propensity. [FN180]

Finally, not only attitudes specifically toward *violence* against women but also attitudes toward women more generally influence rape propensity. "Hostility toward women" is a measure designed to reflect attitudes of distrust, anger, alienation, and resentment toward women. [FN181] Such attitudes include, for example, beliefs that most women are deceitful, that women flirt to tease or hurt men, and that women take advantage of men who do not stand up to them. [FN182] Several studies have found correlations between hostility toward women and sexual aggression against women. [FN183]

Similarly, sex-role stereotyping generally--regarding occupational, familial, and social roles--also has been found to be associated with rape-propensity, at least in the contemporary American context. Such sex-role stereotyping includes views that women should not do men's work nor men do women's work, that a man is the head of the household, and that women should take a passive role in courtship. [FN184] Numerous studies using a variety of measures of sex-role stereotyping have found a correlation between stereotypical attitudes concerning gender roles and rape incidence or proclivity. [FN185]

***704** Thus, there is a set of attitudes--including attitudes of hypermasculinity, adversarial sexual beliefs, sexual promiscuity, rape myth acceptance, acceptance of violence against women, hostility toward women, and sex-role stereotyping--that is correlated with rape and rape proclivity. In fact, these attitudes share more than just their association with rape propensity. The attitudes associated with rape proneness form a "constellation" of attitudes in two senses. First, they are frequently found together; the presence in an individual of certain of these attitudes is correlated with the presence of certain other of the attitudes. [FN186] The existence of extensive intercorrelations between the rape-conducive attitudes supports the view that they form a meaningful whole, a ***705** constellation or configuration of attitudes rather than a mere assortment of attitudes that are each conducive to rape. Second, these attitudes have interactive effects that produce a greater total impact on rape propensity than the simple additive effects of the attitudes. For instance, in one study, while hostile masculinity and sexual promiscuity each were found to be correlated with increased rape propensity, when they were both present, an interaction effect accounted for an additional 4% of explained variation in the prediction of sexual aggression. [FN187]

Mosher and Sirkin have offered an integrated attitudinal construct that posits a "macho personality constellation" consisting of "calloused sex attitudes," a belief in "violence as manly," and a conception of "danger as exciting." [FN188] Statistical analyses have supported the validity of this construct, [FN189] suggesting that it captures an underlying coherence in the set of different attitudes that it combines.

A 1986 study by Mosher and Anderson found a significant positive correlation between the macho personality constellation and aggressive sexual behavior. [FN190] Two additional studies have found that men with strong "macho personality" characteristics experienced more enjoyment and less negative affect while imagining themselves committing rape than did less "macho" men. [FN191] As Mosher and Anderson concluded,

> The socialization of the macho man, if it does not directly produce a rapist, appears to produce calloused sex attitudes toward women and rape and proclivities toward forceful and exploitative tactics to gain sexual access to reluctant women. The socialization of the hypermasculine male may script him to overvalue a definition of masculinity as tough and unfeeling, violent and exploitative of women, and as seeking the excitement of risking danger. This personality constellation, in conjunction with a history of aggressive behavior that elicits increasing levels of positive affect ***706** and decreasing levels of negative affect, may provide the disinhibition that transforms the rape fantasy into a brutal reality. [FN192] In sum, a set of attitudes conducive to rape has been identified in several decades of research. This set of attitudes is inter-correlated and forms a coherent attitudinal configuration whose effect on rape propensity is greater than the sum of its parts.

5. *Rape-Conducive Sexual Norms in Military Culture.* Individuals' attitudes toward gender and sexuality, like other attitudes, are strongly influenced by their primary groups. In the process of socialization into a primary group, group norms, including normative attitudes toward gender and sexuality, are conveyed to group members. [FN193] If the normative gender and sexual attitudes of the primary group are of the sort that has been found to be conducive to rape, then we would expect the rape propensity--and, all other things being equal, the rape incidence--of the group to be heightened.

Like other primary groups, primary groups in the military develop and enforce group norms. [FN194] And like the sets of norms developed in other primary groups, the sets of norms in military primary groups include norms about gender and sexuality. [FN195]

***707** The sexual and gender norms presently imparted to members entering the U.S. armed forces are inadvertently comprised largely of the sort associated with heightened rape propensity. [FN196] The rape-conducive attitudinal constellation, including elements of hypermasculinity, adversarial sexual beliefs, promiscuity, rape myth acceptance, hostility toward women, and possibly also acceptance of violence against women, is reflected in various ways in military culture. [FN197]

Having said that, it is also important to note that the U.S. military is in some respects in a state of transition regarding gender. Women are now participating in greater numbers and in a broader range of roles than in the past. And, within very recent years (particularly in the wake of Tailhook '91), special efforts have been made by military leaders to eliminate sexual harassment and assault by personnel. [FN198] All of these changes have had some influence on the gender and sexual norms extant within military culture.

Nevertheless, certain factors that remain within military organizations tend to reinforce and to perpetuate the traditional gender ***708** and sexual norms of the military, as discussed in Part IV below. The result is that, while the gender norms within military culture have undergone some alteration in recent years, much of the traditional gender and sexual culture of the military remains.

The following examination of the gender and sexual norms of military culture attempts to present a picture of that culture that takes into account the extent of relevant change in recent years. The analysis is intended to describe central themes within an existing culture of military society. [FN199] Because no systematic study of

military culture on these dimensions has yet been conducted, the discussion is necessarily suggestive rather than conclusive.

a. Attitudes toward masculinity in military culture. The military traditionally has had, and to a very large extent still has, a central group-identity structure built around a particular construction of masculinity. [FN200] As expressed by David Marlowe, Chief of Military Psychiatry at the Walter Reed Army Institute of Research:

> In the world of the combat soldier ... masculinity is an essential measure of capability. In an interaction between male bonding and widespread cultural norms, the maleness of an act is the measure of its worth and thus a measure of one's ability. While many may disapprove of these norms, they have been and are, as a matter of ethnographic fact, the operative ones in much of military society and particularly in the combat group. [FN201] General William Westmoreland made explicit the traditional link between military service and masculinity in his testimony to Congress: "[N]o man with gumption wants a woman to fight his battles." [FN202] Or, as General Robert Barrow, former Marine Corps Commandant, commented on the prospect of women in combat: "When you get right down to it, you have to protect the manliness ***709** of war." [FN203] In the words of David Marlowe, "The soldier's world is characterized by a stereotypical masculinity. His language is profane, his professed sexuality crude and direct; his maleness is his armor, the measure of his competence, capability, and confidence in himself." [FN204]

While such a vision of masculinity as a basis for group identity or individual worth is no longer an official part of military training or socialization (and while statements like those made by Generals Westmoreland and Barrow more than a decade ago presumably would not be made by military leaders now), this aspect of military culture nevertheless retains considerable vitality. As personnel at Parris Island Marine Recruit Training Depot stated in interviews in 1993 and 1994, the value of "manliness" is heavily impressed upon (male) recruits. [FN205] According to one drill instructor, this "manliness" means

> a warrior spirit that is based upon a sense of brotherhood, fraternalism-- which, obviously, excludes women... . When a military organization is called to war, the mission is to kill and to dominate the opposing force. And domination is generally associated with a masculine thing. There's very little remorse. That's where the manliness thing comes into play. [FN206] One enlisted Army man made related observations:

> The macho thing is still the image for the combat arms... . Being rough and tough is still the mainstay of the way of troops trying to get to the top of the line. It's one of the things that will get you ahead. Nowadays, you can also advance by other means--but then you better have something excellent up your sleeve. [FN207] ***710** The normative elements of hypermasculinity--a focus on toughness, self-sufficiency, and dominance [FN208]--are strikingly reflected in these descriptions. As Arkin and Dobrosky conclude in their analysis of masculinity in military socialization, military socialization produces "a strong, silent, self-reliant man" [FN209] who will to a heightened extent "[reject] ... intimacy and warmth," [FN210] and emphasize "the ideal of virility." [FN211]

b. Attitudes toward sexuality in military culture. In addition to the attitudes toward masculinity discussed above, the attitudes toward sexuality embodied in military culture also largely partake of those found to be conducive to rape, including both adversarial sexual beliefs and high valuation of promiscuity. Within traditional military culture, women are cast largely as the sexual adversary or target, while men are cast largely as promiscuous sexual hunters. These themes currently remain rather prevalent in military culture.

To better understand the military construction of the female as sexual adversary and the male as

promiscuous, we should meet "Suzie." "Suzie Rottencrotch" is a name sometimes used by military men to refer to women (other than close relatives of the men present). [FN212] One drill instructor had the following to say about her in the course of a training lecture on the use of hand and arm signals:

> If we get home with little Suzie ... we're in a nice companionship with little Suzie and here you are getting hot and heavy and then you're getting ready to go down there and make that dive, privates, and Suzie says ... Suzie says it's the wrong time of the month. Privates, if you don't want to get back home ***711** and indulge in this little adventure, you can show your girlfriend the hand and arm signal for "close it up." And you want her to close up those nasty little thighs of hers, do you not, privates? [FN213] The same training lecture included the following aside: "Privates, if you don't have a little Suzie now, maybe you're going to find one when you get home. You bet. You'll find the first cheap slut you can get back home. What do you mean, 'No'? You're a Marine, you're going to do it." [FN214] Together with the intended humor of the presentation, other messages inhere. These include the intimation that, for a Marine, the female is the sexual adversary or target and is without other value; that what a Marine is looking for in women is "the first cheap slut he can get." The attitude is thus conveyed that a Marine's only relationship to women is the pursuit and acquisition of sex--a relationship that both casts the Marine as promiscuous and women as prey.

The current status of "Suzie Rottencrotch" is perhaps emblematic of the partial changes that have occurred in military culture. In October 1993, I asked a female drill instructor at Parris Island Marine Corps Recruit Depot whether the name "Suzie Rottencrotch" was still in use. She had never heard of the name but asked her male counterpart who was standing nearby. He replied that the name was still used but "not officially." [FN215]

A more contextualized account of aspects of military sexual norms was conveyed to me in an interview with a former Navy judge advocate who served in the 1970s. [FN216] Other former Navy and Marine personnel confirm his description of the environment in Olangapo, the Philippines, near the American Naval Station at Subic Bay. [FN217] As the judge advocate described,

> [W]e participated in creating the world's biggest brothel (just outside Subic)... . Olangapo is called "the city of 10,000 ***712** whores." If you're an impressionable young kid, and you're taken in tow--outside to Olangapo which is just row after row of bars, massage parlors, and no-pretext brothels--what does that do to a young kid's view on the value of women? These gals would do the most degrading things--and do them in public. And it was always in a group. A gal would come along to a table in a bar and literally "serve" all the guys at the table. It was always in groups. In fact, girls would do tricks with their bodies and orifices on stage--that was very common. One game was to have the girl go under the table and fellate each guy-- and whoever's face cracked soonest would buy the next round of drinks. This was true in all the enlisted bars--in the officer clubs there wouldn't be the group sex, but there would be group performances. Subic Bay was an automatic stop for all the ships in the Pacific. So all the guys experienced this. This was not just a few of the guys or some small proportion; this was all the guys... . That place was a circus. If I had to guess at the percentage of sailors-- officer and enlisted--who *never* partook of those activities in Olangapo and Subic, I'd guess five percent. The one thing that strikes me is: I don't think it's possible to overestimate the influence of places like Olangapo. And these included graduates of the top law schools in the country--and we were all affected by it... . I mean I can't overstate it; it was beyond anything I'd ever seen or ever have seen since... . The whole carnival atmosphere cannot be overstated. [FN218] Although the account of Olangapo quoted above refers to a period during the 1970s, Olangapo apparently maintained a similar atmosphere until Subic Bay Naval Station closed in 1991. As the New York Times reported in 1993,

> Many of the mothers [of the estimated 8,600 Amerasians in Olangapo] subsisted for a time on sporadic payments from the [American] fathers, pressuring Navy officials when payments lagged. But the financial support began drying up in 1991, when the Philippine Senate barred the renewal of United States leases on the sprawling naval base at Subic Bay and other installations in the Philippines... . When the bulk of American ships and planes finally left last year, the decades-long party was over at the Pussy Cat Bar, the Joy Club and hundreds of other hostess clubs, discotheques, ***713** brothels, massage parlors and short-stay hotels with neon signs just outside the gates of the Subic base. [FN219] While Olangapo is far away, we may be reminded in reading about it of events in Las Vegas at the 1991 and earlier Tailhook conventions where, according to the Department of Defense Inspector General, "[i]ncidents related by witnesses included a high ranking Navy civilian official dancing with strippers in hospitality suites, the throwing of flaming mannequins from rooftops, [and] earlier gauntlets and strip shows ... ." [FN220]

Nor are these events limited to faraway places or to convention weekends. [FN221] As one Army Combat Engineer stationed at Fort Bragg related to me in 1994:

> You'd be amazed. Most people have no idea what goes on. The talk is "down." The whores and sluts are circulated between the guys. (They go for pay, for no pay, for drinks, whatever.) Those women actually go into the barracks. The guys talk and brag about it and share it with each other. You pull out of it once you've found a good woman (like my wife). It's a lot of contempt toward the women plus bragging about what studs they [the guys] are. [FN222] Each of the foregoing descriptions reflects a theme within military culture of casting women as sexual targets and military men as promiscuous sexual consumers. This theme, even while mitigated through the services' equal opportunity and anti-harassment efforts and policies, still appears to be strongly rooted within current military culture.

An additional datum reflecting this theme within military sexual culture is the fact that military personnel appear to consume more soft-core pornography [FN223] per capita than does the civilian***714** population of comparable gender, age, and education. Preliminary market research indicates that, on yearly average for 1992-93, the total percentage of all active duty military personnel reading Playboy was 14%, as compared with 4% of civilians. [FN224] More specifically, 33% of male active duty personnel aged eighteen to twenty-nine read Playboy as compared with 13% of male civilians of that age range. [FN225] For males aged thirty to forty-four, the civilian and military readership was comparable (approximately 9%), while for males forty-five and older, the military readership (approximately 11%) again exceeded civilian readership (approximately 4%) considerably. [FN226]

When educational level is held constant, the military readership level is again higher than the civilian level. On yearly average for 1992-93, among those whose highest educational degree was high school graduation, 24% of male military personnel read Playboy as compared with 9% of male civilians. [FN227] For college graduates, readership levels were 12% for male military personnel and 7% for male civilians. [FN228]

To point out that pornography is more prevalent in the military than in the civilian environment is not to suggest that reading Playboy causes military personnel to commit rapes. (On the contrary,***715** the available experimental psychology data on the links between pornography and sexual aggression tend to indicate that while violent pornography tends to increase sexual aggression, nonviolent pornography does not. [FN229]) Rather, the suggestion here is that the prevalence of pornography in the military environment may reflect sexual attitudes and norms within military culture that cast women as sexual targets and men as sexual consumers.

The hypothesis that the prevalence of pornography in the military reflects such a sexual culture within the military is supported by the findings of research on the links between pornography and rape at the societal level.

Societal rates of pornography circulation and rape are highly correlated; [FN230] that is, states and regions with high pornography circulation rates also tend to have high rape rates. [FN231] Thus, even while no causal link has been found between nonviolent pornography and aggression at the individual level, the two rates are highly correlated at the societal level.

The presence of the societal-level correlation seemingly without a relationship of direct causation at the individual level suggests that the correlation between pornography circulation and rape rates may be spurious. In other words, both phenomena may be influenced by some common third factor. Researchers in this field have suggested that the third factor influencing both rape rates and pornography circulation may be the cultural pervasiveness of a "macho" attitudinal pattern. [FN232] They hypothesize that each of the two phenomena, heightened pornography consumption and heightened rape rates, both reflect and at least in part result from the heightened cultural prevalence of the constellation of ***716** attitudes constituting "machismo." Thus, there is reason to believe that the apparent heightened pornography consumption in the military environment may reflect the prevalence of normative sexual and gender attitudes within military culture that place women in the role of sexual targets or adversaries and men in the role of sexual consumers. [FN233]

Without providing a systematic or scientific comparison of military and civilian sexual attitudes, the foregoing discussion does suggest the continuing presence within military culture of adversarial sexual beliefs and normative promiscuity. [FN234] Suzie Rottencrotch, Olangapo, Tailhook, Playboy, and remarks from Fort Bragg all reflect--without providing a systematic measure of--those attitudinal elements of military sexual culture. While recent military policy changes presumably are effecting some change in military gender and sexual norms, such a transition is, based on the available evidence, far from complete.

c. Attitudes toward women in military culture. Along with the attitudes toward sexuality discussed above, there are attitudes toward women reflected in military culture that are associated with rape propensity. These include hostility toward women and possibly also acceptance of violence against women. [FN235]

The masculinity that is definitive of the military in-group is, not surprisingly, defined in *contrast* to the "other" [FN236]--in particular, in contrast to women. [FN237] An unmistakable hostility is ***717** directed toward this other. A typical method of ostracization, particularly in basic training, is to refer to a male group member as a female. For instance, recruits are called "ladies" or "girls" as well as more vulgar names for women when they perform poorly in training. [FN238] As Randy Shilts recounts,

> The lessons on manhood ... focus less on creating what the Army wanted than on defining what the Army did not want. This is why calling recruits faggots, sissies, pussies, and girls had been a time-honored stratagem for drill instructors throughout the armed forces. The context was clear: There was not much worse you could call a man. [FN239] While the practice of this particular type of gendered name-calling is not now officially sanctioned, it still does occur with continuing frequency in practice. [FN240]

Perhaps the most straightforward expression of hostility toward women is found in the T-shirt worn by several male officers at the 1991 Tailhook convention. The back of the shirt read "Women Are Property," while the front read "He-Man Woman Hater's Club." [FN241]

The military definition of the "nonmasculine" as the "other" is, of course, rendered problematic by the existence of military women. [FN242] One response to this dilemma has been to endeavor ***718** to maintain essentially masculine group identity and, necessarily then, female otherness. Consistent with this approach, official efforts are made to maintain the "femininity" of military women. The current Marine Corps Handbook,

for instance, specifies that women's hair shall be "arranged in an attractive (feminine) style." [FN243] Many similar examples of official efforts to "maintain femininity" may be found. [FN244] Maintenance of the otherness of women is also sometimes achieved through less pleasant means, like the use of names such as "WUBA," an acronym meaning "Women Used by All," to refer to (allegedly promiscuous) female midshipmen [FN245] or the reference to female Marines as "marionettes." [FN246] The effect in each case is to retain, even in the face of female military participation, the position of females as the "other" and the definition of the "real military" as masculine and manly. Women, if present, are in that way recast as outside the group and, largely, as sexual targets-- either under the more approving valence of having "an attractive, feminine style" or as the disapproved "Woman Used By All." In each case, the female is treated as the other and as sexual, as "government issue pussy" as ***719** she is sometimes called, [FN247] even while she is formally a Marine, soldier, airman, or sailor and so, formally, "one of us." [FN248]

This is not to say that no progress has been made toward improving gender attitudes and reducing hostility toward women. Rather, the point is that progress in that direction is incomplete and still often meets with resistance. The comments of one enlisted Army woman in 1994 are illustrative. As she related,

> The changes in positions open to women and the number of women in the military--this has changed people's attitudes and ways of relating to women. Because they know we're going into combat with them. And that's what is important. It means they have to treat us a little more equal. But they still don't. For instance, in BNCOC [Basic Non-Commissioned Officer Course] the guys were passing around this story about how we only had to carry a twelve pound instead of a thirty-five pound rucksack into the field in training-- which wasn't true. They were saying: You girls don't do anything hard just because you're female. They're saying that they're big, tough men, *and* they're saying that we come in and get an easier deal. [FN249] Even while military gender culture is changing, elements of hostility toward women still appear to remain a part of that culture. The picture, then, is a complex one of attitudinal change and resistance to change being played out currently within military organizations.

In addition to general attitudes of hostility toward women, attitudes accepting of violence against women also *may* be heightened in military society. Direct measures comparing military and civilian attitudes regarding violence against women are lacking. However, recent studies conducted by the Army do suggest elevated rates of domestic abuse of the female partners of Army personnel as compared with rates of abuse of the female partners of civilian men. [FN250] This heightened rate in the Army population of ***720** violent abuse of women may (though it does not necessarily) reflect underlying attitudes in the Army population that are more accepting of violence against women than are the attitudes in the civilian population. [FN251]

In sum, there is substantial evidence--though as yet, no systematically collected data comparing military and civilian populations--of themes of hypermasculinity, adversarial sexual beliefs, promiscuity, hostility toward women, and possibly acceptance of violence against women, within current military culture. [FN252] The norms and normative attitudes toward gender and sexuality that are prevalent in military culture thus appear to partake largely of the set of attitudes that have been found to be associated with heightened rape propensity. These norms and attitudes are imparted to new members as they are socialized into their primary groups within the military. Even while the military services institute policies of "zero tolerance" of sexual harassment and assault, [FN253] and provide formal training pursuant to those policies, informal socialization continues to perpetuate group norms that are inconsistent with those formal policies and goals. The result is that, even while the U.S. military is in some ways in transition regarding gender, military units' normative attitudes toward gender and sexuality continue in part to be those associated with heightened levels of rape propensity.

***721** 6. *Rape Conducive Sexual Norms and the Psychology of Individual Military Personnel.* The gender and

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sexual norms of military organizations are conveyed to new members as they are socialized into the military group. But it must also be remembered that individual military personnel come to the military with their own psychological structures and motivations, including varying degrees of proclivity or aversion to rape. As argued below, the rape-conducive group norms extant in the military may tend disproportionately to attract members with heightened rape proclivities. This is not by any means to suggest that the U.S. armed forces are composed of a group of rapists in waiting. Quite the contrary, the predominant motives for joining the U.S. armed forces are educational and economic opportunity, [FN254] followed by ideological and patriotic commitments. [FN255] The point, however, is that a military culture featuring rape-conducive norms and attitudes may attract a greater number of members with heightened rape proclivities than would a military culture without those features--and those individual members may then have a particularly undesirable effect on their units.

The individual recruit who is psychologically inclined to rape poses a heightened rape risk within a military unit for several reasons. He may contribute to the elaboration of rape-conducive norms within his unit, and may serve as an instigator or leader in group rape. [FN256] In addition, he may take the opportunity to commit***722** rape in a combat situation where deterrents are low.

The following consideration of the patterns of motivation for rape suggests reasons that an organization with rape-conducive gender and sexual norms may disproportionately attract individuals with heightened rape proclivities. Researchers on the psychology of rape generally concur that there are different motives for rape that may be categorized into types. [FN257] Studies of individuals' motives for rape have produced several typologies of rape motives, including***723** Nicholas Groth's widely accepted three-type taxonomy. [FN258]

Groth identified three patterns of motivation for rape: power, anger, and sadism. In power-motivated rapes, the offender is motivated by underlying feelings of inadequacy and weakness and by doubts about his masculinity. He rapes in an effort to compensate for those feelings through controlling and sexually possessing the victim. Power rapists typically

> feel insecure about their masculinity or conflicted about their identity ... . Rape, then[,] becomes a way of putting such fears to rest, of asserting one's heterosexuality, and of preserving one's sense of manhood... . ... The intent of the power rapist, then, is to assert his competency and validate his masculinity. [FN259] The anger-motivated rapist, by contrast, seeks to use rape to gain revenge for a perceived wrong. [FN260] He feels hurt, humiliated, or unjustly treated. The victim may be the perceived wrongdoer or may be only a symbolic representative of him or her (usually her). [FN261] Because the rape expresses feelings of rage, it typically is characterized by deliberate brutality and degradation. [FN262]

Finally, in sadism rapes, "[t]here is a sexual transformation of anger and power so that aggression itself becomes eroticized... . The assault usually involves bondage and torture and frequently has a bizarre or ritualistic quality to it." [FN263]

The most prevalent of the three identified motive patterns for rape appears to be power rape (55% in Groth's study), followed ***724** by anger rape (40%), and then by a small minority of sadism rapes (5%). [FN264] Thus, the vast majority of rapes fall within the power and anger motive patterns. Here, the perpetrator population is composed of men with concerns of inadequacy in areas of masculinity, manhood, and power (power rapists) and rage, usually against a woman or women (anger rapists). It would not be surprising if men intensely concerned with those issues were disproportionately attracted to an all-male, supposedly all-heterosexual, "macho," highly cohesive organization committed to the threat or deployment of armed physical force. [FN265] By constructing a military organization that answers to that description, we may attract potential power and anger rapists in

undesirable numbers. [FN266]

Again, the point here is not that many or most military personnel are psychologically predisposed to rape but, rather, that a military culture with the group norms discussed above may attract some critical mass of potential rapists who then have an undesirable effect in fostering the acceptance, transmission, and elaboration of rape-conducive norms; in committing rape; and in initiating and leading group rape, especially in the combat context. In these ways, individual psychological dynamics may interact with group ***725** gender and sexual norms to magnify the effects of rape-conducive norms on the rape propensity of military organizations.

7. *Deindividuation Norms in Primary Groups.* Rape-conducive gender and sexual norms are not, however, the only normative component of military culture that would tend to elevate the incidence of rape in military organizations. In addition, the presence in military organizations of norms favoring deindividuation also would tend to heighten military rape incidence.

a. Normative deindividuation in general. "Deindividuation" is a function of the submergence of individual identity within the larger group. [FN267] This eclipsing of individual identity by group identification has been found under certain conditions to reduce individuals' internal constraints on behavior. [FN268]

The deindividuated state can render positive results. Strong feelings of unity and love, ecstatic experiences, and religious and other conversion experiences are associated with deindividuation. [FN269] However, the submersion of individuality in groups is also associated with aggression and lack of compassion. [FN270] In deindividuation, "[t]he loosening of our hold on the ego can bring about an emotional communion of a transcendental nature, but it can also lead us to commit atrocities of horrific proportions." [FN271] As Ed Diener states,

> [T]he deindividuated person in a certain situation might be more likely to donate a large amount of money to charity, might be more likely to risk his or her life to help another, and might be more likely to kiss friends ... . However, a deindividuated person***726** might also be more likely to throw rocks at others, participate in a lynching, or set a building ablaze. [FN272] Deindividuation, then, is associated with extremes of behavior that may be positive or negative.

Deindividuation is believed to be related to disinhibition of behavior through a lessening of the deindividuated, group-focused individual's internal self-awareness or self-reflection, [FN273] which disrupts his normal self-regulation. [FN274] External situational cues and internal emotional impulses come to govern the behavior of the person in the deindividuated state. [FN275]

This does not mean, of course, that deindividuated behavior is random. On the contrary, individuals deindividuated at a religious revival meeting predictably will "testify," and deindividuated gang members engaged in gang rape do not get confused and "testify" instead of attacking the victim. The emotional impulses and situational cues that come to guide individuals' and groups' behavior in the deindividuated state are themselves a predictable and meaningful reflection of individuals' desires and the groups' cultures. The situational cues present in the deindividuated situation develop into the context-specific standards of behavior or "emergent norms" of the situation. [FN276] In conditions of deindividuation, emotional impulses together with situation-specific group norms govern. [FN277] In turn, those emotions as well as those emergent norms reflect the proclivities of group members. [FN278]

While the form of deindividuation discussed thus far has been radical or acute deindividuation, it appears that deindividuation may best be conceived as including a continuum of psychological ***727** states ranging from

acute deindividuation to milder and perhaps more chronic or ongoing forms of deindividuation in which consciousness and identity are heavily communal, and individuality and individuated identity are minimized. [FN279] Such low-level or "chronic" deindividuation might be found, for instance, in day-to-day life in a religious cult.

The normative level of individuation of group members varies between different primary groups. [FN280] While some groups, such as some families for instance, normatively encourage the individuation and individuality of their members, other groups, such as the chronically deindividuated religious cult, have norms encouraging or requiring deindividuation. Similarly, acute deindividuation also is normative behavior for some groups. [FN281] For instance, acute deindividuation may be normative behavior at a religious revival or at some rock concerts.

Thus, the occurrence of deindividuation itself--both chronic and acute--is affected by group norms that favor or disfavor deindividuation. Moreover, the "disinhibited" behavior that will occur once in the deindividuated state also is guided by group attitudes, proclivities, and emergent group norms. [FN282] That disinhibited behavior may range from the heights of generosity to the depths of atrocity, including rape.

b. Normative deindividuation in military organizations. Military organizations share norms favoring deindividuation, both chronic (in training, in barracks life) and acute (in combat). This is not to say that deindividuation is fostered to the exclusion of all individuality in the military. On the contrary, recognition of individuality is reflected in, for instance, achievement awards and commendations to individuals. However, some degree of deindividuation is favored throughout a military career, and a particularly***728** high degree of deindividuation is called for during certain periods of service, including basic training and, for those who serve in combat, the combat context.

From the time of basic training, low-level deindividuation is cultivated in recruits. Throughout training, recruits learn to view themselves less and less as the individual identities they came in as and more and more as part of a team or group of buddies. [FN283] Indeed, learning to identify with the other members of the unit is perhaps the most important lesson of basic training. [FN284] Integral to basic training is the systematic stripping away of the recruit's prior self-image and identity. [FN285] As Peter Bourne simply states, "[T]he recruit must reject his preexisting identity and envelop himself instead in the institutional identity of the military organization." [FN286] Robert Lifton similarly observes that the recruit's "civil identity, with its built-in restraints, is eradicated, or at least undermined and set aside in favor of the warrior identity." [FN287] This process of deindividuation is carefully constructed as part of the basic training process. As Gwynne Dyer vividly describes,

> The first three days the raw recruits spend at Parris Island [Marine Corps Recruit Depot] are actually relatively easy, though they are hustled and shouted at continuously. It is during this time that they are documented and inoculated, receive uniforms, and learn the basic orders of drill that will enable young Americans to do everything simultaneously in large groups. But the most important thing that happens in "forming" is the surrender of the recruits' own clothes, their hair--all the physical evidence of their individual civilian identities. During a period of only seventy-two hours, in which they are allowed little sleep, the recruits lay aside their former lives in a series of hasty rituals (like being shaven to the scalp) whose symbolic significance is quite clear to them even though they are quite deliberately given absolutely no time for reflection... . [S]o the recruits emerge from their initiation into the system, stripped of their civilian clothes, shorn of their hair, and deprived of whatever confidence in their own identity they may ***729** previously have had as eighteen-year-olds, like so many blanks ready to have the Marine identity impressed upon them. [FN288] In these ways, deindividuation is normatively favored

and encouraged in military training. Additional techniques that foster deindividuation include screaming in bayonet training, chanting cadences in drill training, and other exercises that minimize individual self-reflection and maximize group cohesion. [FN289]

Deindividuation has been found to be fostered and intensified by high levels of group cohesiveness, [FN290] by physiological arousal of group members (caused by physical exertion, sensory stimulation, and the like), [FN291] by intensive situational involvement (especially when the group has an urgent common goal), [FN292] and by lack of situational structure. [FN293] All of those potentiating factors are present at particularly powerful levels in the combat context, where deindividuation tendencies among military units will therefore be heightened.

J. Glenn Gray provides a vivid description of the deindividuation characteristics of the combat situation:

> In these situations some are able to serve others in simple yet fundamental ways. Inhuman cruelty can give way to super-human kindness. Inhibitions vanish, and people are reduced to their essence***730** ... . Again and again in moments of this kind I was as much inspired by the nobility of some of my fellows as appalled by the animality of others, or, more exactly, by both qualities in the same person. The average degree, which we commonly know in peacetime, conceals as much as it reveals about the human creature. [FN294] Some of the commonalities between military and religious organizations were noted earlier. [FN295] With regard to deindividuation, the parallels become striking. As Gray has commented regarding the experience of combat:
>
> > In moments like these many have a vague awareness of how isolated and separate their lives have hitherto been and how much they have missed by living in the narrow circle of family or a few friends. With the boundaries of the self expanded, they sense a kinship never known before. Their "I" passes insensibly into a "we," "my" becomes "our," and individual fate loses its central importance... . [A]t its height, this sense of comradeship is an ecstasy. [FN296] Gray concludes that
> >
> > > [t]here must be a similarity between this willingness of soldier-comrades for self-sacrifice and the willingness of saints and martyrs to die for their religious faith... . This is the mystical element of war that has been mentioned by nearly all serious writers on the subject. William James spoke of it as a sacrament. [FN297] Thus, the situation of a cohesive military unit in a combat situation is, like certain religious experiences, highly conducive to deindividuation.

Once military unit members are in a deindividuated state, and if the group's proclivities--its culture and normative attitudes, including gender and sexual attitudes--have already been developed in a rape-conducive direction, then rape becomes a plausible outcome. [FN298] This would be particularly true under the conditions ***731** of acute deindividuation that are characteristic of combat, but would also apply in peacetime when a milder or chronic deindividuation appears to be common and acute deindividuation occasional.

In summary, the deindividuation fostered in military units may interact with normative rape-conducive sexual and gender attitudes to elevate the rape propensity of military organizations. This interactive effect would be expected to occur in peace as well as in war, but to be particularly potent in the combat context.

III. CHANGES IN THE CONTENT OF MILITARY CULTURE

We have seen evidence in the discussion thus far that there exists a differential between military rape rates and military rates of other violent crime. We have considered the possibility that the military rape differential may be attributable in part to the norms and attitudes--toward gender and sexuality, and toward deindividuation-

-extant within military organizations. If that causal analysis is at all accurate, then it suggests that we may be able to reduce military rape rates, in peace and also in war, by altering the norms that are conveyed within the military.

The potential for reducing military rape incidence in this way suggests an additional perspective from which to evaluate policies affecting military culture. The possibility that certain aspects of military culture contribute to the military rape differential weighs in favor of policy choices that foster change in those aspects of military culture.

Thorny questions, however, remain. In particular, we must ask what sorts of policy choices would foster the cultural change in question and whether the contemplated cultural change can occur ***732** without undermining military effectiveness. These are the issues to be addressed in this and the following section.

Primary group bonding has repeatedly been found in military research to be essential to combat performance--and thus essential to the effectiveness and, indeed, the survival of troops in combat. [FN299] Primary group relations provide essential elements of morale in combat, including on-the-scene motivation, [FN300] emotional support, and self-confidence. [FN301] Primary group bonding in the military is, in this way, a matter of life and death.

Deindividuation too appears to be an important contributor to combat effectiveness, fostering bravery and heroism in battle. Indeed, it has been suggested that traditional rituals such as war dances or chanting before battle were designed to facilitate deindividuation of the warriors in combat. [FN302]

For these reasons, in exploring ways to reduce the rape incidence of military personnel, reducing primary group bonding or deindividuation of troops would not be an appropriate place to start. Rather, a more appropriate focus would be on the normative gender and sexual attitudes within military culture.

There is reason to believe, as we have seen, that change in the gender and sexual norms of military culture could contribute to a reduction in the rape incidence of military organizations. Such cultural change could very likely be fostered through gender integration of the military, from basic training through combat, as shall now be considered. Such thoroughgoing integration of the military would be importantly facilitated by further narrowing or elimination of the female combat exclusion and by "accession" (as ***733** hiring of uniformed personnel is called) of a greater proportion of female personnel, as shall be discussed later in this section.

We might expect that a truly thoroughgoing integration of women throughout the military services would do much to undermine group norms featuring the constellation of attitudes comprised of hypermasculinity, hostility toward women, adversarial sexual beliefs, and the like, discussed earlier. The presence of women as full members of the fighting forces would be inconsistent with a military culture in which women are viewed as the "other," primarily as sexual targets, and in which aggression is viewed as a sign of masculinity. The very presence of women as military equals would call into question such views.

There has been considerable movement in recent years toward integration of women into the American military. The gender integration of some military units may already be having a positive effect on gender attitudes. According to one female Army Sergeant interviewed in 1994, "The idea that being a soldier means being masculine is changing because of more women coming into the services. The fact that there are now female fighter pilots, for example, helps a lot." [FN303] A female Army Staff Sergeant summed up the point, saying: "The units that work with females every day seem to be able to relate better." [FN304]

While we have seen some movement toward integration of women into the services in recent years,

however, that movement has been within limits. Those limits on gender integration of the *734 military also appear to limit the extent of change likely to occur in military gender and sexual culture. It seems improbable, for reasons now to be considered, that we will see a full transition in the gender and sexual norms of the military as long as rules remain excluding women from a range of combat positions, and low proportions of women are accessed for military service.

A. *The Combat Exclusions*

The rules excluding women from combat have been narrowed considerably in recent years. However, the remaining exclusions of women from combat positions still limit the potential for change in the gender and sexual culture of the military. A very brief historical overview of legal limitations on American women's military participation will place these issues in context.

Prior to the Armed Forces Integration Act of 1948, American military women served only in auxiliary units. [FN305] The 1948 Act authorized the participation of women in certain roles in the regular services, but limited their total presence to 2% of enlisted strength, and limited the rank that a female officer could achieve. [FN306] The 2% total-female-enlisted participation limit was lifted in 1967. [FN307] In 1976, women were admitted for the first time to the Naval, Air Force, and Military (Army) Academies. [FN308] Two years later, statutory reform permitted women to be assigned to duty on certain naval vessels. [FN309] Throughout this period, women were prohibited by statute from naval and air combat roles. Army policy, in the absence of statutory law, excluded women from combat positions. The legal status of American women's military participation remained in essentially this posture until 1988, when the Department of Defense (DOD) further defined the combat exclusion by adopting the "risk rule," which excluded women from noncombat units or missions in which the risks of exposure to direct combat, hostile fire, or capture equaled or exceeded those risks in the combat units they supported. [FN310]

*735 Major changes toward a narrowing of the combat exclusion for women began to occur in 1991, when Congress repealed the statutory exclusion of women from combat aircraft in the Air Force and Navy. [FN311] In 1993, Congress eliminated the statutory restrictions on women serving on combatant Navy vessels. [FN312] Then, in the spring of 1993, Secretary of Defense Les Aspin directed the services to open combat aircraft positions to women, to provide recommendations to the DOD on whether to retain or replace the risk rule, and to study the possibilities for opening to women additional positions, including combat positions. [FN313]

Pursuant to Secretary Aspin's initiative, the risk rule was rescinded in January of 1994, and was replaced by the "Direct Ground Combat Rule" (DGC Rule), which provides as follows:

> A. *Rule.* Service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground, as defined below. B. *Definition.* Direct ground combat is engaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect. [FN314] *736 Pursuant to Secretary Aspin's directive, the Air Force in 1994 opened additional combat aviation positions, bringing to over 99% the total proportion of Air Force positions open to women. [FN315] Air Force positions remaining closed include Air Force Pararescue, Combat Controllers, and any other positions or units defined as involving direct ground combat or assignment with direct ground combat units. [FN316]

The Navy, pursuant to its interpretation of the DGC Rule, opened most combatant vessel positions to

women, bringing to 94% the proportion of all active-duty Navy positions open to women. [FN317] Positions still excluding women include those in submarines, coastal patrol boats, certain mine warfare ships, and Special Operations Forces. [FN318]

The Army, pursuant to its interpretation of the DGC Rule, opened certain additional positions, raising to 67% (from a former 61%) the proportion of Army positions open to women. [FN319] Army positions that remain closed include, but are not limited to, all combat units below the brigade level; Special Operations Forces; all armor and infantry; cannon, artillery, and short-range air defense*737 artillery; and units that co-locate by doctrine or requirement with direct ground combat units. [FN320]

The Marine Corps opened additional positions, raising from 33% to 62% the Marine Corps positions open to women. [FN321] Marine Corps positions still closed to women include positions analogous to Army positions still closed to women, listed above. [FN322]

Considerable progress has thus been made in narrowing the legal limitations on American women's military participation. However, exclusions still remain in all four forces, particularly in the Army and Marine Corps.

While the recent narrowing of the combat exclusion has been extremely valuable, the perpetuation of the exclusion in its present form limits potential effects on the gender and sexual norms of military culture that might be gained from a more thoroughgoing integration of women. The remaining combat exclusions limit women's advancement into leadership positions and also retain as exclusively male many of the most stereotypically masculine roles. Each of these factors limits the cultural change likely to result from the presence of women in the forces.

The remaining combat exclusions pose significant limitations on women's advancement within military organizations, particularly in the Army and Marine Corps. As one reporter asked Undersecretary of Defense for Personnel and Readiness Edwin Dorn,

> If you're going to keep women, particularly in the Army and the Marine Corps, out of direct ground combat, are you not denying them ... the opportunity to compete with their male counterparts for promotion, particularly to general officer? If they're not allowed to be in infantry and armor and most artillery, you've kind of removed them from the fast track, have you not? [FN323] Undersecretary Dorn replied that "to be quite honest, you are partially correct, because [of] the prohibition against ground combat, it is not likely that in the next 25 or 30 years there will be a female chief of staff of the Army." [FN324] Of course, Chief of Staff is not the only position that women will be impeded in achieving. Rather, insofar as combat service has been and continues to be an *738 important element in promotion decisions, [FN325] women's exclusion from much of combat service will limit their opportunities for promotion generally.

Integration of women into positions of military leadership would affect military gender norms both at a symbolic level and in very concrete ways. As one female former Army officer stated,

> It helps a lot to have females there, but especially if they have some rank. Like in Saudi, during the Persian Gulf War, my commander told me to "Act like a soldier, not like a girl." I confronted him and he backed off. So he got feedback, because there was a female there--but especially because I had enough rank and the confidence to confront him. Not everyone would have been in a position to do that. [FN326] To the extent that women are, because of remaining combat exclusions, less likely to become military leaders and more likely to remain in lower echelons, their value in changing the gender norms of

military culture is thereby limited.

But it is not only the *rank* held by women but also the substance of their military roles--their job fields and duties--that would be expected to affect military gender norms. The combat exclusions contribute to a powerful symbolic message about the appropriate roles of men and women. Only men are deemed suitable for ground and certain other forms of combat--arguably the very positions that have been considered the prototypical military positions, perhaps the most "macho" ones. In this way, the continued exclusion of women from certain combat roles may actually reinforce and reaffirm traditional military gender norms; that is, to be a "real soldier," a fighter, one must be a man.

In addition to the general effects on military culture of the symbolic message carried by the remaining combat exclusions, we also must consider the particular effects of the exclusion on those occupational fields from which women are actually excluded. Units from which women are excluded may well elaborate "macho" norms (norms consisting of the constellation of rape-conducive gender and sexual attitudes discussed earlier) even more intensively than we have seen before, as all-male composition now becomes a distinguishing group feature even within the broader military.***739** We would expect for that tendency toward masculinist group identification to be heightened yet further as individuals attracted to that group image self-select into the remaining all-male occupational fields. [FN327]

While important progress has been made in reducing the range of combat positions from which women are excluded, reform also has been limited in ways that are likely to limit the effects of that reform on military culture. The remaining combat exclusions may tend, in both concrete and symbolic ways, to reinforce the traditional military gender and sexual norms that may be contributing to the military rape differential.

B. *Accessions Policies*

Related to but distinct from the issue of combat exclusion rules are the military services' policies on accessions of service members. No matter how many military positions are "open to women," unless the services' accessions policies contemplate actually placing women in some substantial proportion of those positions, military occupations will not become substantially integrated, and resultant change in military gender and sexual culture will thereby be limited.

1. *Accessing Recruits.* Each year, each service produces a personnel management plan for the next year including projected accessions, promotions, and discharges. [FN328] These plans set numerical goals for accessions on a variety of bases, including prior service experience, job specialty, geographical district, race, ***740** and ethnicity. [FN329] The Army and Marine Corps also have set minimum female enlisted accessions goals (18% and 16%, respectively). [FN330] Informed sources within each of these services state that they intend to meet but do not expect to exceed their minimum goals for female accessions. [FN331] The Navy and Air Force now have gender-neutral accessions policies (in the sense of having no stated gender goals or quotas), [FN332] but still have projected or predicted numbers of females expected to be accessed (18% to 20% for the Navy). [FN333]

The planned or projected number of women to be accessed obviously is not simply a function of the number of jobs "open" to women in each service (i.e., jobs not restricted to men under a combat exclusion and not "reserved" to men for other policy reasons). [FN334] Rather, each service considers a variety of factors, including the service's needs, potential availability of female recruits, and costs, in identifying the number of females to be accessed. [FN335] That number may bear only a very distant relationship to the number of jobs open to women in the service. [FN336] For instance, while 62% of Marine Corps positions are "open" to women, [FN337] the current Marine Corps minimum goal or floor for female enlisted accessions is 6%. [FN338]

And the Navy prediction for female enlisted accessions is 18% to 20%, [FN339] even while 94% of Navy positions are open to women. [FN340]

For gender integration to be effective in changing gender and sexual norms in the military, women must be present in sufficient numbers to be perceived as more than tokens. [FN341] Two decades of ***741** research in commercial, educational, and military contexts indicates that when women are introduced into a previously male environment, the *proportions* of male and female in the newly integrated environment are crucial in determining the outcome of integration. When women remain a small minority, stereotyping and negative reaction are perpetuated and women remain isolated within the group. [FN342] As Rosabeth Kanter has observed, "As long as numbers are low, disruptions of interaction around tokens ... are seen by the organization as a huge deflection from its central purposes, a drain of energy, leading to the conclusion that it is not worth having people like the tokens around." [FN343] The presence of women in small numbers dispersed throughout the military creates, in some ways, the worst of both worlds. As Judith Stiehm puts it, "Because the women remained a small percentage both of the whole and of any unit to which they were assigned, were dispersed through a variety of noncombat jobs, and were integrated into many previously all-male units, their presence disturbed without altering." [FN344] The gender ratios of accessions are thus a very important factor in determining what effect the presence of military women will have on the gender and sexual norms of military culture.

Accessions policies exert a strong influence on accessions results. Based on accessions policies, recruiting commands in each service pursue recruiting strategies that target particular populations (defined by factors including age, region, race, and gender) in their advertising and in high school recruiting visits. While accessions policies and resultant recruiting strategies surely do not entirely determine the proportion of recruits that are female (broader societal gender roles, for instance, may more narrowly limit the number of females than the number of males that are "recruitable"), those policies do exert a considerable influence on the proportion of female accessions. For that reason, accessions ***742** policies are crucially important to the future of women's military participation and thus to the potential effects of gender integration on military culture. "Accessions are the heart of the women-in-the-military matter. If women are not accessed, all other considerations become moot." [FN345]

Numerous factors, including military readiness, force diversity, and cost, have formed the basis of accessions policies to date. Military cultural change and the potential resulting reduction in military rape rates are yet another factor that might valuably be taken into account in the future formation of accessions policies regarding gender.

2. *Basic Training.* An especially important problem for purposes of military cultural change that arises from the low rate of female accessions into the services is the resultant impossibility of thoroughly integrating basic training. The most intensive period of socialization into military culture occurs in the basic training of new recruits. Therefore, an important point for transformation in the gender and sexual norms of military culture is in this initial training of military personnel.

The Army, Navy, and Air Force each conduct some form of gender-integrated basic training. But those services, in attempting to integrate basic training, are constrained by the fact that there are far fewer female than male recruits. [FN346] The Air Force has responded to that constraint by distributing recruits in a gender-neutral manner, with the result that women generally constitute a small minority within their training units (on average, 21% in fiscal year 1993). [FN347] The Navy, in contrast, clusters female recruits into a few basic training units with roughly equal numbers of ***743** males and females, and leaves the remaining majority of basic training units male only. [FN348] The Army clusters female recruits into a few basic training units with a minimum of 25% females, leaving the remaining majority of units male only. [FN349] The Marine Corps makes

no attempt to integrate basic training, segregating male and female recruits at the battalion level. [FN350]

Air Force basic training thus occurs in a context in which females constitute a small minority within their training units. This minority status may substantially diminish the effects of women's presence on the gender norms and attitudes of the units in which they train. [FN351] For Marine and most Army and Navy personnel, basic training, a crucial period of socialization into military culture, occurs in an all-male environment. [FN352] The result of maintaining all-male training units is that females may be viewed by male recruits (and perhaps even by female recruits themselves) as marginal or peripheral to military life. [FN353]

*744 In explaining the Navy's reasons for moving toward gender-integrated recruit training, Patricia Thomas and Kathleen Bruyere state that "the Navy recognized that the practice [of single-sex recruit training] is divisive, setting the stage for differential treatment of women later in their military careers." [FN354] Such marginalization of female recruits presumably would minimize the impact of their presence on the norms and attitudes of the organizations in which they participate. It will be difficult, however, for the Navy to counteract a tendency toward such marginalization of female recruits by "integrating" basic training if, because of accessions numbers, most basic training units remain all male even after "integration."

In addition to potentially causing female recruits to appear marginal or peripheral, another consequence of the single-sex basic training that occurs in all Marine and most Navy and Army units is that the presence of women in the services has little effect on the content (particularly the informal, "cultural" content) of the male recruits' training. This phenomenon is reflected in an anecdote mentioned earlier: The name "Suzie Rottencrotch" was still in unofficial use by males at Parris Island in 1993, but the female drill instructor I spoke with learned this only by asking her male counterpart. [FN355] Also illustrative is the fact, related to me by a female drill instructor at Parris Island in 1994, that female recruits are informally instructed on what sexual conduct is appropriate for them, and on how to deal appropriately with the sexual conduct of the male Marines, which they should not expect to be exemplary. [FN356] In ways such as those reflected in these brief anecdotes, the maintenance of single-sex basic training units permits the informal content of the training of male and female recruits to differ and, thereby, minimizes the effect that the existence of female ***745** recruits has on the gender and sexual norms conveyed in basic training.

Thoroughgoing integration of basic training would thus be an important component in transforming the gender and sexual norms of military culture. Such integration, however, is rendered highly problematic by the relative paucity of female accessions. The low proportion of female accessions therefore represents an obstacle to military cultural change both in terms of the reduced presence of women in the military generally and, of particular significance, during the intensive socialization period of basic training.

Although extensive progress has been made toward integration of women into the military, significant limitations remain that reduce the extent of resultant change in the gender and sexual norms of military culture. [FN357] Arguably, a more thorough program ***746** of gender integration of the military would be preferable. Effects on military rape incidence are an additional factor, not previously taken into account, that should be considered in the making of policies--including combat-exclusion and accessions policies--that will ultimately shape the gender and sexual culture of the military. [FN358]

*747 A detailed analysis of the considerations for and against thorough gender integration of the military is beyond the scope of this Article. However, in suggesting that considerations of rape reduction may weigh in favor of policies that will change military gender and sexual culture, it is worthwhile to explore the feasibility of such change at the conceptual level. In particular, it is important to ask: Can military gender and sexual culture be changed more thoroughly than has occurred to date without eroding military effectiveness? That is, does the

traditional gender culture of the military itself contribute in necessary ways to military readiness? That question is addressed in the next and final Part.

IV. FUNCTIONS OF AND ALTERNATIVES TO A MASCULINIST MILITARY IDENTITY

We have seen that a certain constellation of attitudes toward gender and sexuality has been found to be associated with heightened rape propensity. For ease of exposition, I will refer to this attitudinal constellation as "masculinist." [FN359] We have also seen evidence suggesting that this masculinist constellation of normative attitudes toward gender and sexuality is prevalent within military culture as currently constructed.

We now must ask, in contemplating a change in those gender and sexual norms of military culture, whether such a change can occur while also maintaining military effectiveness. For that reason, it will be valuable to explore the reasons for and the functions of a masculinist military identity, [FN360] in order to consider whether functions now served by a masculinist military identity can be fulfilled through alternative means.

***748** Certainly, the phenomenon of linking military identity with masculinity has been longstanding and widespread. As David Marlowe has commented,

> A widespread relationship links male sexual validation and validation in war, combat, and aggression. Until recent times, many human groups' definition of the male as sexually mature and eligible for marriage and intercourse was contingent upon his having proven himself as a warrior in battle. For example, the Afar and Issa peoples of the Horn of Africa required the slaying of an enemy in combat before a male was eligible for marriage. Among the Somali the demand for blood vengeance following assault is underlined by threats to withdraw sexual access and taunts about sexual unworthiness made by the women of the group to goad the men into combat. The examples can be multiplied for human groups on every continent and, at almost every level of societal complexity. [FN361] The pervasiveness of a masculinist military construct raises the question of the reasons for its widespread popularity and the functions that the construct may serve. Although no definitive explanation for the pervasiveness of the masculinist military construct is possible, five elements are likely contributing factors. The first two, as we shall see, may be waning in their causal vitality at this moment in history. The latter three continue to be causally efficacious, but may not represent an insurmountable barrier to change because of the availability of suitable alternatives.

The first and rather obvious explanation for the linkage of military service and masculinity is that, historically, success in combat depended heavily upon the physical strength of the combatants. Combat was a male domain because strength was largely determinative of combat's outcome. Now, of course, with the advent of increasingly lighter and more effective firepower, this basis for linking combat and maleness has become much more tenuous. [FN362]

***749** But the historical importance of strength for combat, while addressing the linkage of combat and maleness, does not satisfactorily explain the more complex linkage of combat with the particular construction of masculinity (and attendant attitudes toward sexuality and toward women) that I have termed "masculinist" or the significant emotional energy invested in that link. The second explanation of the linkage between military service and masculinity addresses the issue on that more complex dimension. Here, at the level of psycho-sexual causes, explanations necessarily become more speculative.

One psychoanalytic explanation for the linkage of military service and a particular, "masculinist" construction of masculinity is that young males, unlike young females, utilize institutions like the traditional

military as means through which to affirm their gender identities. The reasoning is that young males gravitate toward opportunities to affirm their masculinity (in a manner not analogous to the behavior of young females) because of gender-asymmetry in parenting which makes the psycho-sexual development of girls and boys fundamentally different. In essence, the argument here is that, in a society in which girls and boys are both primarily parented by women, girls never have to shift away from their primary attachment (mother) to develop (female) gender identity, whereas boys have to separate psychologically from the primary bond with mother to establish identification with a male figure to develop male gender identity. This more problematic male course of development, it is argued, creates a variety of psychological differences between the sexes, including a continuing need in many young (and some older) men to separate, distance, and distinguish themselves from the feminine, the (m)other, and to affirm their masculine identification in sharp contradistinction to femininity. [FN363] Methods for such affirmation of maleness presumably would include bonding with father figures as well as with all-male, ***750** hypermasculine groups. One such group would be, of course, the traditional armed forces. [FN364] Viewed in this light, we can perhaps make sense of the Army National Guard advertisement that shows a group of young men wading through high water and bears the caption: "Kiss your momma goodbye." [FN365]

David Marlowe has once again made pertinent observations:

> The military group is, in this sense, a reflection of the myriad other adolescent and youthful male groups that in most cultures traditionally play either a formal or informal role in the process of maturation and the acquisition of full male sexual and social identity. These institutions range from the *poro* and other agegraded groups in African societies, including circumcision and warrior-age class groups, to the men's societies and men's houses of the Circum-Pacific and other specialized groups. Horizontally bonded, exclusive groups of young males have also characterized the social developmental process in Western Europe. These range from groupings of apprentices and students to those of young professionals, all based upon highly elaborated and complex percepts and images of male brotherhood. The United States has since its founding been marked by many like groups in the form of gangs, militias, volunteer fire companies, and other organizations that partake of elaborate sets of constructs of masculinity and male behavior. [FN366] To whatever extent the above psychoanalytic view of the reasons for a masculinist military is accurate, trends toward more shared parenting should reduce the power of young males' need for participation in masculinist groups defined in distinction to the feminine (m)other. At the same time as technology plays a part in weakening the link between maleness and combat (by making successful use of violence less dependent on physical strength), technology and other social factors also weaken the link between ***751** femaleness and primary parenting. Both of these historical changes make more possible and more likely a movement away from the traditional masculinist military and toward a desegregation of military culture.

The first two reasons for the masculinist military construct thus may be waning in their causal efficacy. The other three, however, are of continuing vitality.

The third factor contributing to the masculinist military construct relates specifically to the particular *vision* of masculinity as dominance, aggressiveness, and toughness embraced in military culture. Presumably, idealization of those characteristics is highly functional in an organization whose *raison d'être* is combat. It therefore is unsurprising that those characteristics would be highly valued in military organizations.

Nevertheless, there is no reason that the high valuation of those attributes cannot be retained while simultaneously dissociating them from masculine gender; they may be valued instead as important attributes in a good soldier regardless of gender. Nor need the celebration of a certain steeliness exclude the approval also of

compassion and understanding (as it does in the hypermasculinity component of the masculinist construct). [FN367] Indeed, it is that very combination of aggressivity with compassion that is required for compliance with the laws of war that require humane treatment of prisoners, civilians, and the wounded. [FN368] Therefore, there is much to be gained and little to be lost by changing this aspect of military culture from a masculinist vision of unalloyed aggressivity to an ungendered vision combining aggressivity with compassion.

The two final factors contributing to the masculinist military construct arise from the benefits of that construct for group cohesion.***752** First, a masculinist group identity may provide a basis for group cohesion between group members who otherwise share little in common. The group of individuals composing a military organization is often quite diverse in terms of race, ethnicity, religion, region, education, and class. This is especially true under conscription but remains somewhat true even with an all-volunteer force. Because military organizations *have* been virtually all male until recently, a focus on masculinity or "manhood" may well have served as a handy and powerful basis for group identity, [FN369] allowing for a stable definition of group and other. [FN370] Moreover, embracing a particular vision of masculinity that is defined in part by eschewal of the feminine may further aid group cohesion by defining an "other" that is constant over time: Even while the "enemy" changes, the *sexual* other does not change.

Given the importance of group cohesion for military effectiveness, especially in combat units, [FN371] we must ask, in contemplating changes to the military's traditional masculinist group identity, what alternative bases of group identity and cohesion could successfully replace the existing, gender-based structure. As discussed earlier, group identity and cohesion in ideological primary groups can be effectuated around themes that are religious, political, moral and the like; and nonideological primary groups can bond on the basis of not much more than the merest assertion of a "we/they" divide such as gang, fraternity, or team membership. There thus exists a range of possible bases for group identity and cohesion to be considered.

***753** Appropriate and effective bases for military group identification other than gender could incorporate both ideological and nonideological elements. Ideological bases could include an identification of the group as just warriors, protecting democracy and the decent lives of decent people. The "other" (always important for group identity) could be defined as those who would be oppressors, the unjust. Such visions of just warriors on an honorable mission can be mightily motivating.

One may have certain misgivings about such a basis for military group identity. Group identification as an armed band on a righteous mission can indeed be powerfully motivating--even intoxicating--and, for that reason, risky. Certainly, people who believe that they are justified in using violence for a righteous cause often are dangerous. As Myriam Miedzian well states,

> Cossacks, whose pogroms against Jews terrorized my father and his family ... believed that they had God and virtue on their side.... [T]he Germans who threw my aunts and uncles ... into gas chambers ... believed that they were serving the higher cause of purifying the Aryan race. [FN372] The use of violence in the pursuit of good, then, is always something of which to be suspicious; but so is pacifism in the face of atrocity. Short of adopting a position of thoroughgoing pacifism, the merits of which I will not debate here, some basis for military group identification must exist. Surely, if armed force is ever to be deployed, then idealism and moral conviction are preferable motives to macho posturing. Examples of cohesive groups centered on ideological rather than gendered bases for bonding include some religious orders, Communist Party cells, the French resistance underground, and even Alcoholics Anonymous. Each of these types of groups has based a high degree of cohesion on an ideological basis, a shared cause, without utilizing gender as a basis of group bonding.

Nonideological bases for military group identification also are available. Those bases could include such basic definitions of group and other as national identification and, of course, unit and buddy identification. [FN373] The readiness with which formation of group ***754** identification occurs even in the absence of shared ideology or other apparent basis is notable. As Donald Horowitz has described,

> There is now a rapidly accumulating body of evidence that it takes few differences to divide a population into groups. Groups can form quickly on the basis of simple division into alternative categories. Once groups have formed, group loyalty quickly takes hold.... The tendency to cleave and compare ... forms the theme of a series of experiments ... [which demonstrated] a marked propensity to form groups on the basis of the most casual differences and then to behave in a discriminatory fashion on the basis of the new group identity. There are many variations on the experiments, but they generally involve subjects assigned to a category on the basis of trivial differences, no differences, or a conspicuous toss of a coin. Once assigned, group members experienced no face-to-face interaction with other ingroup or outgroup members, and there was no effort to instill ingroup loyalty or outgroup hostility. Given the opportunity to apportion rewards, subjects nevertheless discriminated so as to favor ingroup members and disfavor outgroup members. The minimal basis of group differentiation needs to be underscored. What produces group feeling and discrimination is simple division into categories.... In another experiment, subjects who were not placed into categories were accorded an opportunity to discriminate in apportioning rewards among other subjects with similar artistic preferences, dissimilar preferences, and no known preferences at all. This produced no statistically significant tendency to discriminate on the basis of similarity. Plainly, what counts is group membership and not demonstrated similarity.... These findings have now been replicated and have a solid basis in the experimental literature. [FN374] There thus exists a range of bases for group identity and motivation that would be suitable alternatives to the traditional masculinist military identity. Indeed, new bases for military identity may actually be more sustaining for soldiers' morale over time ***755** than the masculinist identity. William Manchester has argued that while the "macho" image provides initial attraction, soldiers faced with the tragic realities of combat may reject that vision as false, and may feel duped and betrayed by the leaders who fostered that image. [FN375] Manchester describes his own experience reflecting this phenomenon:
>
> > After my evacuation from Okinawa, I had the enormous pleasure of seeing [[[John] Wayne humiliated in person at Aiea Heights Naval Hospital in Hawaii .... Each evening, Navy corpsmen ... could watch a movie. One night they had a surprise for us. Before the film the curtains parted and out stepped John Wayne, wearing a cowboy outfit .... He grinned his aw-shucks grin, passed a hand over his face and said, "Hi ya, guys!" He was greeted by a stony silence. Then somebody booed. Suddenly everyone was booing. This man was a symbol of the fake machismo we had come to hate, and we weren't going to listen to him. He tried and tried to make himself heard, but we drowned him out, and eventually he quit and left. [FN376] In short, while macho images may be potent motivators for young men, their productive effects may be shortlived and followed by counterproductive ones. Alternative bases for group identification thus might be not only equally but actually more efficacious than the traditional masculinist construct.

To recognize potential alternative bases for military group cohesion is not to underestimate in any way the power of gender as a basis for group bonding. Prudence requires clear recognition that gender-based bonding has served well to foster unit cohesion in the past. At the same time, however, we must acknowledge that utilization of that basis likely comes at a price. Loss of cohesion resulting from a shift away from gender as a basis for group identity may be at least minimized by the development of other bases for cohesion. A policy decision then is required as to whether, if any residual loss of cohesion remains, the benefits in military cultural

change are worth that loss. We have accepted marginal losses of cohesion in choosing to integrate units by race, ethnicity, class, region, and religion. [FN377] A similar weighing of costs and benefits ***756** would be required as to any loss of cohesion that could result from further change in military gender and sexual culture.

Fifth and finally, in considering the functions of a masculinist military identity, it is important to note that an exclusively male, heterosexual group identity may serve to minimize sexual tensions between group members. As discussed earlier, sexual loyalties as well as sexual rivalries or jealousies pose potential threats to primary group cohesion. [FN378] The maintenance of an all-male, ostensibly all-heterosexual military would be expected to minimize those threats to cohesion within military primary groups. [FN379] Moreover, if those outside the group were viewed primarily as sexual targets (or even adversarial sexual targets), then this would tend to minimize even threats to group cohesion coming from the formation of bonds and loyalties in sexual relationships outside the group. Given this cohesion-protecting function of a masculinist group identity, we must ask, in considering amending such a basis for group identity, whether there are alternative means to minimize sexual tensions within the military group.

As discussed earlier, all primary groups develop sexual norms--sometimes specialized sexual norms--to control the potentially destructive effects of sexuality on group cohesion. [FN380] The specialized sexual norms best suited to the military would appear to be much like those of the family [FN381] (just as the military unit replicates many of the other psychological structures of the family, as discussed earlier). [FN382] A military "incest taboo" would strictly prohibit sexual relationships between members of the same military units. [FN383] The minimization of sexual relationships within military***757** units has been accomplished historically through the exclusion of women and the ostensible exclusion of gays. The full inclusion of women would require adjustment of the mechanisms for continued minimization of sexual relationships within units. Just as military units have traditionally been "a band of brothers," gender-integrated units would have to be carefully shaped and defined as a band of brothers and sisters between whom sexual relationships would be unacceptable. [FN384] The incest taboo approach would amount to a broadened fraternization policy, prohibiting not only inappropriate relationships between ranks but also sexual relationships regardless of rank within military units. [FN385] We might realistically expect that the "incest taboo," like the longstanding fraternization policy prohibiting sexual relationships between ranks, would be less than completely enforceable but nevertheless sufficiently effective to minimize the potential problem of sexual tensions within military units.

***758** Results of a large-scale study on gender relations in mixed-gender military units support the validity and potential efficacy of this family-analogy approach. The study observes that in fostering positive gender relations that minimize sexual tensions,

> [w]omen may ... rely on societal roles in which men and women are not sex objects for one another, such as sibling, parent, and child. Common during interviews were sentiments similar to this one heard in Somalia: "We're just like brothers and sisters out here." Women often note that harassment tends to come from outside the unit--from men who do not know them personally and especially from men who do not work with women regularly. A "brother" may stick up for a "sister" he feels is being discussed disparagingly behind her back. [FN386] The taboo against within-unit sexual relationships could be intensified in units, such as combat units, in which cohesion is particularly crucial. Impressing upon troops that their lives may depend upon group cohesion in combat may cause units to develop internal mechanisms for enforcing the sexual-relationships prohibition for purposes of self-preservation.

Thus, there are methods available to minimize the disruptive potential of sexuality other than through the maintenance of a masculinist military. Certainly, other cohesive groups such as zealous political, religious, and self-help organizations have maintained strong group cohesion without gender exclusions. [FN387] Moreover,

group cohesion appears to have been adequate in the gender-integrated combat units of the past, including those of Russia, Israel, North Vietnam, and others. [FN388]

***759** As the Report of the Presidential Commission on the Assignment of Women in the Armed Forces states,

> A review of the psychological literature and post-integration studies and testimony before the Commission indicates situations have existed in which women were able to bond with men in various non-combat environments. Also, non-combat mixed-gender units seemed to communicate and work better than single gender units performing similar tasks. [FN389] Even so, the presence of both men and women within a unit surely creates some potential for sexual tensions that would not exist in an all-male group. Some loss of cohesion may result at the margin. As discussed earlier, the decision whether any loss of cohesion that does result from gender integration is warranted by the benefits of integration is a policy decision. Rape incidence considerations are among those that should be taken into account in that weighing.

In sum, while the masculinist military identity has served important functions as a basis for military group cohesion and identification, sound alternative bases for military group identity appear to be available. Masculinist military identity, then, is not inevitable or indispensable to military effectiveness but, rather, is a matter of choice.

Altering the masculinist basis of military group identification raises important concerns: What if there are important functions of the masculinist identity that have not been accounted for? [FN390] What if the new basis is therefore less powerful, and leads to less cohesion, less motivation, less effectiveness in combat? These are crucial questions requiring careful address. Experimental programs to test the viability of a fully integrated combat force, for instance, should be earnestly pursued. [FN391] The exploration undertaken in this section suggests that the prospects for military cultural change consistent with military effectiveness are promising, and identifies ***760** reduction in military rape incidence as one potential benefit of such change.

The factors that have been considered to date in the policy debate regarding women in the military have been primarily equal employment opportunity and military readiness. [FN392] This Article points to yet another, previously unconsidered, factor--the reduction of rape by military personnel--that should be taken into account in future consideration of policies, such as integration of women, that are likely to influence and to shape military culture. Indeed, taking into account the potential effects of military policies on military rape rates is a national obligation under some interpretations of international humanitarian law and human rights law. Both of those bodies of law require states to respect *and to ensure respect for* the legal prescriptions and prohibitions they entail. A comprehensive interpretation of the obligation to "ensure respect for" the prohibitions against rape would encompass both an obligation to refrain from policies that may unduly heighten rape incidence and an affirmative duty to pursue policies that would contribute to a reduction in rape rates when feasible. [FN393]

***761** CONCLUSION

This Article has presented evidence of a military rape differential, has considered methods of addressing that differential through domestic and international law, and has explored in some depth one avenue of explanation for and remediation of the differential observed. The evidence considered suggests that the gender and sexual norms of military culture may be causal factors contributing to the rape differential. The foregoing consideration of the ***762** functions of and possible alternatives to a masculinist military culture suggests that changes in the military's gender and sexual norms, which may help to reduce military rape incidence, may be effectuated

without unduly degrading military effectiveness.

This exploration of rape incidence in the military has implications both for further research and for present policymaking. Research comparing rape and other crime rates among different types of units (for instance, combat and noncombat units, units stationed at home and stationed abroad) may reveal important information. Further research on the handling and prosecution of rape by military personnel also is required to identify methods of improving both domestic and international enforcement of the prohibition against rape. In addition, evaluation research techniques [FN394] should be employed to measure military cultural change and to measure the effects of that change both on military effectiveness and on military rates of rape and sexual assault. The generalizability of the findings reported in this Article also remains to be considered: Further research is warranted to determine the extent to which the factors increasing U.S. military rape rates may also increase rape incidence in non-U.S. military organizations, and the extent to which common remedies may be applied. [FN395]

Beyond indicating the need for further research, this Article points to the appropriateness of taking rape incidence into account in making policy decisions affecting the gender and sexual norms of military culture. We may begin to act upon the indications that we already have of the sorts of cultural changes that could contribute to reducing rape incidence in the military. The benefits of such a reduction are great for potential victims of rape in war and in peace and also for those personnel who may thus be spared from becoming rape perpetrators. [FN396]

*763 APPENDIX A

METHODOLOGY FOR COMPARING MILITARY AND CIVILIAN CRIME RATES FOR THE PERIOD 1987-1992

The following methodology was used to compare male military and civilian crime rates while controlling for age. For each year, 1) Divide the total population base ("Total All Agencies") of the Uniform Crime Reports (UCR) "Offenses Known to the Police, Population Group" table [FN397] by the total U.S. civilian population [FN398] to obtain the percentage of the U.S. civilian population *764 included in the UCR offenses-known population. 2) A) Create age groupings as follows. Because military participation begins at age seventeen, the first age group includes ages 17-19. The remainder of the age groups represent five-year increments (to be consistent with UCR data age groupings) beginning with age 20 and ending with age 65 (because there is essentially no military participation over that age). B) Multiply the total number of males [FN399] in each age group in the U.S. civilian population [FN400] by the percentage of the civilian population included in the UCR offenses-known population (obtained in step one) to identify the number of males in each age group in the UCR offenses-known population. *765 3) A) List the number of arrests for the year of males in each age group for the crime in question. [FN401] B) Multiply that number of arrests in each age group by the percentage of *completed* crimes for the crime in question (i.e., excluding attempts) to obtain the number of arrests for the year for the completed crime in question committed by males in each age group. [FN402] 4) Divide that number of arrests of males in each age group for completed crimes (obtained in step 3) by the rate of arrest per offense known for the crime [FN403] to estimate the number of completed offenses known to the police committed by males in each age group. *766 5) Divide that number of completed offenses known committed by males in each age group (obtained in step 4) by the number of males in the UCR population in that age group (from step 2) to obtain the rate per person. 6) Identify the percentage of male personnel in the relevant military service that are in each age group (out of the total male population of that service). [FN404] Multiply that percentage by 1,000 to identify the number of

males in each age group that would exist in a model population of 100,000 males with the age distribution of that military service. 7) Multiply the civilian completed offenses-known rate per person for each age group (obtained in step 5) by the number of males in that age group in the model population to produce a number of offenses known of that crime that would be produced by that age group in the model population, i.e., in a population of males with the age distribution of the particular military service and with the crime rate structure of the civilian population. 8) Add up the number of offenses committed by each age group in the model population to obtain the total number of offenses in the model population. That total is the rate of the crime in question per 100,000 population that would be expected in a male population with the age structure of the particular military service and the crime rate structure of the civilian population. 9) To estimate the number of founded investigations of murder/nn.m for the Navy and for the Marine Corps, multiply the number of founded reports of cases of (murder/nn.m *plus* negligent/involuntary manslaughter) by .74. [FN405] ***767** 10) Adjust the number of founded investigations [FN406] of the crime in question [FN407] for each service [FN408] to exclude crimes committed***768** by females by the following procedure. Multiply the percent male in the service population by the percent male arrestees for that crime that year (from UCR arrest data). [FN409] Now divide that number by the sum of (the percent male in the service population times the percent male arrestees) plus (the percent female in the service population times the percent female arrestees). The resulting figure estimates the percent of the service's founded reports of the crime in question committed by males. Multiply the total number of founded reports by that percentage to obtain the number of founded investigations of the crime in question committed by males in that service. [FN410] 11) Divide the expected rate per 100,000 model population (obtained in step 8) by the actual male offense rate in the particular military service (obtained in step 10) to obtain the ratio of "expected rates" (i.e., civilian male rates adjusted for age) to actual rates (i.e., military male rates). 12) To test the statistical significance of the differences between rape diminution from "expected rates" and diminution for other crimes from "expected rates," the regression analysis is as follows. ***769** The basic linear regression model has annual ratios for four types of crime under consideration as a dependent variable and three dummy variables as predictors: murder/nn.m, aggravated assault, and other-violent-crime. The reference category is rape. This model is estimated separately for each one of the four military services. The data used in the analysis are pooled panel data. For that reason, to safeguard against potential autocorrelation across years, employ the SAS Autoreg procedure. Because in all but one [FN411] of the estimated models the autocorrelation has been negligible, utilize the ordinary least squares (OLS) estimators for the regression coefficients in the analysis.***770** APPENDIX B

TABLE IV

MILITARY RATES OF MURDER/NN.M, AGGRAVATED ASSAULT, OTHER-VIOLENT-CRIME INDEX, ROBBERY, AND RAPE AS PROPORTIONS OF U.S. MALE CIVILIAN RATES 1987-1992 (controlling for age)

1987-1992 on Yearly AverageFN [FN412]	Army	Navy	Marine Corps	Air Force
Murder/nn.m	.20	.07	.13	.05

Aggravated Assault	.18	.04	.04	.02
Other-Violent-Crime Index[FN] [FN413]	.19	.04	.05	.02
Robbery	.02	.009	.02	.003
Rape	.47	.19	.27	.20

1987

	Army	Navy	Marine Corps	Air Force
Murder/nn.m	.25	.02	.05	.11
Aggravated Assault	.15	.04	.08	.02
Other-Violent-Crime Index	.16	.04	.08	.02
Robbery	.03	.008	.01	.003
Rape	.45	.13	.22	.17

1988

	Army	Navy	Marine Corps	Air Force
Murder/nn.m	.19	.10	.15	.08
Aggravated Assault	.18	.03	.04	.02
Other-Violent-Crime Index	.18	.03	.04	.02
Robbery	.02	.008	.01	.003

Rape	.50	.18	.30	.22

1989

	Army	Navy	Marine Corps	Air Force
Murder/nn.m	.18	.11	.27	.06
Aggravated Assault	.24	.03	.05	.02
Other-Violent-Crime Index	.24	.03	.05	.02
Robbery	.02	.01	.03	.003
Rape	.46	.17	.23	.20

1990

	Army	Navy	Marine Corps	Air Force
Murder/nn.m	.18	.12	.16	.08
Aggravated Assault	.18	.04	.04	.02
Other-Violent-Crime Index	.18	.05	.05	.02
Robbery	.01	.009	.03	.002
Rape	.44	.25	.32	.20

1991

	Army	Navy	Marine Corps	Air Force
Murder/nn.m	.23	.09	.20	.09

Aggravated Assault	.18	.04	.04	.02
Other-Violent-Crime Index	.18	.04	.04	.02
Robbery	.02	.01	.01	.002
Rape	.47	.22	.25	.22

1992

	Army	Navy	Marine Corps	Air Force
Murder/nn.m	.17	.09	.18	.01
Aggravated Assault	.17	.04	.04	.02
Other-Violent-Crime Index	.17	.05	.04	.02
Robbery	.01	.01	.03	.002
Rape	.51	.25	.34	.23

***774** APPENDIX C

METHODOLOGY FOR COMPARING MILITARY AND CIVILIAN CRIME RATES FOR JUNE 1944 THROUGH MAY 1945

The following methodology was used to compare male military and civilian crime rates while controlling for age. For each month, 1) Divide the total population base of the Uniform Crime Reports (UCR) "Monthly Variations, Offenses Known to the Police" table [FN414] by the total U.S. civilian population [FN415] to obtain the percentage of the U.S. civilian population included in the UCR offenses-known population. [FN416] ***775** 2) A) Create age groupings as follows. The first age group includes ages 18-19. [FN417] The rest of the age groups represent five-year increments for age groups 20 through 49 and then end with age group 50 (to be consistent with UCR data groupings). B) Multiply the total number of males [FN418] in each age group in the U.S. civilian population [FN419] by the percentage of civilian population included in the UCR offenses-known population (obtained in step one) to identify the number of males in each age group in the UCR offenses-known population. 3) Identify the percentage of arrestees for the crime in question that year that were males. [FN420] 4) List the

number of arrests for that crime for the year in each age group. [FN421] *776 5) Multiply the number of arrests for that crime for the year for each age group (obtained in step 4) by the percentage of male arrestees for that crime for the year (obtained in step 3) to estimate the number of arrests of males in each age group for that crime for the year. 6) Divide that number of arrests of males in each age group (obtained in step 5) by the total number of arrests for that crime for the year [FN422] to obtain the *percentage* of arrests for that crime for the year that were arrests of males in each age group. 7) A) Multiply the average daily number of offenses known for the crime in question for the month [FN423] by the number of days in the month to obtain the *monthly* number of offenses known. [FN424] B) For rape, multiply the monthly number of offenses known by the percentage of all rapes for the year that were *forcible* [FN425] (i.e., to exclude statutory rapes, which are not included in the ETO rape figures [FN426]). 8) Multiply that monthly number of offenses known for the crime in question (obtained in step 7) by the percentage of offenses*777 *completed* for that crime to obtain the monthly number of *completed* offenses known for the crime in question. [FN427] 9) A) Multiply that monthly number of completed offenses known for the crime in question (obtained in step 8) by the percentage of offenses cleared [FN428] for the crime in question [FN429] to estimate the monthly number of offenses cleared for the crime in question. B) Multiply that monthly number of offenses cleared for the crime in question by the percentage of arrests for the crime for the year that were arrests of males in each age group (obtained in step 6) to estimate the monthly number of completed offenses cleared for males in each age group. 10) Divide that monthly number of completed offenses cleared for males in each age group (obtained in step 9) by the number of males in the UCR population in that age group to obtain the civilian monthly rate of completed offenses cleared per person in each age group. 11) Identify the percentage of male personnel in the military population [FN430] that are in each age group out of the total male *778 military population. Multiply that percentage by 1,000 to identify the number of males in each age group that would exist in a model population of 100,000 males with the age distribution of the military population. 12) Multiply the civilian monthly completed-offenses-cleared rate per person for each age group (obtained in step 10) by the number of males in that age group in the model population to produce a number of offenses cleared for that crime that would be produced by that age group in the model population, i.e., in a population of males with the age distribution of the military population and with the crime rate structure of the civilian population. 13) Add up the number of offenses cleared for each age group in the model population to obtain the total number of offenses cleared in the model population. That total is the rate of offenses cleared for the (completed) crime in question per 100,000 population that would be expected in a male population with the age structure of the military population and the crime rate structure of the civilian population. 14) A) For aggravated assault, adjust the ETO assault-with-a-dangerous-weapon numbers as follows. [FN431] Divide (the number of ETO courts martial for assault with a dangerous weapon plus the number of ETO courts martial for assault with intent to do murder or manslaughter) by the number of ETO courts martial for assault with a dangerous weapon. [FN432] Now multiply the resulting percentage (113%) [FN433] by the number of ETO investigations for *779 assault with a dangerous weapon to estimate the total number of ETO investigations for aggravated assault. B) Divide the expected offenses cleared rate per 100,000 model population (obtained in step 13) by the actual investigation rate [FN434] for the ETO, [FN435] for the crime in question (obtained, for *780 aggravated assault, in step 14A) to obtain the ratio of "expected rates" (i.e., civilian male rates adjusted for age) to actual rates (i.e., Army male rates). 15) It is not possible to test the statistical significance of the difference between diminution factors for different crimes for the WWII period because each month's data must be analyzed separately (pooled data covering the ten-month period would not be meaningful), [FN436] and there is only one observation for each month.*781 APPENDIX D

TABLE V

ETO RATES OF MURDER/NN.M, AGGRAVATED ASSAULT, AND RAPE AS A PROPORTION OF U.S. MALE CIVILIAN RATES AUGUST 1944-MAY 1945 (controlling for age)

	Murder/nn.m	Aggravated Assault	Rape
August	.62	.21	2.86
September	.32	.15	2.33
October	.79	.27	1.02
November	.48	.14	.60
December	.75	.11	.48
January	.83	.11	.24
February	.35	.17	.36
March	.56	.27	3.85
April	1.54	.27	4.76
May	.96	.26	2.38

 Professor of Law, Duke University. I am grateful for the contributions of Kate Bartlett, Lawrence Baxter, Brian Belanger, Kenneth Bullock, Paul Carrington, Dennis DeConcini, Cynthia Enloe, Robinson Everett, William Fulton, John Gagnon, Pamela Gann, Tim Gearan, Shannon Geihsler, Andrew Gordon, Françoise Hampson, Donald Horowitz, Susan Kerner-Hoeg, Benedict Kingsbury, Peter Klopfer, Andrew Koppelman, Paul Kurtz, David Lange, Charlene Lewis, Robert Lifton, Dino Lorenzini, Elizabeth McGoogan, Laura Miller, Mary Newcomer, Jonathan Ocko, Steven Prentice-Dunn, Horace Robertson, Alex Roland, Gladys Rothbell, Sheldon Rothbell, Mady Segal, Scott Silliman, Judith Stiehm, Olga Suhomlinova, Theodore Triebel, Laura Underkuffler, William Van Alstyne, Ronald Vergnolle, Neil Vidmar, Michael Wells, Yoshiaki Yoshimi, Chung-ok Yun, the participants at the April 1994 Colloquium of the Georgia Humanities Center, the participants at the May 27, 1993 meeting of the Feminist Discussion Group of Kyoto, and the participants at the 1993 Rockefeller Foundation Conference on Women and War. For methodological assistance, I am indebted to John Jarvis, Survey Statistician, Criminal Justice Information Services Division, Federal Bureau of Investigation (FBI), and to Kenneth Land, Chair, Department of Sociology, Duke University. As always, I am indebted to Sandi Perkins for her excellent secretarial assistance and support.

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[FN1]. *See infra* note 5.

[FN2]. *See infra* notes 6-10 and accompanying text.

[FN3]. This Article focuses specifically on *rape* by military personnel. However, research in this field suggests that the causal factors affecting rape share common features with the factors affecting sexual harassment. *See, e.g.,* Carl A. Bartling & Russell Eisenman, *Sexual Harassment Proclivities in Men and Women,* 31 BULL. OF THE PSYCHONOMIC SOC'Y 189, 191 (1993) (finding common characteristics associated with rape proclivity and sexual harassment proclivity). For that reason, the observations made in this Article are in part applicable to sexual harassment by military personnel.

[FN4]. It is anticipated that the patterns of rape incidence identified in the present study may be shared by the military organizations of many nations and cultures. However, because the empirical study reported in this Article is a case study of the American military only, further empirical work will be required to test the hypothesis that the rape differential described herein is generalizable to other nations and cultures.

[FN5]. Certainly, rape in war is pervasive. Perhaps surprisingly, rape victims in war commonly include not only enemy civilians and troops but also allied and national civilians and even comrades in arms.

The tragedy in the former Yugoslavia provides recent examples of rape in war. *See Situation of Human Rights in the Territory of the Former Yugoslavia: Report of the Special Rapporteur of the Commission on Human Rights,* U.N. ESCOR, 49th Sess., Annex II, Agenda Item 50, at 63-75, U.N. Doc. E/CN.4/1993/50 (1993); Roy Gutman, *Serbs' Rape of Muslim Women in Bosnia Seen as Tactic of War,* HOUSTON CHRON., Aug. 23, 1992, at A1; Carol J. Williams, *Balkan War Rape Victims: Traumatized and Ignored,* L.A. TIMES, Nov. 30, 1992, at A1. The European Community estimated in its January 8, 1993 Report that 20,000 Muslim women had been raped by Serbian forces. *See* Jeri Laber, *Bosnia: Questions About Rape,* N.Y. REV. OF BOOKS, Mar. 25, 1993, at 4; *Rape Was Weapon of Serbs, U.N. Says,* N.Y. TIMES, Oct. 20, 1993, at A1. Such estimates can be subject to considerable inaccuracy, but may nevertheless provide some initial indication of the magnitude of the problem.

Although Muslims and Croats are also guilty of widespread war-related rapes, *see* Lance Morrow, *Unspeakable,* TIME, Feb. 22, 1993, at 48, numerous reports appear to indicate that Serbian soldiers may have been under orders to rape, pursuant to a deliberate Serbian military policy. *See id.* The Serbian case would not be unique with regard to the involvement of the national government in mass rapes by military personnel. The Japanese government has recently admitted that forced-prostitution centers, called "comfort stations," were established and run by the Japanese military pursuant to official governmental policy, prior to and during World War II. *See* James Sterngold, *Japan Admits Army Forced Women into War Brothels,* N.Y. TIMES, Aug. 5, 1993, at A2; Teresa Watanabe, *Japan Admits That WWII Sex Slaves Were Coerced,* L.A. TIMES, Aug. 5, 1993, at A1. Estimates of the total number of women forced into sexual slavery at Japanese "comfort stations" range from 70,000 to 200,000. *See* Leslie Helm, *Human Rights: Koreans Won't Let Japan Bury "Comfort" Issue,* L.A. TIMES, Aug. 8, 1992, at A3.

Rape also is common in wars where there is no evidence of an official policy to rape. During the Rwandan war and genocide of 1994, thousands of women and girls were raped in a most brutal and inhuman manner. *See* AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR AND DEFIANCE 748-97 (rev. ed. 1995). In the Vietnam War as well, horrific descriptions of widespread rape were reported--by veterans as well as others--without any suggestion that an official policy was involved. *See, e.g.,* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 87-118 (1975); VIETNAM VETERANS AGAINST THE WAR, THE WINTER SOLDIER INVESTIGATIONNNNNNN 13-14, 29, 44, 53-54, 94 (1972).

The victims of rape in war are not exclusively "enemy" civilians or troops. Allied and national civilians and troops also are assaulted. For example, rape of French women by American soldiers in World War II was sufficiently pervasive to cause General Eisenhower's headquarters to issue a directive in December 1944 to U.S.

Army Commanders announcing the General's "grave concern" and instructing that speedy and appropriate punishments be administered. *See* JOHN COSTELLO, LOVE SEX AND WAR 143 (1985).

Civilian women in Peru recently have been subjected to widespread rape by military troops of their own country--apparently without regard to which "side" in the war, if any, with which the women may have been associated. As described in a publication of Human Rights Watch:

> Throughout Peru's 12-year internal war, women ... have been threatened, raped and murdered by government security forces; and women have been threatened, raped and murdered by the Communist Party of Peru--Shining Path. Often, the same woman is the victim of violence by both sides.

See AMERICAS WATCH & THE WOMEN'S RIGHTS PROJECT, UNTOLD TERROR: VIOLENCE AGAINST WOMEN IN PERU'S ARMED CONFLICT 1 (1992). For additional examples of rape of civilian women by military troops of their own countries, see BROWNMILLER, *supra,* at 81; Christine Chinkin, *Peace and Force in International Law, in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 203, 203-06 (Dorinda G. Dallmeyer ed., 1993). Not only allied and national civilians but also comrades--co-members of the same military units--are raped in theaters of combat. A preliminary study of female Vietnam veterans estimated that as many as 29% of the American military women who served in Vietnam were the victims of attempted or completed sexual assaults. *See The Counseling and Other Needs of Women Veterans Who Were Sexually Assaulted or Harassed While on Active Duty and VA's Ability to Respond, Hearings Before the Senate Comm. on Veterans' Affairs,* 102d Cong., 2d Sess. 9 (1992) [hereinafter *Counseling and Other Needs of Women Veterans*] (statement of Dr. Jessica Wolfe, Associate Director, National Center for PTSD, Behavioral Science Division, Dep't of Veterans Affairs). (It should be noted, however, that this testimony reported only preliminary findings of an unpublished study. *See* Letter from the office of Jessica Wolfe to author (July 26, 1994) (on file with author). In addition, the 29% estimate in the Wolfe study is based not on data drawn from a random sample but on data drawn from a set of women who volunteered to participate in the survey. *Id.* That self-selection of respondents may, of course, introduce some bias into the data.) During the Persian Gulf War period, 24 female American military personnel were raped or sexually assaulted by male American soldiers, according to official reports. *See* John Lancaster, *24 Women Assaulted in Gulf Duty,* WASH. POST,, July 21, 1992, at A1 (reporting six rapes, four attempted rapes, and fourteen indecent assaults). One self-report victimization study of female American Gulf War veterans found that approximately 8% of respondents had experienced attempted or completed sexual assault during their Gulf War deployment. Jessica Wolfe et al., Self-Reported Sexual Assault in Female Gulf War Veterans (Nov. 1992) (paper presented at the Annual Meetings of the Ass'n for Advancement of Behavior Therapy). Wolfe et al. state that the 8% sexual assault victimization rate of women deployed in the Gulf War represents "nearly a ten-fold increase over rates obtained using female community samples." *Id.* Wolfe et al. do not state whether those community samples control for age differences in military and civilian populations. Again, the 8% figure in the study is based on a set of self-selected respondents rather than on a random sample, which may introduce bias into the data.

In sum, rape in war is pervasive. It may be officially permitted or forbidden. Its victims include civilians as well as troops, allies, and sometimes even nationals as well as enemies.

[FN6]. *See Counseling and Other Needs of Women Veterans, supra* note 5.

[FN7]. *See, e.g., id.* at 382 (statement of Christine Courtois).

[FN8]. *See id.* at 12, 13 (statement of Diana Danis); *id.* at 24 (statement of Jacqueline Ortiz); *id.* at 26 (statement of Barbara Franco); *id.* at 28, 33-34, 38-39 (statement of Kelley Richard).

Of course, it is also frequently remarked that rates of sexual assault are underestimated in the civilian context. The author is aware of no systematic comparison of the relative accuracy of military and civilian estimates of sexual assault rates. For further discussion of military and civilian rape reporting and recording

rates, see *infra* note 33.

[FN9]. *See* INSPECTOR GEN., U.S. DEP'T OF DEFENSE, TAILHOOK 91, PART 2: EVENTS AT THE 35TH ANNUAL TAILHOOK SYMPOSIUM VI-13 to VI-14 (1993); *see also* David Ballingrud, *Assaults Tarnish Navy Group,* ST. PETERSBURG TIMES, Jan. 17, 1992, at 1A; John Lancaster, *Navy "Gauntlet" Probed; Sex Harassment Alleged at Fliers' Convention,* WASH. POST,, Oct. 30, 1991, at A1.

While other forms of sexual assault were reportedly pervasive, no allegations of rape at Tailhook '91 have been reported.

For a critique of some aspects of the Department of Defense Inspector General's Report on Tailhook '91, see William H. Parks, *Tailhook: What Happened, Why & What's to Be Learned,* PROCEEDINGS, Sept. 1994, at 89, 101.

[FN10]. INSPECTOR GEN., U.S. DEP'T OF DEFENSE, *supra* note 9, at VI-3; *see also* John C. Bahnsen, *Do We Need a Few Good Men?,* PROCEEDINGS, Aug. 1994, at 59, 59 ("According to my good Navy sources, Tailhook '91 was not an unusual Tailhook get-together, except for a larger turnout of women pilots.").

[FN11]. *See Counseling and Other Needs of Women Veterans, supra* note 5, at 10 (statement of Diana Danis); 1990 NAVY WOMEN'S STUDY GROUP, AN UPDATE REPORT ON THE PROGRESS OF WOMEN IN THE NAVY III-28 (1990) ("The incidence, the reporting, and the actions taken regarding sexual assault/rape are not fully captured in any Navy data base."); Gary A. Warner, *Rape In Military: Vexing Problem, but Difficult to Measure,* ORANGE COUNTY REG., July 11, 1992, § A, at 1; Gary A. Warner, *Pentagon Has No Clearinghouse for Data on Rape in Military,* ORANGE COUNTY REG., May 18, 1992, § A, at 18; *cf.* 1990 NAVY WOMEN'S STUDY GROUP, *supra,* at III-23 ("The lack of a data base and a common punitive charge for sexual harassment inhibits command oversight and trend analysis.").

[FN12]. MELANIE MARTINDALE, DEFENSE MANPOWER DATA CENTER, SEXUAL HARASSMENT IN THE MILITARY: 1988, at xiii (1988). The "actual or attempted rape or sexual assault" category, though rather broad, was not further subdivided in the study.

Some commentators have noted that the Martindale study has the limitation that it did not provide for respondent anonymity, which may have resulted in underreporting. Wolfe et al., *supra* note 5, at 1.

[FN13]. *See* MARTINDALE, *supra* note 12, at 32-34.

[FN14]. A 1989 Navy study of sexual harassment rendered results similar to those obtained in the 1988 Defense Manpower Data Center study. *See* AMY L. CULBERTSON ET AL., ASSESSMENT OF SEXUAL HARASSMENT IN THE NAVY: RESULTS OF THE 1989 NAVY-WIDE SURVEY (1992). The Navy study, like the Defense Manpower Data Center Study, sought to measure *victimization* of, rather than perpetration by, military personnel. For that reason, the Navy study shares the limitations of the Defense Manpower Data Center study.

[FN15]. This Article does not examine officer and enlisted military personnel separately. A separate examination of those two populations would be valuable in subsequent research.

[FN16]. World War II was chosen for study because it is the most recent war, other than Vietnam, for which data were available in which the United States was engaged for a prolonged period, *and* in which troops had extensive contact with civilians. The Korean War was not chosen for study because of difficulty in obtaining relevant data. *See* Letter from Maria T. Hanna, Reference Librarian, Suitland Reference Branch, Nat'l Archives, to Kenneth W. Bullock, Research Assistant to author (Oct. 14, 1994) (stating that relevant records from Korean

war are not indexed and may or may not exist) (on file with author). Vietnam was not chosen for study because its levels of low troop morale, particularly during the latter part of the war, would presumably influence crime rates. *See* Col. Robert D. Heinl Jr., U.S.M.C., *The Collapse of the Armed Forces,* ARMED FORCES J., June 1971, at 30, 30 ("The morale ... of the U.S. Armed Forces [in Vietnam] are, with a few salient exceptions, lower and worse than at any time in this century and possibly in the history of the United States."). The Persian Gulf War was not chosen for study because troops' contact with civilians in the Persian Gulf was limited. *See* H.G. Reza, *When Troops Went to Persian Gulf So Did Military Justice,* L.A. TIMES, June 29, 1992, at B1.

Of course, because rape incidence and reporting are affected by societal factors that change over time, comparisons between 1940s wartime and contemporary peacetime rape statistics would be impracticable. The point of the present study, however, is not to compare rates or measure trends across time. Rather, this study seeks to compare military and civilian rates--first within one time period (1944-45) and then within another (1987-92). Thus, the focus is on the military/civilian comparison within a *given* (1940s or 1980s) time period. For that reason, societal changes over time should not unduly influence the comparison.

[FN17]. *See supra* note 4.

[FN18]. All references hereinafter to "rape" refer to forcible rape. Statutory rape is not included in the scope of this study.

[FN19]. Regarding other possibly relevant control variables, see *infra* text accompanying notes 66-74. For a full description of the methodology used in studying the peacetime data, see *infra* Appendix A, at pp. 764-70.

[FN20]. The "peacetime" period studied is 1987-92. Of course, that period includes January and February of 1991, during which there was active fighting in the Persian Gulf War. That combat period, however, had no discernible effect on the relevant crime rates. Regression analyses performed on the data excluding 1991 produced essentially equivalent results to those produced when including the 1991 data.

[FN21]. For year by year data, see *infra* Appendix B, at pp. 771-74.

[FN22]. One additional crime, robbery, was also examined in the peacetime study. (It was not examined in the WWII study because of a paucity of data.) The diminution in military robbery from civilian rates was even greater than the diminutions in murder/nn.m and aggravated assault. *See infra* Appendix B, at pp. 771-74. This is perhaps not surprising since robbery has a property-crime component. We might reasonably *expect* lower rates of property crime by a fully employed population such as the military than by the civilian population. Because the property-crime aspect of robbery makes it less comparable to rape than the violent crimes of murder/nn.m and aggravated assault, this Article does not focus on it.

[FN23]. Percentages are rounded to whole numbers.

[FN24]. The statistics kept by the Naval Criminal Investigative Service, which supplied the Navy and Marine Corps data, do not separate murder/nn.m from negligent manslaughter. For that reason, the murder/nn.m rates of the Navy and Marine corps have been estimated. For estimation method, see *infra* note 406 and accompanying text.

[FN25]. The following additional information for the 1987-92 period may be of interest to the reader.

TABLE
II

COMPARISION OF CRIME RATES OF MALE MILITARY PERSONNEL AND THE CIVILIAN POPULATION (average crime rate per 100,000)

	Army	Navy	Marine Corps	Air Force	Male Civilians (controlling for age)[FN] [FNa1]	Civilians (*not* controlled for age *or* gender)
Rape	64	28	42	26	135	42
Murder/nn.m	8	4	7	3	37	9
Aggravated Assault	270	57	75	24	1,476	419

FNa1. The "civilian rates controlling for age" are controlled relative to the age distribution of the Army. Because the age distributions of the military services vary somewhat, the civilian rates "controlling for age" may be viewed only as approximations (though rather close approximations) for comparisons with the military rates for the services other than the Army.

For methodological and source information regarding the foregoing data, see *infra* Appendix A, at pp. 764-70.

[FN26]. The index is constituted by adding the raw numbers of murder/nn.m and aggravated assault per year in each military service and dividing by the number of male personnel in that service to establish a rate of other violent crime for each service.

[FN27]. All numbers are yearly averages for 1987-92.

[FN28]. The "other-violent-crime ratio" is the ratio of military other-violent-crime rates to civilian other-

violent-crime rates.

[FN29]. The "rape ratio" is the ratio of military rape rates to civilian rape rates.

[FN30]. The "rape differential" is the multiple by which the rape ratio exceeds the other-violent-crime ratio.

[FN31]. P .01. The differences between the diminutions of rape and of aggravated assault alone were highly significant (P .01) for all four services. Differences between the diminutions of rape and of murder/nn.m alone were highly significant (P .01) for Army and significant (P .05) for Air Force and Navy. For the Marine Corps, the difference between rape diminution and murder/nn.m diminution was significant (P = .04) when an outlier year (1987) is excluded, but not significant (P = .14) when the outlier is included. For a description of the regression analyses performed, see *infra* Appendix A, at pp. 769-70.

[FN32]. Indeed, the interservice differences in crime rates are fascinating in themselves. While beyond the scope of this Article, an analysis of the different crime patterns of the four services would be worthwhile.

[FN33]. In comparing any sets of crime statistics, there is always the possibility that differences in reporting patterns and record-keeping practices may distort findings. In the present study, the findings would be misleading if rape were *more* completely reported in military than in civilian populations, and/or if murder/nn.m or aggravated assault were *less* completely reported in military than in civilian populations. Either or both of those reporting differences would cause an artificial appearance of a lesser diminution in military rates of rape than of other violent crime. It appears, however, that reporting differences of those sorts have not influenced the findings of the present study for the following reasons.

First, it seems unlikely that rape reporting rates are higher in military populations than in civilian populations, particularly when the victim is a military woman. As stated in the 1990 *Update Report on the Progress of Women in the Navy,* regarding the authors' study of rape and sexual assault of Navy personnel:

> The majority of staff level advisors interviewed perceive that most female victims would not report a rape. In the Study Group survey, only one out of ten females who said they had been raped or assaulted in the past year said they reported it to the police or Master at Arms.... Interview data suggest that rape is under-reported for the following reasons: fear of reprisals; embarrassment; would not be believed; lack of confidentiality and lack of sensitivity by those personnel providing assistance to the victim. Women in the Personal Reliability Program said they would not report a rape for fear of being removed from the program.

1990 NAVY WOMEN'S STUDY GROUP, *supra* note 11, at III-29 (emphasis omitted). Another reason to believe that the military rape figures used in this study are estimated as conservatively as the civilian figures involves the definition of the crime. The definition of rape applied by the U.S. military until October 1992 *excluded* marital rape. *See* Uniform Code of Military Justice, Pub. L. No. 81-506, art. 120, 64 Stat. 107, 140 (1950), *amended by* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 911(c), 106 Stat. 2315, 2506 (1992) (codified at 10 U.S.C. § 920 (1994)). By contrast, the UCR definition of rape during 1987-92 had no marital exemption. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1992: UNIFORM CRIME REPORTS 23 (1992) [hereinafter UCR 1992]; FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1991: UNIFORM CRIME REPORTS 23 (1991) [hereinafter UCR 1991]; FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1990: UNIFORM CRIME REPORTS 15 (1990) [hereinafter UCR 1990]; FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1989: UNIFORM CRIME REPORTS 14 (1989) [hereinafter UCR 1989]; FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1988: UNIFORM CRIME REPORTS 15 (1988) [hereinafter UCR 1988]; FEDERAL BUREAU OF

INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1987: UNIFORM CRIME REPORTS 13 (1987) [hereinafter UCR 1987]. Many states had eliminated marital exemptions from their rape statutes by or during the 1980s, and thus would have included marital rapes in their data provided for the UCR. *See, e.g.,* MICH. COMP. LAWS ANN. § 750.5201 (1991); Merton v. State, 500 So.2d 1301, 1305 (Ala. Crim. App. 1986); Weishaupt v. Commonwealth, 315 S.E.2d 847, 855 (Va. 1984); People v. Liberta, 474 N.E.2d 567, 572-73 (N.Y. 1984), *cert. denied,* 471 U.S. 1020 (1985); State v. Smith, 426 A.2d 38, 45 (N.J. 1981). Thus, the military crime data for 1987-92 would have excluded marital rapes, while the UCR included marital rapes. Hence, military rapes may have been *less* completely reported than civilian rapes.

I turn now from the question of possible overestimation of military rape rates relative to civilian rates to the question of possible underestimation of military rates of other violent crime relative to civilian rates. It seems unlikely that murder/nn.m is less completely reported in military than in civilian populations. Once a homicide has occurred and there is a corpse to be accounted for, informal handling is precluded--and there is no evidence of greater leniency in charging or prosecution of homicides in the military than in the civilian criminal justice system. Interview with Col. Scott Silliman, U.S.A.F. (Ret.), former Staff Judge Advocate, Air Combat Command, in Durham, N.C. (Aug. 10, 1994).

Finally, it is possible that aggravated assault might be less completely reported in a military population that may have a greater tolerance for violent behavior than the civilian population. As indicated above, while the diminutions of military rates of both murder/nn.m and aggravated assault from civilian levels are significantly greater than diminutions of military rape rates, the magnitude of difference is greater for aggravated assault than for murder/nn.m; that is, while both military aggravated assault and military murder/nn.m rates are diminished significantly more from civilian levels than are military rape rates, military aggravated assault is reduced even more from civilian levels than is military murder/nn.m. Perhaps some of that greater magnitude of diminution for aggravated assault found in the present study is due to greater underreporting of aggravated assault in military than in civilian populations. Even if this is so, however (and the proposition is highly speculative), the findings of significantly lesser diminution in rape apply to *both* murder/nn.m and aggravated assault. Therefore, even if greater underreporting of aggravated assault by military populations exists, its effect would seem to be on the magnitude rather than on the existence or statistical significance of the difference between rape and aggravated assault diminution.

For discussion of additional methodological safeguards, see *infra* Appendix A, at pp. 764-70.

[FN34]. The "U.S. Army" here includes air forces. The U.S. Air Force, which was not yet a separate military branch, was part of the War Department during WWII.

[FN35]. "Continental ETO" refers to the ETO excluding the United Kingdom. (Of course, the "ETO" also excludes the Mediterranean Theater of Operations, which included parts of Europe such as Italy.).

[FN36]. For a full description of the methodology used in studying the WWII data, see *infra* Appendix C, at pp. 775-81.

[FN37]. *See* MARTHA HOYLE, A WORLD IN FLAMES 247-49, 253-54 (1969); CHARLES WHITING, '44: IN COMBAT FROM NORMANDY TO THE ARDENNES 59-102 (1984).

[FN38]. WHITING, *supra* note 37, at 82.

[FN39]. *Id.* at 91.

[FN40]. *Id.* at 63.

[FN41]. *See* CRIMINAL INVESTIGATION BRANCH, OFFICE OF THE THEATER PROVOST MARSHAL, SEMI-ANNUAL REPORT, JUNE-DEC. 1944 (1944) (on file with the National Archives RG 160, Entry 91, Box 725) [hereinafter 1944 SEMI-ANNUAL REPORT] (statistical graphs on unnumbered pages at end of Report). The number of investigations in June and July for rape was nineteen; for murder/nn.m was two; and for aggravated assault was twenty-seven (as adjusted). *See id.* Regarding adjustment of ETO aggravated assault numbers, see *infra* Appendix C, notes 432-34 and accompanying text. Unfortunately, it is not possible to calculate a rate per 100,000 troops for these crimes because the number of troops on the continent in the months of June and July is not available. Rather, the available data on ETO troop strength for those months combines troops on the continent with troops in the United Kingdom. *See* WAR DEP'T GEN. STAFF, STRENGTH OF THE ARMY (Aug. 1944-May 1945) (monthly reports).

[FN42]. *See* HUBERT ESSAME, THE BATTLE FOR GERMANY 178-218 (1969) (Germany); HOYLE, *supra* note 37, at 259-61 (France), 300-06 (Germany); WHITING, *supra* note 37, at 97-108 (France).

[FN43]. *See* ESSAME, *supra* note 42, at 178-222 (Germany); HOYLE, *supra* note 37, at 259-61 (France); WHITING, *supra* note 37, at 98-118 (France).

[FN44]. *See* COSTELLO, *supra* note 5, at 343-46 (Germany); ESSAME, *supra* note 42, at 178-222 (Germany); HOYLE, *supra* note 37, at 259 (France); WHITING, *supra* note 37, at 105-118 (France); Interview with Col. William S. Fulton Jr. (Ret.), Clerk of Court, U.S. Army Judiciary, in Durham, N.C. (Jan. 10, 1994) (describing the levels of contact with German civilians during the "house to house pursuit" phase of the breakout period in Germany).

[FN45]. *See* European Theater of Operation Historical Division, Dep't of War, *Criminal Investigation Branch, in* HISTORY OF THE OFFICE OF THE THEATER PROVOST MARSHAL, ETOUSA: 1 OCT. 1944-8 MAY 1945, § III, at App. A (1945) (statistical graphs) (on file at the National Archives RG 332, Adm. 567c).

[FN46]. The raw numbers of ETO offenses for August and September on monthly average were 16 murder/nn.m (1.4 per 100,000 troops), 54 aggravated assaults (4.62 per 100,000 troops), and 107 rapes (9.27 per 100,000 troops). For methodological and source information on the foregoing data, see *infra* Appendix C, at pp. 775-81.

[FN47]. Office of the Judge Advocate Gen., Dep't. of War, History of the Judge Advocate General's Office in the European Theater, 18 July 1942-1 November 1945, at 241 (1945) (unpublished manuscript, on file with the Office of the Chief of Military History, Historical Manuscript File, no. 8-3.5 AA v.1).

[FN48]. My colleague Mel Shimm shared with me a story that illustrates this point. As an officer serving in Korea after WWII, he interviewed a woman filing a complaint alleging that she had been raped by an American soldier. When Mel (a Caucasian male dressed in military uniform) asked her if she knew the soldier's identity or could describe his appearance, the woman said that she did not know her assailant's identity, but that he looked just like Mel.

[FN49]. Office of the Judge Advocate Gen., *supra* note 47, at Chart 15.

[FN50]. Indeed, it seems reasonable to assume, given the nature of a combat theater, that some number of actual murders of Germans soldiers by American troops in the ETO were classified not as murders but as lawful killings in combat or in self-defense.

[FN51]. It is important to note, however, that under the Articles of War the sentences provided for rape and murder were the same. LEE S. TILLOTSON, THE ARTICLES OF WAR ANNOTATED 179 (1944) ("Any

person subject to military law who commits murder or rape shall suffer death or imprisonment for life ...."). Therefore, there is no reason to believe that murders would be more likely than rapes to be covered up to spare a soldier from harsh punishment.

[FN52]. *See* 1990 NAVY WOMEN'S STUDY GROUP, *supra* note 11, at III-29.

[FN53]. According to the Report of the ETO Judge Advocate General, none of the 761 complainants in the general courts martial for rape in the ETO were American. Office of the Judge Advocate Gen., *supra* note 47, at Chart 16.

One initially colorable theory suggesting *overcounting* of rapes in the ETO must be rejected on close examination of the available information. The theory for overcounting would be that because of factors associated with the war, women in WWII Europe were very sexually active with U.S. troops and then frequently alleged rape if the women's socially unacceptable sexual activity was discovered, which resulted in frequent false reports and an aggregate overcount of rapes. The problem with this theory is that the reports on criminal activity in the ETO consistently characterize the rapes as occurring in a violent manner, often at gunpoint. *See supra* note 47 and accompanying text; *infra* text accompanying note 58.

[FN54]. Office of the Judge Advocate Gen., *supra* note 47, at 339-40. Although this section of the Report indicates that "[a] more complete discussion of this situation will be set out in the next Chapter," *id.* at 340, the pages containing that discussion are missing from the Report and have been for many years, notwithstanding the considerable efforts of archivists to find the missing pages. Memorandum by Library of Congress 1 (Aug. 1975) (on file with the Office of the Chief of Military History, Historical Manuscript File, no. 8-3.5 AA v.1).

[FN55]. Office of the Judge Advocate Gen., *supra* note 47, at 249.

[FN56]. The raw numbers of ETO offenses for March and April on monthly average were 80 murder/nn.m (3.1 per 100,000 troops), 228 aggravated assaults (8.82 per 100,000 troops), and 452 rapes (17.47 per 100,000 troops). For methodological and source information on the foregoing data, see *infra* Appendix C, at pp. 775-81.

[FN57]. European Theater of Operation Historical Division, *supra* note 45, at 6.

[FN58]. Office of the Judge Advocate Gen., *supra* note 47, at 242.

[FN59]. In considering these data, it is interesting to note that patterns of violent crime in the United States underwent sharp changes during the WWII period. While civilian murder/nn.m rates decreased from pre-war rates, aggravated assault rates increased substantially, and forcible rape rates increased dramatically. As of January 1945, the wartime murder/nn.m rate was 7.5% below the pre-war (1939-41) average, the wartime aggravated assault rate was 19.9% above the pre-war average, and the wartime forcible rape rate was well over 27% above the pre-war average. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 79 (1945) [[[hereinafter UCR 1945]. (I say that the forcible rape rate was "well over" 27% above the prewar average because the 27% increase figure includes all rape including statutory; the increase in forcible rape during the war period, however, was actually far greater than the increase in statutory rape. *See* UCR 1945, *supra,* at 3; FEDERAL BUREAU OF INVESTIGATION FOR THE UNITED STATES, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 83 (1944) [hereinafter UCR 1944]; FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 80 (1943) [hereinafter UCR 1943].)

One might speculate about some of the reasons why the civilian rape rate increased so dramatically during wartime: a changed role for women, who undertook greater participation in the public sphere during the war;

reckless behavior by men expecting to go to war; and perhaps other effects of war mobilization on American culture. In any event, it is worth noting that, when comparing military rates of violent crime with civilian rates during WWII, we base these comparisons on relatively stable civilian murder/nn.m rates compared with previous levels, somewhat elevated aggravated assault rates, and highly elevated civilian rape rates. This fact underscores the finding that, of the three crimes examined, military rape rates are increased *most* from civilian levels.

[FN60]. *See* ESSAME, *supra* note 42, at 65-177; MAX HASTINGS, VICTORY IN EUROPE 91-114 (1985); HOYLE, *supra* note 37, at 263-64, 270-72, 295-99; WHITING, *supra* note 37, at 177-89.

[FN61]. *See* ESSAME, *supra* note 42, at 65-177.

[FN62]. The raw numbers of ETO offenses for October through February on monthly average were 34 murder/ nn.m (1.8 per 100,000 troops), 77 aggravated assaults (4.0 per 100,000 troops), and 33 rapes (1.8 per 100,000 troops). For methodological and source information on the foregoing data, see *infra* Appendix C, at pp. 775-81. For month by month data, see *infra* Appendix D, at p. 782.

[FN63]. 10 OFFICE OF THE THEATER PROVOST MARSHAL, REPORT OF OPERATIONS 1 JULY-30 SEPTEMBER 1946, at 3 (1946) ("supporting documents" section).

[FN64]. Wars are often fought in foreign lands where troops may experience a feeling of "time out" from the usual rules. In addition, troops may identify less with persons from other countries and cultures and may therefore tend more readily to dehumanize potential victims. *See* PETER KARSTEN, LAW, SOLDIERS AND COMBAT 55-61 (1978); Peter G. Bourne, *From Boot Camp to My Lai, in* CRIMES OF WAR 462, 466-67 (Richard Falk et al. eds., 1971); *see also* KARSTEN, *supra,* at 35 (discussing the role of cultural distance in the My Lai massacre). In addition, battle is terrifying, often chaotic and, of course, violent. The fear, rage, and desires for revenge produced in combat all can lead to atrocities in war. *See* KARSTEN, *supra,* at 62; JAMES S. KUNEN, STANDARD OPERATING PROCEDURE 281 (1971) (testimony of Dr. Robert Lifton before the Citizens' Commission of Inquiry in U.S. War Crimes in Indochina); *see also* Richard Fox, *Narcissistic Rage and the Problem of Combat Aggression,* 31 ARCHIVES GEN. PSYCHIATRY 807, 807-08 (1974) (commenting on the transition toward more personalized hostility and desire for revenge after longer exposure to combat, especially after death of a "buddy" in combat).

[FN65]. *See supra* note 33; *supra* notes 48-55 and accompanying text.

[FN66]. *See, e.g.,* Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime,* 47 AM. SOC. REV. 114 (1982); Gary LaFree et al., *Race and Crime in Postwar America: Determinants of African-American and White Rates, 1957-1988,* 30 CRIMINOLOGY 157 (1992); Joseph F. Sheley, *Structural Influences on the Problem of Race, Crime, and Criminal Justice Discrimination,* 67 TUL. L. REV.. 2273 (1993).

[FN67]. It is important to note that, since the rape differential was observed not only in the 1987-92 all-volunteer force but also in the largely conscripted WWII force, a demographic factor that would account for part of the rape differential would have to obtain even for a conscripted army.

[FN68]. *See* MARTIN BINKIN, WHO WILL FIGHT THE NEXT WAR? 61-101 (1993).

[FN69]. *See* UCR 1992, *supra* note 33, at 235 (arrests by race); UCR 1991, *supra* note 33, at 231 (same); UCR 1990, *supra* note 33, at 192 (same); UCR 1989, *supra* note 33, at 190 (same); UCR 1988, *supra* note 33, at 186 (same); UCR 1987, *supra* note 33, at 182 (same).

[FN70]. *See* sources cited *supra* note 69.

[FN71]. *See id.*

[FN72]. The robbery rate for blacks was 12.9 times that of whites compared once again to a rape arrest rate 6.36 times that of whites. *See id.* Therefore, for robbery as well as for murder, race would not account for any part of the observed variance in diminution of rape and robbery incidence.

[FN73]. This brief consideration of the expected effects of a race control variable rests on the assumption that race would have the same effect on arrest rates (i.e., both on criminality and on police arrests decisions) in the military and civilian contexts. That assumption might or might not be warranted.

[FN74]. For some discussion of the effects of those additional variables on crime in the general population, see Blau & Blau, *supra* note 66, at 121-27.

[FN75]. This statement would apply to the many military bases located in rural locations, but would not apply, of course, to bases such as Long Beach Naval Shipyard in Los Angeles, Treasure Island Naval Base in San Francisco, or other military bases located in or near urban areas.

[FN76]. I am indebted to my colleague Bob Mosteller for noting the need to consider this possible explanation for the variance observed.

[FN77]. Related to the "sexual deprivation" explanation for the rape differential is the possible effect on military rape rates of the exclusion of gays from the military. *See infra* note 357 (regarding U.S. policy concerning gays in military service). If the percentage of gay males is lower in the military than in the civilian population, then perhaps the percentage of potential rapists of women is higher in the military than in the civilian population. (This proposition rests on the untested hypothesis that gay men rape women at a lower rate than do heterosexual men.) The possibly lower percentage of gays in the military than in the civilian population could thus explain some part of the military rape differential. We cannot know, of course, what proportion (if any) of the rape differential is accounted for by this factor because we do not know whether or to what extent the proportion of gay males in the military is actually lower than the proportion of gay males in the civilian population, and we do not know whether or to what extent gay men are less likely than heterosexual men to rape women. (Rape of a male is excluded from the present study because it was not defined as "rape" under military law prior to 1992. *See* 10 U.S.C. § 920 (1994) (amending 10 U.S.C. § 920 (1988)), and so does not appear in the available military crime statistics.)

[FN78]. *See, e.g.,* MENACHEM AMIR, PATTERNS IN FORCIBLE RAPE 63-68 (1971) (discussing but not finding support for a skewed-sex-ratio theory of rape causation); *cf.* Larry Baron & Murray A. Straus, *Four Theories of Rape: A Macrosociological Analysis,* 34 SOC. PROBS. 467, 481-82 (1987) (finding no positive correlation between the percent of states' populations constituted by single adult males and states' rape rates).

[FN79]. *See generally* HELEN REYNOLDS, THE ECONOMICS OF PROSTITUTION 103 (1986) (prostitution and U.S. military in Nevada); SAUNDRA P. STURDEVANT & BRENDA STOLTZFUS, LET THE GOOD TIMES ROLL: PROSTITUTION AND THE U.S. MILITARY IN ASIA (1992); CHARLES WINICK & PAUL M. KINSIE, THE LIVELY COMMERCE: PROSTITUTION IN THE UNITED STATES 245-67 (1971) (history of prostitution and U.S. military).

[FN80]. During the period 1987-92, the percentage of male active duty military personnel who were married rose from 56% to 60%. *See* Defense Manpower Data Center, Active Duty by Marital Status 1987-92 (Oct. 26,

1994) (computer printout provided by the U.S. Defense Manpower Data Center, on file with author). During the same period, military rapes rates showed an upward trend. Specifically, for each of the years 1987-92, Army rape rates per 100,000 active duty personnel were 55, 64, 61, 62, 69, 74. Navy rape rates were 16, 23, 23, 35, 34, 38. Marine rape rates were 31, 41, 32, 48, 41, 56. And Air Force rape rates were 20, 25, 24, 26, 29, 31. *See* data described *infra* Appendix A, at pp. 764-70, on file with author. During this period, military rates of murder/nn.m and aggravated assault did not show an upward trend. *See id.*

[FN81]. For example, at least for the period after Tailhook '91 in which the services publicized "zero tolerance" policies regarding sexual assault, the increase in reported rape rates may reflect a higher rate of reporting by victims and of record-keeping by military authorities.

[FN82]. Telephone Interview with Mary Koss, Professor of Psychology, Univ. of Arizona (July 1994); Telephone Interview with Susan Roth, Professor of Psychology, Duke Univ. (Nov. 17, 1994); Telephone Interview with Leslie Lebowitz, National Center for the Study of Post Traumatic Stress Disorder (Nov. 17, 1994).

[FN83]. *See infra* notes 257-66 and accompanying text.

[FN84]. *See* LEE ELLIS, THEORIES OF RAPE: INQUIRIES INTO THE CAUSES OF SEXUAL AGGRESSION 14-16 (1989) (reviewing the literature on sociobiological theories of rape); *see also* Charles Crawford & Birute M.F. Galdikas, *Rape in Nonhuman Animals: An Evolutionary Perspective,* 27 CANADIAN PSYCHOLOGY 215, 225-26 (1986); William M. Shields & Lea M. Shields, *Forcible Rape: An Evolutionary Perspective,* 4 ETHOLOGY & SOCIOBIOLOGY 115, 117-20 (1983); Randy Thornhill & Nancy W. Thornhill, *Human Rape: The Strengths of the Evolutionary Perspective, in* SOCIOBIOLOGY AND PSYCHOLOGY: IDEAS, ISSUES AND APPLICATIONS 269, 286 (C. Crawford et al. eds., 1987); Randy Thornhill & Nancy W. Thornhill, *Human Rape: An Evolutionary Analysis,* 4 ETHOLOGY & SOCIOBIOLOGY 137, 140 (1983).

Not surprisingly, data for the sociobiological theories of rape are inconclusive, and the theories (as well as sociobiology more generally) have come under serious scholarly criticism. For critiques of sociobiological theories of rape, see JOHN KLAMA, AGGRESSION: THE MYTH OF THE BEAST WITHIN 147-48 (1988); SUZANNE R. SUNDAY & ETHEL TOBACH, VIOLENCE AGAINST WOMEN: A CRITIQUE OF THE SOCIOBIOLOGY OF RAPEEEEEEEEE (1985). Regarding the scientific status of sociobiology in general, see MICHAEL RUSE, SOCIOBIOLOGY: SENSE OR NONSENSE? (2d ed. 1985); FLORIAN VON SCHILCHER & NEIL TENNANT, PHILOSOPHY, EVOLUTION AND HUMAN NATURE 106-68 (1984); Robert L. Simon, *The Sociobiology Muddle,* 92 ETHICS 327 (1982).

[FN85]. *See generally* KLAMA, *supra* note 84, at 147-48 (discussing sociobiological theories of aggression).

[FN86]. For a discussion of such possible aggression/sexuality links, see DOLF ZILLMANN, CONNECTIONS BETWEEN SEX AND AGGRESSION (1984).

[FN87]. *Id.* at 15-17.

[FN88]. As sociobiologist E.O. Wilson stated, while "genes hold culture on a leash[, t]he leash is very long." EDWARD O. WILSON, ON HUMAN NATURE 167 (1978).

[FN89]. *See, e.g.,* AMIR, *supra* note 78, at 43-125; A. NICHOLAS GROTH, MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER 12-83 (1979); JEAN S. MACKELLAR, RAPE: THE BAIT AND THE TRAP 68-78, 129-33 (1975).

Particularly persuasive evidence of the strong influence of social factors on rape incidence are the findings

that there are large differences in rape rates between different geographical areas, such as between different regions of the United States, and that these differences are consistent over time. *See, e.g.,* Baron & Straus, *supra* note 78, at 467, 480-83; Joseph E. Scott & Loretta A. Schwalm, *Rape Rates and the Circulation of Adult Magazines,* 24 J. OF SEX RES. 241, 245-48 (1988).

[FN90]. 10 U.S.C. § 920 (1994). This statute applies to any rape committed by military personnel regardless of whether the victim is another military personnel or a civilian. When a military personnel commits an offense within a civilian jurisdiction (i.e., not on a military base or installation), that individual generally will still be prosecuted by military authorities applying military law, but may by law alternatively be (and, in practice, occasionally will be) prosecuted by civilian authorities applying civilian law. Interview with Wilbur L. Hardy, U.S. Army Crime Records Center, in Baltimore, Md. (May 19, 1994); Interview with personnel at the Navy Criminal Investigative Service, in Washington, D.C. (May 4, 1994).

The military rape statute that was in effect prior to October 1992 actually defined rape more narrowly than does the current statute. *See supra* note 33 (describing former statute, which excluded rape of a spouse and rape of males). The change in law, however, does not affect the analysis here. Rather, it means only that the rape differential measures in this Article are conservative measures, because the effect on the rape differential of having now broadened the military definition of rape would actually be to increase the rape differential since a broader range of conduct would now be counted as rape in military statistics. *See id.*

[FN91]. 10 U.S.C. § 920 (1994).

[FN92]. MANUAL FOR COURTS MARTIAL, UNITED STATES, Rule 1004(c)(9) (1984) (as amended).

I reserve comment here on the appropriateness of the death penalty in general or on its constitutionality when applied to the category of rape cases for which it may be imposed under military law.

Unfortunately, meaningful statistics on the military sentences *actually* imposed for rape are unavailable because of the nature of military sentencing procedures. Military courts do not impose separate sentences for each count of which a defendant is convicted. Rather, one sentence is imposed for all the counts of which the defendant is convicted at a particular trial. For example, in 1991-92, for trials resulting in convictions of which rape was the most serious count, the median sentence in the Navy was five years and in the Marine Corps was thirteen years; however, those numbers are largely uninterpretable because the sentences might have included punishment for multiple crimes, all prosecuted in the same trial. *See* Letter from Capt. W.F. Grant, Jr., Chief Trial Judge, U.S. Navy, to author (June 15, 1995) (on file with author).

[FN93]. *See* MANUAL FOR COURTS MARTIAL, UNITED STATES, Rule 301 (1984) (as amended).

[FN94]. *See id.,* Rule 303.

[FN95]. *See id.* (Discussion of Regulation).

[FN96]. *See generally id.,* Rule 306 (Initial Disposition); *id.,* Rule 307 (Preferral of Charges).

[FN97]. *See id.,* Rule 405.

Any plea bargaining with regard to sentencing normally occurs in the period between the conclusion of the Article Thirty-Two investigation and the commencement of trial. *See* Interview with Col. Scott Silliman, U.S.A.F. (Ret.), former Staff Judge Advocate, Air Combat Command, in Durham, N.C. (Oct. 14, 1994). Plea bargaining as to the *crime charged* is extremely rare in the military justice system, *see id.,* in contrast with the civilian sector where pleas to a lesser charge are common.

[FN98]. 10 U.S.C. § 898 (1994).

[FN99]. 10 U.S.C. § 938 (1994).

[FN100]. *See, e.g., Counseling and Other Needs of Women Veterans, supra* note 5, at 12-14 (statement of Diana Danis); *id.* at 24 (statement of Jacqueline Ortiz); *id.* at 34 (statement of Barbara Franco); Molly Moore, *Navy Failed to Prosecute in 6 Rapes; Probe Finds Laxity on Sex Offenses at Florida Base,* WASH. POST,, Oct. 22, 1990, at A1; Jeff Nesmith, *Military Courts Often Fail to Deal with Rape Charges: Leniency Is Common as Commanders Use Their Discretion to Punish Offenders,* ORANGE COUNTY REG., Oct. 4, 1995, at A14.

[FN101]. *See, e.g., Counseling and Other Needs of Women Veterans, supra* note 5, at 12-14 (statement of Diana Danis); *id.* at 24 (statement of Jacqueline Ortiz); *id.* at 34 (statement of Barbara Franco).

[FN102]. *See* Nesmith, *supra* note 100:

> Behind the guarded gates of military installations, there is no public scrutiny when commanders decide whether persons accused of crimes will be court-martialed or "counselled." That tends to favor leniency, said Frank Zimring, a law professor at the University of California at Berkeley.
>
> In addition, Zimring said, if a charge is seen as serious enough to warrant prosecution, military commanders and court-martial juries often are under pressure to get rid of the accused, rather than incur the expense of incarceration.

[FN103]. On the roles of certainty and celerity in deterrence, see J.L. Miller & Andy B. Anderson, *Updating Deterrence Doctrine,* 77 J. OF CRIM. L. & CRIMINOLOGY 418, 421-22 (1986).

[FN104]. Regarding the utility of such a record-keeping and oversight program, see Statement of Professor Madeline Morris on the DeConcini Amendment to the National Defense Authorization Act of 1994 to Establish Within the Office of the Secretary of Defense the Position of Director of Special Investigations and for Other Purposes, 140 CONG. REC. S8164 (daily ed. July 1, 1994).

[FN105]. *See, e.g.,* Proposed DeConcini Amendment to the National Defense Authorization Act of 1994 to Establish Within the Office of the Secretary of Defense the Position of Director of Special Investigations and for Other Purposes, 140 CONG. REC. S8159 (daily ed. July 1, 1994) (Amend. No. 2146) (companion legislation to S. 816, 103d Cong., 1st Sess. (1993)).

[FN106]. *See, e.g.,* 140 CONG. REC. S8167-72 (daily ed. July 1, 1994) (rejecting proposed DeConcini Amendment).

The Department of Defense is currently in the process of implementing a Defense Incident Based Reporting System (DIBRS) which will provide for centralized uniform crime record-keeping throughout the military services. Telephone Interview with Lt. Col. David Shutler, U.S.A.F., Deputy Director, Legal Policy, Requirements and Resources (June 24, 1994). DIBRS, once in place, will greatly facilitate any attempt at centralized data compilation and oversight of rape/sexual assault case handling.

[FN107]. *See infra* note 109.

[FN108]. Rape is incontrovertibly a war crime. Both the Fourth Geneva Convention and the Additional Protocols to the Geneva Conventions explicitly prohibit rape. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3516, 3536, 75 U.N.T.S. 287, 306 (Fourth Geneva Convention); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, arts. 76(1), 85, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 4(2)(e),

1125 U.N.T.S. 609, 612.

Rape also may constitute a grave breach under the Geneva Conventions. Although rape is not specified in the Conventions as a grave breach, there is clear movement in the international community toward interpreting the Conventions' grave breach provisions to cover rape. The International Committee of the Red Cross (ICRC) has declared that the grave breach of "wilfully causing great suffering or serious injury to body or health" (Article 147 of the Fourth Geneva Convention) covers rape. Theodor Meron, *Rape as a Crime Under International Humanitarian Law,* 87 AM. J. OF INT'L L. 424, 426 (1993) [[[hereinafter Meron, *Rape*] (citing ICRC, Aide-Memoire (Dec. 3, 1992)). The U.S. Department of State also has stated recently that rape in some instances may constitute a grave breach. *See id.* at 427 n.22 (citing Letter from Robert A. Bradtke, Acting Assistant Sec. for Legislative Affairs, to Senator Arlen Specter (Jan. 27, 1993)).

For excellent overviews of the law of rape as a war crime, see Christine Chinkin, *Peace and Force in International Law, in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW, *supra* note 5, at 203; Meron, *Rape, supra.*

Rape, like other war crimes, may constitute a crime against humanity when committed in a mass and systematic manner, and on the basis of political, racial, or religious group membership. *See* Theodor Meron, *The Case for War Crimes Trials in Yugoslavia,* 72 FOREIGN AFF. 122, 130 (1993) [hereinafter Meron, *Case*]. The Statutes of the International Criminal Tribunal for the Former Yugoslavia and Rwanda list rape among the conduct that may constitute crimes against humanity. *Statute of the International Tribunal, in* UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993), Annex, art. 5(g), at 13, U.N. Doc. S/ 25704 (1993), *adopted by* S.C. Res. 827, U.N. SCOR, 48th Sess., at 29, U.N. Doc. S/INF/49 (1993) (former Yugoslavia); UNITED NATIONS, SECURITY COUNCIL, STATUS OF THE INTERNATIONAL TRIBUNAL FOR RWANDA, art. 3(g), U.N. Doc. S/RES/955 (1994) (Rwanda). There was broad consensus among the parties participating in the drafting of the first International Tribunal Statute to include rape (when committed under relevant conditions) within crimes against humanity. The U.N. Secretary-General, France, Italy, seven states represented by the Organization of the Islamic Conference (OIC), and the United States each submitted proposals for definitions of crimes to come within the jurisdiction of the International Tribunal that defined rape, committed under certain conditions, as a crime against humanity. *See Statute of the International Tribunal, supra,* art. 5; UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 10 FEBRUARY 1993 FROM THE PERMANENT REPRESENTATIVE OF FRANCE TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, Annex V, art. VI(1)(b)(iv), at 62, U.N. Doc. S/25266 (1993); UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 16 FEBRUARY 1993 FROM THE PERMANENT REPRESENTATIVE OF ITALY TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, Annex I, art. 4(c), at 3, U.N. Doc. S/25300 (1993); UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 31 MARCH 1993 FROM THE REPRESENTATIVES OF EGYPT, THE ISLAMIC REPUBLIC OF IRAN, MALAYSIA, PAKISTAN, SAUDI ARABIA AND SENEGAL TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL,,,,,,,, Annex, art. II(c)(1), at 2, U.N. Doc. S/ 25512 (1993) (OIC); *cf.* UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 5 APRIL 1993 FROM THE PERMANENT REPRESENTATIVE OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, Annex II, art. 10(b)(i), at b, U.N. Doc. S/25575 (1993) (making an argument that implicitly defines rape, committed under certain conditions, as a crime against humanity).

Under certain circumstances, rape can also be a part of the crime of genocide. The U.N. Convention on the Prevention or Punishment of the Crime of Genocide defines genocide to include "[k]illing members of the group," "[c] ausing serious bodily or mental harm to members of the group," and "[d] eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Convention on

the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, art. II, 78 U.N.T.S. 277, 280. The Convention requires proof of intent to destroy or partially destroy a national, ethnic, racial or religious group. *Id.* Rape, when carried out for the purposes of destroying such a group, may be prosecuted under the Genocide Convention. *See* Meron, *Case, supra,* at 130-32. For analysis of the applicability of the Genocide Convention to ethnic cleansing, see John Webb, *Genocide Treaty--Ethnic Cleansing--Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia,* 23 GA. J. INT'L & COMP. L. 377 (1993).

[FN109]. Those few prosecutions for violations of international criminal law that have occurred have given scant attention to the prosecution of rape. Rape was not mentioned in the Nuremberg Charter and was not prosecuted as a war crime at the Nuremberg trials. *See* Meron, *Rape, supra* note 108, at 425-26. Rape received limited treatment at the Tokyo tribunal. *See id.* at 426 & n.14; Charter of the International Tribunal for the Far East, Jan. 19, 1946, *amended* Apr. 26, 1946, TIAS No. 1589, 4 Bevans 20; 2 THE INTERNATIONal Military Tribunal for the Far East, The Tokyo Judgment 967-68, 971-73, 988-89 (B.V.A. RöLING & C.F. RüTER EDS., 1977); 1 ID. AT 385; John A. Appleman, Military Tribunals and International Crimes 259 (1971); Arnold C. Brackman, The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials 20-21, 84, 379-82 (1987); WILLIAM H. PARKS, COMMAND RESPONSIBILITY FOR WAR CRIMES, 62 Mil. L. Rev. 1, 69-73 (1973). NATIONAL TRIBUNALS HAVE ONLY OCCASIONALLY INCLUDED EVIDENCE OF RAPE AS A PART OF PROSECUTIONS FOR WAR CRIMES AND CRIMES AGAINST HUMANITY. SEE, E.G., Control Council Law No. 10, ART. II(1)(C) (DEC. 20, 1945) (ALLIED CONTROL COUNCIL), REPRINTED IN Naval War College, Documents on Prisoners of War 305 (INT'L LAW STUDIES VOL. 60, HOWARD S. LEVIE ED., 1979) (PROVIDING OCCUPYING POWERS IN EUROPE WITH AUTHORITY TO CONDUCT WAR CRIMES TRIALS SUBSEQUENT TO WWII); XV United Nations War Crimes Commission, Law Reports of Trials of War Criminals 121 (1949); Philip R. Piccigallo, The Japanese on Trial 179-80 (1979).

[FN110]. Prosecution of war crimes or other crimes committed by military personnel has been inconsistent and rather minimal. Since the Nuremberg and Tokyo international tribunals after WWII, there have been no *international* war crimes tribunals. *See* Meron, *Case, supra* note 108, at 122. Some national courts have tried war crimes, but such proceedings have been sporadic, and their outcomes far from satisfactory. *See id.* at 123. Regarding the myriad impediments to the efficacy of war crimes tribunals in national courts, see II TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995) (country studies).

[FN111]. *See* S.C. Res. 827, *supra* note 108 (former Yugoslavia); S.C. Res. 955, *supra* note 108 (Rwanda).

[FN112]. Most recently, in November 1995 the U.N. General Assembly 6th Committee adopted a draft resolution calling for a Preparatory Committee to draft texts of a convention for an International Criminal Court (ICC). *Draft Resolution of the Gen. Assembly Sixth Comm.,* U.N. Doc. A/C.6/L.14 (1995). Regarding the historic development and prospects for implementation of the ICC concept, see Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns,* 6 PACE INT'L L. REV. 121 (1994); Roy S. Lee, *Remarks Made at Pace University School of Law on October 23, 1993,* 6 PACE INT'L L. REV. 93, 95-97 (1994); Robert Rosenstock, *Remarks Made at Pace University School of Law on October 23, 1993,* 6 PACE INT'L L. REV. 83 (1994); Michael P. Scharf, *Getting Serious About an International Criminal Court,* 6 PACE INT'L L. REV. 103 (1994).

[FN113]. Despite the weak history of prosecution of rape as a war crime, there is every indication that the International Tribunals for the former Yugoslavia and Rwanda will prosecute rape vigorously. *See, e.g.,* Indictment 2, Meakic and Others, *issued by* the International Criminal Tribunal for the Former Yugoslavia (Feb.

13, 1995) (listing rape and sexual assaults among the acts constituting crimes against humanity), *reprinted in* 34 I.L.M. 1011, 1014, 1020 (1995); Statutes of the International Criminal Tribunal for the former Yugoslavia and Rwanda, *supra* note 108 (listing rape as a crime against humanity); Judge Richard J. Goldstone, Prosecutor, International Criminal Tribunal, Remarks Made at Duke Law School (Nov. 5, 1994). Indeed, the International Tribunal may contribute greatly to the development of the international humanitarian law of rape (e.g., by setting a precedent for diligently prosecuting rape as a war crime, establishing it clearly as a grave breach under the Geneva Conventions, identifying it as a crime against humanity when committed on a mass and systematic scale, identifying it as a tool of genocide when so used, and by establishing that forced prostitution is a form of rape). *Cf.* SPECIAL TASK FORCE OF THE A.B.A. SECTION OF INT'L LAW AND PRACTICE, REPORT ON THE INT'L TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 15 (1993) (suggesting that the statute of the International Tribunal should "expand subparagraph 5(g) (rape) to include specific reference to enforced prostitution, enforced pregnancy, and other widespread sexual offenses").

[FN114]. Individual *civil* liability for rape, as well as criminal liability, may obtain under provisions of both domestic and international law. (For a discussion of *state* responsibility for rape by military personnel, see *infra* note 393.) There is, however, no reason to believe that any aspect of potential civil liability would contribute to the military rape differential. In the domestic context, military personnel would be subject to civil suit for rape in the same courts and under the same laws as civilians would be--or, more precisely, as civilian federal employees would be. In any event, the provisions applicable to suits for torts by federal employees are, for present purposes, entirely comparable to the provisions applicable to suits for torts by *any* civilian. *See* Letter from Col. Scott Silliman, U.S.A.F. (Ret.), former Staff Judge Advocate, Air Combat Command, to author (Jan. 23, 1996) (on file with author).

In the international context, the provisions under which military personnel would be subject to civil suit for rape would apply equally to other forms of violent abuse or torture because there are no provisions in international law giving rise to individual liability for rape in particular. Rather, international law permits states to provide civil remedies, in tort or restitution, for international crimes giving rise to universal jurisdiction. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. b (1986). Crimes giving rise to universal jurisdiction include grave breaches of the Geneva Conventions, crimes against humanity and, probably, genocide. *See* Meron, *Case, supra* note 108, at 129; Kenneth Randall, *Universal Jurisdiction Under International Law,* 66 TEX. L. REV. 785, 788 (1988) (crimes against humanity). *Compare* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404 (providing universal jurisdiction to punish genocide) *with* E.S. Fawcett, *The Eichman Case,* 38 BRIT. Y.B. INT'L L. 181, 206 (1962) (arguing that territoriality is the exclusive jurisdictional basis for prosecution of genocide). Thus, rape or any other crime committed in such a way as to constitute a grave breach, a crime against humanity, or (probably) genocide, *see supra* note 108, can form the basis for civil liability. *See, e.g.,* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (holding that the Alien Tort Act, 28 U.S.C. § 1350 (1988), provided U.S. federal jurisdiction for a tort suit against Radovan Karadzic, president of the Bosnian Serb administration in Pale, in his individual capacity, for wrongs, including rape, committed in the armed conflict in Bosnia-Herzegovina). Comparative data are lacking regarding the imposition of international law-based civil liability for rape and for other forms of violent abuse. But the prospect that military personnel perceive some disparity in the imposition of international civil liability for rape and for other forms of abuse, and that this perception affects their rape incidence, is extremely remote indeed.

[FN115]. One might ask why military rape incidence needs to be addressed or reduced, given that peacetime military rape rates are lower than civilian rape rates (after controlling for age and gender). The response is threefold. First, the blight of extremely high rape rates that is common to many wars (extremely high both in

comparison with civilian rates and in comparison with military rates of other violent crime in war) is well worth addressing. Second, while peacetime military rape rates are lower than civilian rates, they are diminished from civilian rates substantially less than are military rates of other violent crime. *See supra* notes 20-33 and accompanying text. If that lesser diminution in rape is in fact due to factors that can be addressed with a resultant *further* reduction in military rape rates, bringing reduction in military rape rates more into line with reduction in military rates of other violent crime, then this too is a goal worth pursuing. Thirdly, reducing military rape rates as much as possible may be a national obligation under international law. *See infra* note 393 and accompanying text.

[FN116]. *See* 10 U.S.C. § 504 (1994).

[FN117]. *See* Eric Schmitt, *Military Struggling to Stem an Increase in Family Violence,* N.Y. TIMES, May 23, 1994, at A1, A12.

[FN118]. Of course, military primary groups also could share norms conducive to crimes other than rape. The prevalence of certain crimes in particular units in certain wars suggests that such phenomena have indeed occurred. *See, e.g.,* Office of the Judge Advocate Gen., *supra* note 47, at 263-68 (discussing widespread organized theft and resale of government supplies by members of a certain railway battalion in the ETO). However, there are reasons why norms conducive to rape in particular are especially likely to form in military organizations. See *infra* Part IV. For that reason, the following analysis, while having some applicability to crimes by military personnel in general, is particularly cogent and applicable to the phenomenon of *rape* by members of military organizations.

[FN119]. CHARLES H. COOLEY, SOCIAL ORGANIZATION: A STUDY OF THE LARGER MIND 23 (1909).

[FN120]. *See* DEXTER C. DUNPHY, THE PRIMARY GROUP: A HANDBOOK FOR ANALYSIS AND FIELD RESEARCH 40-79 (1972).

[FN121]. *See id.* at 5.

[FN122]. Ellsworth Faris, *The Primary Group: Essence and Accident,* 38 AM. J. SOC. 41, 48 (1932) ("The family has always been considered the essential type of a primary group.").

[FN123]. *See id.* at 49; Peter O. Peretti, *Perceived Primary Group Criteria in the Relational Network of Closest Friendships,* 15 ADOLESCENCE 555, 555 (1980).

[FN124]. *See* DUNPHY, *supra* note 120, at 5, 15.

[FN125]. *See id.* at 5.

[FN126]. *See id.* at 5, 31-34 (including as primary groups "[r]esocialization groups such as therapy groups, rehabilitation groups, and self-analytic groups").

[FN127]. *Id.* at 5, 13-15.

[FN128]. *See generally id.* at 5.

[FN129]. This list contains factors characteristic of primary groups, not definitive or absolute requirements.

[FN130]. For an in-depth analysis of this process, see DUNPHY, *supra* note 120, at 40-59.

[FN131]. *Id.* at 34.

[FN132]. *See* MARTIN BINKIN & SHIRLEY J. BACH, WOMEN AND THE MILITARY 91 (1977); KARSTEN,,,,,,,, *supra* note 64, at 69; CHARLES C. MOSKOS, JR., THE AMERICAN ENLISTED MAN 156 (1970); David H. Marlowe, *The Manning of the Force and the Structure of Battle: Part 2--Men and Women, in* CONSCRIPTS AND VOLUNTEERS 189, 193-94 (Robert K. Fullinwider ed., 1983).

To be more precise, military units are intended to be, and *usually* are, primary groups. When they are not, "unit cohesion" is lacking, which is considered a serious problem by military leaders and experts. *See infra* notes 299-301 and accompanying text.

[FN133]. *See* JESSE G. GRAY, THE WARRIORS 44 (1959) ("As any commander knows, an hour or two of combat can do more to weld a unit together than can months of intensive training.").

[FN134]. For a discussion of the different roles of primary groups in combat and noncombat military units, see Roger W. Little, *Buddy Relations and Combat Performance, in* THE NEW MILITARY 195, 195-223 (Morris Janowitz ed., 1964).

[FN135]. *See* Frederick Manning, *Morale, Cohesion, and Esprit de Corps, in* HANDBOOK OF MILITARY PSYCHOLOGY 453, 457 (Reuven Gal & A. David Mangelsdorff eds., 1991); *see also* SENATE COMM. ON ARMED SERVICES, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1994, S. REP. NO. 112, 103d Cong., 1st Sess. 264 (1993) ("One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members.").

[FN136]. SENATE COMM. ON ARMED SERVICES, *supra* note 135, at 275 (statement of Gen. Colin Powell).

[FN137]. II SAMUEL A. STOUFFER ET AL., THE AMERICAN SOLDIER: COMBAT AND ITS AFTERMATH 99 (1949).

[FN138]. *See supra* text accompanying notes 122-31.

[FN139]. As Dexter Dunphy has observed, "[T]he primary group in the army acts as a family surrogate ...." DUNPHY, *supra* note 120, at 26.

[FN140]. A typical strategy is for the older, senior drill instructor to play a fatherly role, while the junior drill instructor is more of a "tough guy." Interview with Cpl. Salvatore Cardella, Marine Combat Correspondent, at Parris Island Marine Corps Recruit Depot, S.C. (Oct. 22, 1993).

[FN141]. GWYNNE DYER, WAR 113 (1985) (quoting U.S.M.C. Sgt. Carrington).

[FN142]. II STOUFFER ET AL., *supra* note 137, at 124.

[FN143]. *See* Edward A. Shils, *Primary Groups in the American Army, in* CONTINUITIES IN SOCIAL RESEARCH 16, 32-35 (Robert K. Merton & Paul F. Lazarsfeld eds., 1974) [hereinafter Shils, *Primary*]. Indeed, Shils elsewhere states that

> authoritarian leadership can indeed be a crucial component in primary groups composed of persons with personality needs which can best be satisfied by authoritative protection or in primary groups operating in situations which bring these needs for paternal protection to the fore... . With certain types of

personalities or in certain types of situations (tasks and threats) primary-group solidarity might well be disintegrated by democratic leadership.

Edward A. Shils, *The Study of the Primary Group, in* THE POLICY SCIENCES 44, 65 n.60 (Daniel Lerner & Harold L. Lasswell eds., 1951) [hereinafter Shils, *The Study*].

[FN144]. SIGMUND FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO 25-26 (1959). This commonality between military and religious groups was again reflected in recent congressional testimony stating that "[s]uccessful officers ... relay a strong sense of ... security to their soldiers which ... gains a degree of influence and control over members of their units often associated with charismatic leaders." SENATE COMM. ON ARMED SERVICES, *supra* note 135, at 307 (quoting Dr. William Daryl Henderson, retired Research Fellow at the National War College); *see also* DYER, *supra* note 141, at 103 ("[Military socialization] is, essentially, a conversion process in an almost religious sense--and as in all conversion phenomena, the emotions are far more important than the specific ideas.").

The theme of commonalities in the quasi-familial psychological structures of primary groups as seemingly diverse as military units, religious orders, cults, fraternities, street gangs, and sport teams is significant. The significance lies in the fact that those quasi-familial psychological structures greatly magnify the power of such groups' influence on their members. As we shall see, that magnified group influence may tend to increase, under certain circumstances, the rape incidence of group members.

[FN145]. Of course, "mother" and "sister" have been largely absent from the military "family." The significance of this absence is discussed *infra* notes 303-04 and accompanying text.

[FN146]. *See* DUNPHY, *supra* note 120, at 26 ("[A] man's real family loyalties were one of the most substantial threats to the solidarity of the army unit."); Edward A. Shils & Morris Janowitz, *Cohesion and Disintegration in the Wehrmacht in World War II,* 12 PUB. OPINION Q. 280, 289-91 (1948).

[FN147]. *See* DUNPHY, *supra* note 120, at 26.

[FN148]. DYER, *supra* note 141, at 109 (quoting U.S.M.C. Capt. Brassington).

[FN149]. For a psychoanalytic analysis of the combat buddy relationship as narcissistic failure to discriminate between self and other, see Fox, *supra* note 64, at 809-11.

[FN150]. DYER, *supra* note 141, at 104 (quoting former U.S. Army Capt. John Early); *see also id.* at 127 (quoting William Manchester: "You are closer to those men than to anyone except your immediate family when you were young.").

[FN151]. *See, e.g.,* William Arkin & Lynne R. Dobrofsky, *Military Socialization and Masculinity, in* MAKING WAR, MAKING PEACE: THE SOCIAL FOUNDATIONS 68, 76-77 (Francesca Cancian & James Gibson eds., 1990).

Consistent with the trend toward avoiding relationships with outsiders that might undermine the cohesion of the military primary group, a certain level of care is taken so that personal friendships *within* the military unit do not threaten its primary group solidarity. Thus, especially in the combat context, there is an avoidance of overt pairing off into duos that might seem exclusionary or rejecting of others or of the group. *See* Little, *supra* note 134, at 198.

[FN152]. Arkin & Dobrofsky, *supra* note 151, at 76-77.

[FN153]. For descriptions of membership requirements and initiation rites in college fraternities, see PEGGY R. SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS 135-55

(1990); Patricia Martin & Robert Hummer, *Fraternities and Rape on Campus,* 3 GENDER & SOC'Y 457, 462 (1989).

[FN154]. *See* DUNPHY, *supra* note 120, at 278; *cf.* Martin & Hummer, *supra* note 153, at 462 ("Characteristics of the [demanding and demeaning] pledge experience are rationalized by fraternity members as necessary to help pledges unite into a group, rely on each other, and join together against outsiders.").

[FN155]. While a group ideology or cause (e.g., a religious or political commitment) may serve as the members' ostensible purpose for membership, there is substantial evidence that ideology plays a secondary role to emotional sustenance and attachment in the motivations of many ideological primary group members. *See* DUNPHY, *supra* note 120, at 27; Edward A. Shils, *Primordial, Personal, Sacred, and Civil Ties, in* THE STUDY OF SOCIETY: AN INTEGRATED ANTHOLOGY 178, 178-92 (Peter I. Rose ed., 1967); Madeline Morris, IAM: A Group Portrait 75-96 (1986) (unpublished manuscript, on file with author).

For examination of the relationship between primary group bonding and ideological motivation in military organizations, see RICHARD A. GABRIEL, THE NEW RED LEGIONS (1980); Elliot P. Chodoff, *Ideology and Primary Groups,* 9 ARMED FORCES & SOC'Y 569, 577-91 (1983); Charles C. Moskos, Jr., *The American Combat Soldier in Vietnam,* 31 J. OF SOC. ISSUES 25, 26-27 (1975); Shils, *Primary, supra* note 143, at 23-24; Shils & Janowitz, *supra* note 146, at 281-315.

[FN156]. More precisely, military units are *intended* to be (and usually are) primary groups. *See supra* note 132.

[FN157]. Regarding the phenomenon of rape by gang members, see MACKELLAR, *supra* note 89, at 112; W.H. Blanchard, *The Group Process in Gang Rape,* 49 J. OF SOC. PSYCHOL. 259, 259-66 (1959); Gilbert Geis, *Group Sexual Assaults,* MED. ASPECTS OF HUM. SEXUALITY,, May 1971, at 101, 101-13; David Gelman et al., *The Mind of the Rapist,* NEWSWEEK, July 23, 1990, at 46, 50.

[FN158]. Regarding the prevalence of rape by fraternity members, see SANDAY, *supra* note 153; Julie K. Ehrhart & Bernice R. Sandler, *Party Rape,* 9 RESPONSE 2, 2-3 (1985); Mary P. Koss & John A. Gaines, *The Prediction of Sexual Aggression by Alcohol Use, Athletic Participation, and Fraternity Affiliation,* 8 J. OF INTERPERSONAL VIOLENCE 94, 105 (1993); Martin & Hummer, *supra* note 153, at 457-59.

[FN159]. Regarding the prevalence of rape by sports team members, see Gerald Eskenazi, *The Male Athlete and Sexual Assault,* N.Y. TIMES, June 3, 1990, § 8, at 1 (stating that "[i]nterviews with rape-crisis counselors as well as results of studies of assaults on college campuses indicate that athletes are involved in a disproportionate number of rapes and other sexual assaults"); Jerry Kirshenbaum, *An American Disgrace: A Violent and Unprecedented Lawlessness Has Arisen Among College Athletes in All Parts of the Country,* SPORTS ILLUSTRATED, Feb. 27, 1989, at 16, 17; Koss & Gaines, *supra* note 158, at 104-05 (finding participation in organized athletics a significant predictor of sexual aggression in undergraduate population studied); Rick Telander & Robert Sullivan, *You Reap What You Sow: Oklahoma Has Paid the Price for the Anything Goes Attitude That Coach Barry Switzer Has Allowed to Take Root,* SPORTS ILLUSTRATED, Feb. 27, 1989, at 20, 21, 23-24; *see also* Todd W. Crosset et al., Male Student-Athletes Reported for Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices, Address before the North American Society for Sports Sociology (Nov. 11, 1994), at 9 (on file with author) (reporting that, at 20 schools with highly rated Division I football and basketball teams surveyed between 1991 and 1993, "athletes appear to be disproportionately involved in incidents of sexual assault on college campuses").

[FN160]. Regarding sexual abuse of adults in cults, see Paul Martin et al., *Post-Cult Symptoms: As Measured by MCMI Before and After Residential Treatment,* 9 CULTIC STUD. J.. 219, 221, 238-39 (1992). Little systematic

research has been done on the incidence in cults of rape specifically, as opposed to sexual abuse defined to include rape along with other forms of sexual abuse of adults. However, some anecdotal data on the subject is collected in Marcia Rudin, *Women, Elderly, and Children in Religious Cults,* 1 CULTIC STUD. J.. 8, 10 (1984).

[FN161]. "Group norms" have been described as "ideas in the minds of members about what should and should not be done by a specific member under specified circumstances." THEODORE M. MILLS, THE SOCIOLOGY OF SMALL GROUPS 74 (1967); *see also* GEORGE C. HOMANS, THE HUMAN GROUP 121-27 (1950).

[FN162]. *See generally* Kurt W. Back, *Small Groups, in* SOCIAL PSYCHOLOGY: SOCIOLOGICAL PERSPECTIVES 320, 327-28 (Morris Rosenberg & Ralph H. Turner eds., 1990) (discussing Freudian perspectives on family relations as prototypes for small group interactions).

[FN163]. *See generally id.* at 334 (citations omitted):

> [A] group will be more cohesive if it has fewer mutual choices... . [P] airing is an activity that is opposed to the general efficient group process, just as fighting--interpersonal aggression--is. Social critics have seen this point intuitively. Orwell's *Nineteen Eighty-Four* opposes individual love to group solidarity with Big Brother.

Cf. Martin & Hummer, *supra* note 153, at 470-71 (The fraternity norm of "getting sex without giving emotionally ... poses no threat to the bonding and loyalty of the fraternity brotherhood.").

[FN164]. FREUD, *supra* note 144, at 73.

[FN165]. Broad sexual access for group leaders often means virtually unconstrained sexual access by the group leader to all group members (or sometimes to all group members of the opposite sex). *See* Martin et al., *supra* note 160, at 221, 240. Limited or leader-controlled sexual access by group members takes a variety of forms ranging from celibacy requirements to requirements that members have sexual relations with (and/or marry) other members of the leader's choosing, or that members (usually female) engage in prostitution for the benefit of the group, or other arrangements in which the leader dictates the sexual behavior of group members, invariably prohibiting some sexual activities and often requiring others. *See* Rudin, *supra* note 160, at 9-10 (describing the leader-controlled sexual practices of a variety of religious cults); Roy Wallis, *Sex, Violence, and Religion,* 7 NEW RELIGIOUS MOVEMENTS 3, 3-4 (1983) (same).

[FN166]. *See* SANDAY, *supra* note 153, at 1-19; Martin & Hummer, *supra* note 153, at 459 ("[Some] fraternities create a sociocultural context in which the use of coercion in sexual relations with women is normative ... .").

[FN167]. *See, e.g.,* SANDAY, *supra* note 153, at 11-19.

[FN168]. While social science research on attitudes and rape-propensity cannot definitively establish a *causal* relationship based on the extensive correlations established, a causal relationship is strongly suggested by the available data and is generally believed to exist by researchers in the field. *See, e.g.,* Donald L. Mosher & Ronald D. Anderson, *Macho Personality, Sexual Aggression, and Reactions to Guided Imagery of Realistic Rape,* 20 J. OF RES. IN PERSONALITYY 77, 91 (1986).

[FN169]. Measures of rape propensity encompass measures both of prior commissions of rape (based on convictions or self-reports) and of self-reported likelihood of raping in the future under various conditions that may or may not occur (e.g., wartime). The available research suggests that all of these measures are valid indicators of some consistent factor of rape proneness or propensity. *See, e.g.,* Neil M. Malamuth, *Rape Proclivity Among Males,* 37 J. OF SOC. ISSUES 138, 138 (1981) (affirming the validity of likelihood-of-raping

measures).

[FN170]. Neil M. Malamuth et al., *Characteristics of Aggressors Against Women: Testing a Model Using a National Sample of College Students,* 59 J. OF CONSULTING PSYCHOL. 670, 673-74 (1991).

[FN171]. David Lisak & Susan Roth, *Motives and Psychodynamics of Self-Reported, Unincarcerated Rapists,* 60 AM. J. ORTHOPSYCHIATRY 268, 277-78 (1990).

[FN172]. Robert L. Quackenbush, *A Comparison of Androgynous, Masculine Sex-Typed, and Undifferentiated Males on Dimensions of Attitudes Toward Rape,* 23 J. OF RES. IN PERSONALITYY 318, 328, 333 (1989).

[FN173]. Martha Burt, *Cultural Myths and Supports for Rape,* 38 J. OF PERSONALITY & SOC. PSYCHOL. 217, 218 (1980).

[FN174]. *See* Quackenbush, *supra* note 172, at 338; *cf.* Burt, *supra* note 173, at 224-25 (finding that adversarial sexual beliefs are correlated with rape myth acceptance, which itself has subsequently been shown to correlate with sexual aggression and attraction to sexual aggression).

[FN175]. Malamuth et al., *supra* note 170, at 677-78.

[FN176]. Burt, *supra* note 173, at 217.

[FN177]. *Id.*

[FN178]. *See* John Briere & Neil M. Malamuth, *Self-Reported Likelihood of Sexually Aggressive Behavior: Attitudinal Versus Sexual Explanations,* 17 J. OF RES. IN PERSONALITYY 315, 321-22 (1983); Neil M. Malamuth, *The Attraction to Sexual Aggression Scale: Part One,* 26 J. OF SEX RES. 26, 38-40 (1989) [[[hereinafter Malamuth, *Part One*]; Neil M. Malamuth, *The Attraction to Sexual Aggression Scale: Part Two,* 26 J. OF SEX RES. 324, 335-37 (1989) [hereinafter Malamuth, *Part Two*]; Quackenbush, *supra* note 172, at 334; *see also* Hubert S. Feild, *Attitudes Toward Rape: A Comparative Analysis of Police, Rapists, Crisis Counselors and Citizens,* 36 J. OF PERSONALITY & SOC. PSYCHOL. 156, 169 (1978) (finding rapists more likely than rape counsellors to endorse rape myths).

[FN179]. Burt, *supra* note 173, at 218.

[FN180]. *See* Neil M. Malamuth, *Factors Associated with Rape as Predictors of Laboratory Aggression Against Women,* 45 J. OF PERSONALITY AND SOC. PSYCHOL. 432, 434 (1983); Malamuth, *Part One, supra* note 178, at 26, 38-40 (using acceptance of interpersonal violence in a three-factor composite index of rape-supportive attitudes that was found to be correlated with attraction to sexual aggression and with self-reported likelihood to rape); Malamuth, *Part Two, supra* note 178, at 335-37 (same); Quackenbush, *supra* note 172, at 334; *see also* Burt, *supra* note 173, at 225-29 (finding acceptance of violence correlated with rape myth acceptance that in turn has been found to be correlated with sexual aggression); Malamuth et al., *supra* note 170, at 676-77 (using acceptance of interpersonal violence scale in a composite index of attitudes supporting aggression that was found to be correlated with hostile masculinity that in turn was correlated with sexual aggression).

[FN181]. *See* James V.P. Check, The Hostility Toward Women Scale 170-72 (1984) (unpublished Ph.D. dissertation, University of Manitoba).

[FN182]. *Id.*

[FN183]. *See, e.g.*, Malamuth, *Part Two, supra* note 178, at 340, 348 (finding correlation of hostility toward women with attraction to sexual aggression); Lisak & Roth, *supra* note 171, at 274 (finding correlation between hostility toward women and commission of rape).

[FN184]. *See* Burt, *supra* note 173, at 222; Janet T. Spence et al., *A Short Version of the Attitudes Toward Women Scale (AWS),* 2 BULL. OF THE PSYCHONOMIC SOC'Y 219 (1973); Caryl Utigard et al., *Gender Stereotyping and Rape Attitudes,* 32 CORRECTIVE AND SOC. PSYCHIATRY & J. OF BEHAV. TECH. METHODS AND THERAPYY 99, 100-01 (1986).

[FN185]. *See* James V.P. Check & Neil M. Malamuth, *Sex Role Stereotyping and Reactions to Depictions of Stranger Versus Acquaintance Rape,* 45 J. OF PERSONALITY & SOC. PSYCHOL. 344, 351-52 (1983); Nella Hegeman & Stuart Meikle, *Motives and Attitudes of Rapists,* 12 CANADIAN J. BEHAV. SCI.. 359, 366 (1980) (reviewing other literature); Ronald L. Scott & Laurie A. Tetreault, *Attitudes of Rapists and Other Violent Offenders Toward Women,* 127 J. OF SOC. PSYCHOL. 375, 379 (1986); *see also* Burt, *supra* note 173, at 225-30 (finding correlation between sex role stereotyping and rape myth acceptance that has subsequently been found to correlate with rape propensity); Neil M. Malamuth et al., *Using the Confluence Model of Sexual Aggression to Predict Men's Conflict With Women: A Ten Year Follow-Up Study,* 69 J. OF PERSONALITY & SOC. PSYCHOL. 353, 354 (1995) (finding that men's distress in failing to conform to traditional masculine roles contributes to the characteristics of hostile masculinity); Utigard et al., *supra* note 184, at 102 (finding a correlation between rape-permissive attitudes and gender stereotyping). *But see* Carolyn Kozma & Marvin Zuckerman, *An Investigation of Some Hypotheses Concerning Rape and Murder,* 4 PERSONALITY & INDIVIDUAL DIFFERENCES 23, 26-27 (1983) (finding no greater antifeminist attitudes among rapists than among murderers or property felons); Zindel V. Segal & Lana Stermac, *A Measure of Rapists' Attitudes Towards Women,* 7 INT'L J. OF LAW & PSYCHIATRY 437, 438-39 (1984) (finding no difference between rapists, nonsex offenders and controls).

[FN186]. Malamuth et al. found that "attitudes supporting violence" (a three-part composite index composed of adversarial sexual beliefs, rape myth acceptance, and acceptance of violence against women) was strongly correlated with "hostile masculinity" (a three-part composite index composed of negative masculinity, hostility toward women, and adversarial sexual beliefs). Malamuth et al., *supra* note 170, at 676. Similarly, Check and Malamuth replicated Burt's findings that sex role stereotyping is correlated with rape myth acceptance, acceptance of violence against women, and adversarial sexual beliefs. Check & Malamuth, *supra* note 185, at 352. Other correlations among rape-conducive attitudes were found by Lisak and Roth, who observed correlations between sex role stereotyping and hostility toward women, and between sex role stereotyping and lack of femininity (the latter being a measure similar to the nonfeminine sex-typing mentioned *supra* text accompanying note 172). Lisak & Roth, *supra* note 171, at 273. Hubert Feild has observed correlations between sex-role stereotyping and belief in rape myths. Feild, *supra* note 178, at 174. Similarly, Quackenbush found strong correlations between nonfeminine sex-typing and adversarial sexual beliefs, acceptance of violence against women, and rape myth acceptance. Quackenbush, *supra* note 172, at 332. As Martha Burt concluded in 1980, "[T]he data support ... the hypothesis that rape myth acceptance forms part of a larger and complexly related attitude structure that includes sex role stereotyping, feelings about sexuality, and acceptance of interpersonal violence." Burt, *supra* note 173, at 228.

[FN187]. Malamuth et al., *supra* note 170, at 677.

[FN188]. Donald L. Mosher & Mark Sirkin, *Measuring a Macho Personality Constellation,* 18 J. OF RES. IN

PERSONALITYY 150, 160 (1984).

[FN189]. *Id.* at 161.

[FN190]. Mosher & Anderson, *supra* note 168, at 83.

[FN191]. *Id.* at 86; James P. Sullivan & Donald L. Mosher, *Acceptance of Guided Imagery of Marital Rape as a Function of Macho Personality,* 5 VIOLENCE AND VICTIMS 275, 282 (1990).

[FN192]. Mosher & Anderson, *supra* note 168, at 91 (citation omitted).

[FN193]. As Peter Peretti observes, "Socialization--the process by which the individual learns the norms, value, attitudes and customs of his or her subcultural groups--takes place within the setting of one's primary groups." Peretti, *supra* note 123, at 555.

[FN194]. *See* SENATE COMM. ON ARMED SERVICES, *supra* note 135, at 264 ("[T]he military society is characterized by its own laws, rules, customs, and traditions."). Indeed, the military unit in the combat context may have greater power to enforce its group norms than many other primary groups. As one Vietnam veteran pointed out, "The unit is all that one has. He either fits into the unit, or relegates himself to a fearful isolation... . Particularly in such a hostile environment, it is imperative for the individual to embrace the values of the group." KUNEN, *supra* note 64, at 239-40; *see also* II STOUFFER ET AL., *supra* note 137, at 130-31 (discussing the enforcement of group norms within combat units).

[FN195]. The utilization of sexual norms to foster group identity in military primary groups is reflected in an anecdote related by David Marlowe:

> [C]ertain special forces units quasi-publically [sic] defined themselves through their sexual behavior. Several massage parlors in South Vietnam were considered their regular territory; they never engaged in vaginal intercourse; the women in the massage parlors were engaged exclusively to perform fellatio upon them. This was the diacritical that contrasted them with other American groups in Vietnam, as it was widely believed that Vietnamese prostitutes had an abhorrence of oral sex and normally refused to perform it.

Marlowe, *supra* note 132, at 192.

[FN196]. This is not to say that norms inculcated in the military explicitly approve of rape. On the contrary, personnel receive training that there is a policy of "zero tolerance" for sexual harassment or assault. *See, e.g.,* Gordon R. Sullivan & Togo D. West, Jr., Statement of Army Policy on Sexual Harassment (July 21, 1994) (on file with author) ("The policy of the United States Army is that sexual harassment is unacceptable conduct and will not be tolerated.") Rather, the gender and sexual norms imparted to new recruits are of the type that enhance attractions and reduce aversions and inhibitions to rape; that is, they make normative the set of attitudes discussed above that are conducive to rape.

It is, however, also the case that norms approving of sexual assault short of rape apparently are perceived to exist by some personnel, at least episodically. As stated in the Department of Defense Inspector General's report on the events, including sexual assault, at Tailhook '91, "Officers who engaged in misconduct gave a variety of reasons for their behavior at Tailhood 91. Perhaps the most common rationale was that such behavior was 'expected' of junior officers and that Tailhook was comprised of 'traditions' built on various lore." INSPECTOR GEN., U.S. DEP'T OF DEFENSE, *supra* note 9, at X-1.

[FN197]. There is currently no data available on general sex-role stereotyping by military personnel. One study conducted by the Army Research Institute (ARI) does contain four questions addressing general sex role

attitudes of U.S. Army personnel. *See* ARMY FAMILY RESEARCH PROGRAM, 1989 ARMY SOLDIER AND FAMILY SURVEY 13 (1989) (questions 72k-n). However, the study containing those ARI data is classified as a "limited document" and has not, to date, been made available to the author.

[FN198]. *See, e.g.*, Memorandum from Roberta K. Peters, Director, Office of Civilian Personnel Mgmt., U.S. Navy, to Navy HROs, RDs, and NAFI Elements (July 15, 1992) (requiring that all Navy and Marine Corps units schedule a full day of training for all uniform and civilian personnel on sexual harassment prevention).

[FN199]. It is broadly recognized that the military has a distinct culture within but also distinguishable from the broader national culture. As General Colin Powell has noted, "Active military service is not an everyday job in an ordinary workplace. It requires a unique blend of ... ethics, bonding, and culture ... ." SENATE COMM. ON ARMED SERVICES, *supra* note 135, at 279 (statement of Gen. Powell).

[FN200]. *See generally* Kathryn Abrams, *Gender in the Military: Androcentrism and Institutional Reform,* 56 LAW & CONTEMP. PROBS., Autumn 1993, at 217 (arguing that the U.S. military is an "androcentric institution").

[FN201]. Marlowe, *supra* note 132, at 194.

[FN202]. JEANNE HOLM, WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 341 (1982) (quoting Gen. William Westmoreland).

[FN203]. Michael Wright, *The Marine Corps Faces the Future,* N.Y. TIMES MAG., June 20, 1982, at 16, 74 (quoting Gen. William Barrow).

[FN204]. Marlowe, *supra* note 132, at 192.

[FN205]. *See* Interview with Marine Corps Drill Instructor, Name Withheld, in Parris Island, S.C. (Oct. 22, 1993); Interview with Marine Corps Pub. Aff. Officer, Name Withheld, in Parris Island, S.C. (Oct. 22, 1993); Telephone Interview with Marine Corps Drill Instructor (Ret.), Name Withheld (Oct. 2, 1994).

[FN206]. Telephone Interview with retired Marine Corps Drill Instructor, *supra* note 205.

[FN207]. Telephone Interview with male Army Combat Engineer, Name Withheld (Sept. 25, 1994). The units in which gender and sexual norms appear to have changed least are, perhaps unsuprisingly, the units that have remained all male. Army and Air Force personnel--male and female, officer and enlisted--whom I interviewed in 1994 observed virtually without exception that "the manliness thing is still strong in the combat arms." *See* Interviews with female Army enlisted personnel, in Ft. Bragg, N.C. (Sept. 23, 1994) (transcripts on file with author). As one female Army Sergeant related,

> The combat MOS [military occupational specialty] men are always thinking that because I'm a female and in a non-combat MOS, I'm some kind of a sissy. Sissy meaning I don't want to get dirty, won't want to be around bugs, and things like that. They view themselves as the opposite of a sissy--as some kind of a super-hero. I guess it's kind of a macho ego thing.

Interview with female Army Sergeant, Name Withheld, in Ft. Bragg, N.C. (Sept. 23, 1994).

[FN208]. *See supra* text accompanying notes 170-72.

[FN209]. Arkin & Dobrofsky, *supra* note 151, at 72.

[FN210]. *Id.* at 77.

[FN211]. *Id.* at 74.

[FN212]. DYER, *supra* note 141, at 123; ROBERT J. LIFTON, HOME FROM THE WAR 243 (1973).

[FN213]. DYER, *supra* note 141, at 123 (quoting lecture on hand and arm signals, Parris Island, 1982).

[FN214]. *Id.*

[FN215]. Interview with female Marine Corps Drill Instructor, Name Withheld, at Parris Island Marine Corps Recruit Depot, S.C. (Oct. 22, 1993).

[FN216]. Telephone Interview with Judge Advocate (Ret.), U.S. Navy, Name Withheld (Jan. 13, 1993).

[FN217]. Interview with former Captain, U.S. Navy, Name Withheld, in Durham, N.C. (Nov. 14, 1994); Interview with former Brigadier General, U.S. Marine Corps, Name Withheld, in Durham, N.C. (Nov. 3, 1994).

[FN218]. Telephone Interview with Judge Advocate (Ret.), *supra* note 216.

[FN219]. Bruce Lambert, *Abandoned Filippinas Sue U.S. over Child Support,* N.Y. TIMES, June 21, 1993, at A3.

[FN220]. INSPECTOR GEN., U.S. DEP'T OF DEFENSE, *supra* note 9, at X-1 n.60.

[FN221]. Indeed, there has been some controversy within the military over the last decade as to what place striptease shows and the like have within clubs run by the Services. For instance,

> [t]he uniformed leadership endeavored to terminate all striptease acts and go-go dancers at Navy clubs in the early 1980s. However, the order of Chief of Naval Operations James D. Watkins was countermanded the day following its issuance by Secretary of the Navy John F. Lehman. This clearly sent a mixed signal to the uniformed leadership.

Parks, *supra* note 9, at 103 n.6.
[FN222]. Telephone Interview with male Army Combat Engineer, *supra* note 207.

[FN223]. No data are available on military and civilian readership of hard-core pornography. All subsequent references to "pornography" refer only to soft-core materials.

[FN224]. These data reflect the results of market research conducted by Simmons Market Research Bureau, Inc. (on file with author). The market research is "preliminary" for several reasons, including that Playboy is the only publication considered, that the sample size for the military population studied is too small for statistical reliability, and that the military population studied includes only personnel living off base.

[FN225]. *Id.*

[FN226]. *Id.*

[FN227]. *Id.* Usable data were not available for males with less than a high school diploma.

[FN228]. *Id.* While military personnel may consume a good deal of pornography without censure, *appearing* in the same publications is harshly punished on the ground that it reflects "discredit" on the corps. Several female and a few male service members have been disciplined for appearing in pornographic magazines. *See* JUDITH H. STIEHM, ARMS AND THE ENLISTED WOMAN 125 (1989). After the Marines discharged Sgt. Bambi

Finney for appearing in Playboy, a Marine spokesman stated that "whatever activity is undertaken by the Marine is to bring credit upon the corps and not discredit... . [E]very action a Marine takes--both good and bad--reflects not only on herself, but on every Marine wearing a Marine uniform." *Id.*

An initial response is that Sgt. Finney was not quite "wearing a Marine uniform" at the time the photographs were taken. More to the point, the anecdote prompts one to ask what view of sexuality is expressed by the fact that military personnel disproportionately consume pornography but view themselves as "discredited" when one in their own corps appears in pornography.

[FN229]. *See* EDWARD DONNERSTEIN ET AL., THE QUESTION OF PORNOGRAPHY 98 (1987). Playboy contains very little violence. Joseph E. Scott & Steven J. Cuvelier, *Sexual Violence in Playboy Magazine: A Longitudinal Content Analysis,* 24 J. OF SEX RES. 534, 536 (1987).

[FN230]. *See* Baron & Straus, *supra* note 78, at 480-81; Scott & Schwalm, *supra* note 89, at 246-48. *But see* Cynthia S. Gentry, *Pornography and Rape: An Empirical Analysis,* 12 DEVIANT BEHAV.: AN INTERDISCIPLINARY J. 277 (1991) (reporting results of an analysis similar to that of Baron and Straus but using Standard Metropolitan Statistical Areas rather than states as geographical units of analysis, and finding no significant correlation between pornography circulation and rape rates).

[FN231]. *See* Baron & Straus, *supra* note 78, at 480-81; Scott & Schwalm, *supra* note 89, at 246-48.

[FN232]. *See, e.g.,* 2 JOEL FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 150-54 (1985); Baron & Straus, *supra* note 78, at 467-68.

[FN233]. Of course, the relative isolation from women experienced by some male military personnel also might account for some part of the prevalence of pornography in the military environment. For that reason, the pornography circulation data presented here, while suggestive, cannot necessarily be interpreted exclusively as reflecting particular gender and sexual norms within military culture. It may even be the case that these two explanations for the prevalence of pornography are actually interrelated: The isolation from women experienced by some male military personnel may tend to reinforce the types of gender and sexual norms in question.

[FN234]. Because no information on rape myth acceptance by military personnel is currently available, no comparison of military and civilian populations on that dimension is possible.

[FN235]. As noted *supra* note 197, no data are currently available on sex-role attitudes of or sex-role stereotyping by military personnel.

[FN236]. *See generally* GEORG SIMMEL, CONFLICT 91 (Kurt W. Glencoe trans., 1955) (discussing the role of an identified "other" in fostering group unity).

[FN237]. *See* STIEHM, *supra* note 228, at 224 ("[Women] seem to be absolutely essential to the military. Their essentialness, though, lies in their absence.").

Women and gays (as well as young boys and old men) may be included within the out-group composed of those defined as not real men. *See infra* note 357 (regarding the issue of gays in the military and its relationship to the gender and sexual norms of military culture).

[FN238]. *See* CYNTHIA ENLOE, DOES KHAKI BECOME YOU? 14 (1983); CHRISTINE L. WILLIAMS, GENDER DIFFERENCES AT WORK 69 (1989).

There is a striking similarity in this regard in the methods of inculcation of gender norms in military organizations and sports organizations. David Kopay described how his high school football coach, "like many

other coaches ... used sexual slurs--'fag,' 'queer,' 'sissy,' 'pussy,'--to motivate (or intimidate) his young athletes." MYRIAM MIEDZIAN, BOYS WILL BE BOYS 198 (1991). One Indiana University basketball coach resorted to putting sanitary napkins into a player's locker. *Id.* Dave Meggessey, after recounting similar tactics by his coach, notes that "this sort of attack on a player's manhood is a coach's doomsday weapon." *Id.*

[FN239]. RANDY SHILTS, CONDUCT UNBECOMING 133 (1993).

[FN240]. Telephone Interview with female former Army Captain, Name Withheld (Sept. 22, 1994); Telephone Interview with male Army Combat Engineer, *supra* note 207; Interview with female enlisted Army Legal Specialist, Name Withheld, in Ft. Bragg, N.C. (Sept. 23, 1994); Interview with female Marine Corps Drill Instructor, *supra* note 215.

[FN241]. INSPECTOR GEN., U.S. DEP'T OF DEFENSE, *supra* note 9, at X-3.

[FN242]. The complexities of situating female participants in a "masculine" military are reflected in the comments of one young female Marine who remarked: "The way to motivate the male Marines is to play on their masculinity. And then the female Marines are motivated by a general line of 'We're gonna show those guys that we're just as good as they are.'" Interview with female Marine, Name Withheld, at Parris Island Marine Corps Recruit Depot, S.C. (Oct. 22, 1993).

[FN243]. MARINE CORPS INSTITUTE, MARINE BATTLE SKILLS TRAINING HANDBOOK 1-4-50, at 4-35 (1993).

[FN244]. For example, U.S. Air Force Officer Cynthia Wright described a mandatory briefing entitled "Professional Issues" held for the women of the Air Force Academy's class of 1993:

> Among the issues discussed were the techniques of effective makeup application, the importance of not swearing or crying in public, ... and a ... warning about the damage to one's reputation ... of "sleeping around." In the same breath, they were warned that boys will be boys and that they were unlikely to see those same moral standards upheld by their male peers. Finally, they were given, as a class, diet tips for maintaining "all those curves they (the male cadets) like."

Cynthia Wright, *G.I. Jill: Sexism in the Air Force,* NEW REPUBLIC, Oct. 21, 1991, at 17. In a similar vein, I was struck during a visit to Parris Island Marine Corps Recruit Depot by the fact that the majority of male Marines with whom I spoke about the Fourth Battalion (the one female Marine basic training battalion) mentioned that "they even have a beauty parlor over there." To a group of shaven-headed Marine recruits belly-crawling through the Basic Warrior Training terrain, the members of the Fourth Battalion with their beauty salon must appear very much the "other" indeed.

[FN245]. *See* Wright, *supra* note 244, at 17.

[FN246]. *See* WILLIAMS, *supra* note 238, at 69 (1989).

[FN247]. *See Counseling and Other Needs of Women Veterans, supra* note 5, at 26 (statement of Barbara Franco).

[FN248]. Regarding the tendency of previously all-male groups to respond to the new presence of small numbers of "token" women by "exaggerat[ing] both their commonality and the token's difference," see Rosabeth Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women,* 82 AM. J. OF SOC. 975 (1977).

[FN249]. Interview with female enlisted Army Legal Specialist, *supra* note 240.

[FN250]. *See* Eric Schmitt, *Military Struggling to Stem an Increase in Family Violence,* N.Y. TIMES, May 23, 1994, § A, at 1; Mark Thompson, *The Living Room War: As the U.S. Military Shrinks, Family Violence Is on the Rise: Can the Pentagon Do More to Prevent It?,* TIME, May 23, 1994, at 48; *see also* William A. Griffin & Allison R. Morgan, *Conflict in Maritally Distressed Military Couples,* 16 AM. J. OF FAM. THERAPY 14 (1988) (stating preliminary findings that military wives are more likely than civilian wives to be physically abused).

[FN251]. Alternative explanations for heightened military domestic abuse rates would include, for example, that frequent separations place strains on military families.

[FN252]. Clearly, systematic research comparing military and civilian populations' attitudes on gender and sexuality would be most valuable. While the Department of Defense (DOD) has conducted extensive personnel attitude research on other topics, *see, e.g.,* U.S. DEPARTMENT OF DEFENSE, DEFENSE TECHNICAL INFORMATION CENTER (DTIC), TECHNICAL REPORT SUMMARIES, DTIC BIBLIOGRAPHY (May 17, 1993) (on file with author), virtually no DOD research has been done on the attitudes toward gender and sexuality discussed here. *See id.* Presumably, the reason that such research has not been done is that it apparently does not serve any defense-related purpose. However, to the extent that the attitudes in question are contributing to the military rape differential, research on gender and sexual attitudes would be relevant to issues that are of concern to the DOD. *See generally supra* note 115.

[FN253]. *See supra* note 196.

[FN254]. *See* SUE E. BERRYMAN, WHO SERVES?: THE PERSISTENT MYTH OF THE UNDERCLASS ARMY 10 (1988); Charles Dale & Curtis Gilroy, *Determinants of Enlistments: A Macroeconomic Time-Series View,* 10 ARMED FORCES & SOC'Y 192, 202-03 (1982); Robert J. Johnson & Howard B. Kaplan, *Psychosocial Predictors of Enlistment in the All-Voluntary Armed Forces,* 22 YOUTH & SOC'Y 291, 311-12 (1991).

[FN255]. *See* Rupert F. Chisholm et al., *Pre-Enlistment Expectations/Perceptions of Army Life, Satisfaction, and Re-Enlistment of Volunteers,* 8 J. OF POL. AND MIL. SOC.. 31, 34 tbl. 1 (1980).

[FN256]. It has been observed repeatedly that group rape is typically initiated and led by a group leader while the other group members follow, enthusiastically or reluctantly. *See, e.g.,* DUNPHY, *supra* note 120, at 256; Geis, *supra* note 157, at 101; GROTH, *supra* note 89, at 112-13.

It appears that some proportion of participants in group rape are not themselves motivated (or at least not sufficiently or primarily motivated) to commit rape other than for the purpose of being accepted by the group. GROTH, *supra,* at 83; MACKELLAR, *supra* note 89, at 107-08. Rape as a group activity apparently can foster feelings of rapport, fellowship, and cooperation among assailants. *See* GROTH, *supra,* at 115; Geis, *supra,* at 111, 113; Edwin Megargee, *Psychological Determinants and Correlates of Criminal Violence, in* CRIMINAL VIOLENCE 81, 110 (Marvin Wolfgang & Neil Weiner eds., 1982). In addition, members seek to prove their virility or masculinity to each other both by performing sexually in the presence of the group and by their daring in participating in the rape. *See* GROTH, *supra,* at 113; MACKELLAR, *supra,* at 106-09. Several researchers go so far as to say that fulfillment of desire specifically to rape plays little part in the motives for group rape. *See, e.g.,* MACKELLAR, *supra,* at 106; *see also* SANDAY, *supra* note 153, at 12 ("The homoeroticism of [gang rape] seems obvious.").

It seems plausible that leaders of group rape and perhaps some other group members as well may be

predisposed to rape, while for other group members such inclination may play little part in motivating their participation in group rape. This relative absence of predisposition to rape in the motives of followers in group rapes may be reflected in the recidivism patterns of group rapists: While leaders commit as many individual as group rapes, followers typically commit rapes only in the group context. GROTH, *supra,* at 114. This may suggest that, while the act of rape itself is of primary importance to the leader, the rape may be of secondary or less than secondary importance in the motives of the followers. Similarly, whereas individual and group rapists have been found to be about equally likely to have had prior criminal convictions, group rapists were less likely to have had a prior conviction for a sex crime, which suggests that the usual motives for sex crimes are perhaps not central to their criminal activities. Richard Wright & D.J. West, *Rape--A Comparison of Group Offenses and Lone Assaults,* 21 MED. SCI. L.. 25, 26 (1981).

We may therefore surmise that individuals with psychological proclivities to rape are more likely to become the "leaders" who initiate and encourage group rape than are others without those proclivities. We may also surmise that, among followers in group rape, the ratio of rape-specific motives to general affiliative motives for participation may vary, and that enthusiasm and willingness to participate in group rape will be in part influenced by each follower's inclinations or aversions to rape.

Thus, the presence of individuals with psychological proclivities to rape should be expected to increase significantly the rape propensity of groups in which they are members both by providing the leaders who encourage and initiate group rape and also by providing more willing followers.

[FN257]. Researchers on motives for rape concur that "desire for sex" is not a sufficient or even a necessary motivation for rape. *See, e.g.,* Lynn Reynolds, *Rape: A Social Perspective, in* GENDER ISSUES, SEX OFFENSES, AND CRIMINAL JUSTICE 149, 151 (Sol Chaneles ed., 1984); GROTH, *supra* note 89, at 28. As Nicholas Groth states,

> Sexual desire, in and of itself, is not the primary or paramount issue operating in [the rapist]. If it were, there are a number of opportunities available in our society for consensual sex. In fact, sexual assaults always coexist with consenting sexual relations in the life of the offender. In no case have we ever found that ... [the rapist] had no other alternatives or outlets for his sexual desires.

Id.

[FN258]. For a history and review of taxonomies of rape motives, see Robert Prentky et al., *Development of a Rational Taxonomy for the Classification of Rapists: The Massachusetts Treatment Center System,* 13 BULL. AM. ACAD. PSYCHIATRY & L. 39 (1985).

[FN259]. GROTH, *supra* note 89, at 28-31. Several authors of typologies of rape motives describe a type corresponding to Groth's power rapist and use the term "macho" or "machismo" or, occasionally, "hypermasculinity" to describe this type of rapist's personal style. *See, e.g.,* D.J. West, *Violent and Non-Violent Sex Offenders,* 16 AUSTL. J. OF FORENSIC SCI.. 104, 105 (1984) ("The macho man's ideal is to be aggressive in sex ... [and] to show the woman who's boss."); Prentky et al., *supra* note 258, at 48 ("[This type of offender] shows an exaggerated masculine style, an assertion of masculinity that is often labelled 'machismo.'").

[FN260]. GROTH, *supra* note 89, at 13-14.

[FN261]. *Id.* at 16-17.

[FN262]. *Id.* at 13-14.

[FN263]. *Id.* at 44.

[FN264]. *See id.* at 58; *see also* Prentky et al., *supra* note 258, at 65-66 (reporting data on distribution of rape

types consistent with that in the Groth study).

[FN265]. The "convergence theory" of group behavior suggests that individuals with compatible emotional needs tend to join the same groups in order to meet those needs and further tend to move the groups' activities in directions consistent with the fulfillment of those psychological dispositions. *See* DONELSON R. FORSYTH, GROUP DYNAMICS 438-69 (2d ed. 1990).

[FN266]. This would be true of any military organization but is especially true in an allvolunteer force in which the applicant pool is entirely self-selected. Admiral Worth Bagley, Vice Chief of Naval Operations (Ret.) has made a related point. As he stated,

> Men join the Navy for many different reasons; however, a certain portion join and remain in the Navy because they enjoy being in a job which has been historically associated with fellowship among men in a difficult and dangerous endeavor. Changing the fabric of the Navy by integrat[ing] women into all combat roles might well reduce the attractions of the Navy to this segment of mankind.

Hearings on H.R. 9832 to Eliminate Discrimination Based on Sex with Respect to the Appointment and Admission of Persons to the Service Academies Before Subcomm. No. 2 of the House Armed Services Comm., 93d Cong., 2d Sess. 120 (1975) (statement of Vice Admiral Worth Bagley, then Chief of Naval Operations (Personnel)). Admiral Bagley's testimony was in support of the continued exclusion of women. His observations, however, could cut either way. It is true that different organizational cultures attract different "segments of mankind." The question, then, is which segments the armed forces should seek to attract.

[FN267]. *See* Ed Diener, *Deindividuation: The Absence of Self-Awareness and Self-Regulation in Group Members, in* PSYCHOLOGY OF GROUP INFLUENCE 209, 210 (Paul B. Paulus ed., 1980); Leon Festinger et al., *Some Consequences of De-Individuation in a Group*, 47 J. OF ABNORMAL & SOC. PSYCHOL. 382 (1952).

[FN268]. *See* FORSYTH, *supra* note 265, at 442.

[FN269]. *See* Steven Prentice-Dunn & Ronald W. Rogers, *Deindividuation and the Self-Regulation of Behavior, in* PSYCHOLOGY OF GROUP INFLUENCE 87, 102 (Paul B. Paulus ed., 2d ed. 1989); Philip G. Zimbardo, *The Human Choice: Individuation, Reason, and Order Versus Deindividuation, Impulse, and Chaos, in* NEBRASKA SYMPOSIUM ON MOTIVATION 237, 257 (William J. Arnold & David Levine eds., 1969).

[FN270]. *See* Philip G. Zimbardo, *Transforming Experimental Research into Advocacy for Social Change, in* APPLYING SOCIAL PSYCHOLOGY 33, 53 (Morton Deutsch & Harvey A. Hornstein eds., 1975).

[FN271]. Prentice-Dunn & Rogers, *supra* note 269, at 87.

[FN272]. Diener, *supra* note 267, at 232.

[FN273]. *See id.* at 210; Charles S. Carver, *Physical Aggression as a Function of Objective Self-Awareness and Attitudes Toward Punishment*, 11 J. OF EXPERIMENTAL SOC. PSYCHOL. 510, 518 (1975); Brian Mullen, *Atrocity as a Function of Lynch-Mob Composition: A Self-Attention Perspective*, 12 PERSONALITY AND SOC. PSYCHOL. BULL.. 187, 188 (1986).

[FN274]. *See* Steven Prentice-Dunn & Ronald W. Rogers, *Effects of Deindividuating Situational Cues and Aggressive Models on Subjective Deindividuation and Aggression*, 39 J. OF PERSONALITY AND SOC. PSYCHOL. 104, 104 (1980) [hereinafter Prentice-Dunn & Rogers, *Deindividuating Situational Cues*]; *see also* Steven Prentice-Dunn & Ronald W. Rogers, *Effects of Public and Private Self-Awareness on Deindividuation and Aggression*, 43 J. OF PERSONALITY AND SOC. PSYCHOL. 503, 503 (1982) [hereinafter Prentice-Dunn

& Rogers, *Public and Private*].

[FN275]. Diener, *supra* note 267, at 210.

[FN276]. *Id.* at 230.

[FN277]. *Id.* at 231.

[FN278]. *Id.* at 230, 232-33.

[FN279]. *Id.* at 210, 219, 237. *See generally* Prentice-Dunn & Rogers, *supra* note 269, at 102-03 (discussing deindividuation in contexts other than those involving the prototypical acute deindividuation).

[FN280]. *Cf.* Back, *supra* note 162, at 339-40 (discussing differing levels of conformity demanded by different types of cohesive groups); Leon Festinger & John Thibaut, *Interpersonal Communication in Small Groups,* 46 J. OF ABNORMAL & SOC. PSYCHOL. 92 (1951) (considering the relationship between group cohesiveness and pressure on members to conform to group norms).

[FN281]. *Cf.* Diener, *supra* note 267, at 218-19 (discussing the role of norms and cues for disinhibited behavior).

[FN282]. *See supra* text accompanying notes 276-78.

[FN283]. *See* DYER, *supra* note 141, at 114.

[FN284]. *See id.*

[FN285]. Bourne, *supra* note 64, at 463; KUNEN, *supra* note 64, at 237.

[FN286]. Bourne, *supra* note 64, at 465.

[FN287]. LIFTON, *supra* note 212, at 28 (1973).

[FN288]. DYER, *supra* note 141, at 110-11. Personnel interviewed by the author at Parris Island Marine Corps Recruit Depot in October 1993 referred to this process of identity transformation as the "break down" and "build up" periods. *See, e.g.,* Interview with Cpl. Cardella, *supra* note 140.

The analogy with deindividuation norms in other forms of primary group is striking. Regarding fraternities, for instance, Peggy Sanday has noted that

> [b]ound emotionally to one another in the group, they consider group values and traditions to be significant guides for behavior. These values and traditions are inculcated during the pledging period and in the initiation rituals. In these rituals, pledges endure verbal and physical abuse as a condition for membership. The abusive behavior strips the pledge of his individual identity so that he is ready to accept a group-defined identity.
>
> The victimization of pledges is part of a process designed to bring about a transformation of consciousness so that group identity and attitudes becomes personalized. The process includes a symbolic sacrifice of the self (or some part of the self) to a superior body that represents the communal identity of the house.

SANDAY, *supra* note 153, at 135.

[FN289]. *See generally* Diener, *supra* note 267, at 226 ("Rapid talking, shouting, and chanting are frequent accompaniments of deindividuated group activity.").

[FN290]. Prentice-Dunn & Rogers, *supra* note 269, at 94, 97.

[FN291]. *Id.*

[FN292]. Diener, *supra* note 267, at 223.

[FN293]. Zimbardo, *supra* note 269, at 257.

[FN294]. GRAY, *supra* note 133, at 14-15.

[FN295]. *See supra* note 144 and accompanying text; *supra* note 155; *supra* note 164 and accompanying text.

[FN296]. GRAY, *supra* note 133, at 45; *see also* JEAN B. ELSHTAIN, WOMEN AND WAR 207 (1987) ("Communal ecstacy explains a willingness to sacrifice and gives dying for others a mystical quality.").

[FN297]. GRAY, *supra* note 133, at 47.

[FN298]. The normative factors (both gender and sexual norms, and norms favoring deindividuation) that may increase the rape propensity of military units would be expected to increase both the incidence of rape by individual members and also, perhaps disproportionately, the incidence of group rape. It appears from the available anecdotal data that unlike rape in the nonwar context, which is more often than not committed by a lone individual, *see* GROTH, *supra* note 89, at 110 (1979); MACKELLAR, *supra* note 89, at 105, rape in war typically is committed by a group of two or more. *See, e.g., supra* notes 5-10 and accompanying text; Arnold J. Toynbee, *Violation of Women in War, in* MORALS IN WARTIME 136, 149 (Victor Robinson ed., 1943) ("The [WWII] officers and soldiers usually hunted in couples [for rape victims]."). It seems plausible that deindividuation--the eclipsing of individual identity by group identification--may particularly increase a propensity toward group rape.

[FN299]. *See, e.g.,* MOSKOS, *supra* note 132, at 135, 144-45; I STOUFFER ET AL., *supra* note 137; Little, *supra* note 134, at 206-07; David H. Marlowe, *The Basic Training Process, in* THE SYMPTOM AS COMMUNICATION IN SCHIZOPHRENIA 75 (Kenneth L. Artiss ed., 1959); Shils & Janowitz, *supra* note 146, at 280; *see also* Moskos, *supra* note 155, at 37 (arguing that primary-group ties in combat units arise from instrumental strategies for individual physical survival). It is interesting to note, however, that primary groups in the military do not always contribute to military effectiveness. When primary groups develop group norms in opposition to the goals of the larger military, primary groups can supply solidarity in opposition to official goals. *See* Little, *supra* note 134, at 195.

[FN300]. *See* Shils, *Primary, supra* note 143, at 21.

[FN301]. *Id.* at 27-28.

[FN302]. Zimbardo, *supra* note 269, at 257. We should not, however, lose sight of the risks associated with deindividuation in combat: One cross-cultural study, for instance, has found deindividuation to be correlated with torture and mutilation of the enemy in warfare. Robert I. Watson Jr., *Investigation into Deindividuation Using a Cross-Cultural Survey Technique,* 25 J. OF PERSONALITY & SOC. PSYCHOL. 342, 344 (1973).

[FN303]. Interview with female Army Sergeant, Name Withheld, at Fort Bragg, N.C. (Sept. 23, 1994). Another female Sergeant commented that

> [t]he guys from the all-male units are not used to having women around. But once they *do* work with

> females, it helps. Like the guys at NPDLC [non-commissioned officer training] who hadn't worked with females before. They even told us after a while that they were surprised and they had a lot of respect for us.

Interview with Sgt. Alesia Rodriguez, U.S. Army, at Fort Bragg, N.C. (Sept 23, 1994).

[FN304]. Interview with Staff Sgt. Monica Krause, U.S. Army, at Fort Bragg, N.C. (Sept. 23, 1994).

By contrast, regarding the units that still remain all-male, one female former Army Captain who is married to an Army enlisted man observed:

> The things that the leaders do in the male-only branches are different from in the integrated branches. Like they'll call the guys who don't do well "girls" and things like that. That will happen in the combat branches because there are no girls there to object; they won't get caught and turned in in all-male units. So all the leaders in the male units know it's not supposed to go on, but they still do it.

Telephone Interview with female former Army Captain, Name Withheld (Sept. 25, 1994).

[FN305]. *See* M.C. DEVILBLISS, WOMEN AND MILITARY SERVICE 3-9 (1990).

[FN306]. Act of June 12, 1948, ch. 449, 62 Stat. 356 (repealed 1967).

[FN307]. *See* 10 U.S.C. § 3069 (1994) (repealing 10 U.S.C. § 5410 (1956)).

[FN308]. *See* Department of Defense Appropriation Authorization Act, 1976, Pub. L. No. 94-106, Title VIII, § 803(b)(1), 89 Stat. 531, 538 (1975).

[FN309]. *See* Department of Defense Appropriation Authorization Act, 1979, Pub. L. No. 95-485, § 808, 92 Stat. 1611, 1623 (1978) (repealed 1993).

[FN310]. The risk rule provided that risks of direct combat, exposure to hostile fire, or capture are proper criteria for closing *noncombat* positions or units to women, when the type, degree, and duration of such risks are equal to or greater than the combat unit with which they are normally associated within a given theater of operations. If the risk of noncombat units or positions is less than that of the land, air, or sea combat units with which they are associated, then they should be open to women. Noncombat units should be compared to combat land units, air to air, and so forth. Memorandum from Frank Carlucci, Secretary of Defense, to Secretaries of the Military Departments (February 2, 1988) (discussing Women in the Military) (on file with author).

[FN311]. *See* National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531, 105 Stat. 1290, 1365 (1991).

[FN312]. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 547, 107 Stat. 1547, 1659 (1993).

[FN313]. Memorandum from Les Aspin, Secretary of Defense, to the Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Chairman, Joint Chiefs of Staff, Assistant Secretary of Defense (Force Management & Personnel), and Assistant Secretary of Defense (Reserve Affairs) (April 28, 1993) (setting policy regarding the assignment of women in the Armed Forces) (on file with author).

[FN314]. Memorandum from Les Aspin, Secretary of Defense, to the Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Chairman, Joint Chiefs of Staff, Assistant Secretary of Defense (Personnel & Readiness), and Assistant Secretary of Defense (Reserve Affairs) (Jan. 13, 1994) (on file with author).

[FN315]. Secretary of Defense, Press Release, *Secretary of Defense Perry Approves Plans to Open New Jobs for Women in the Military,* July 29, 1994 [[[hereinafter Press Release] (on file with author). These numbers for the

Air Force include reserve and national guard positions. *See* Undersecretary of Defense Dorn, Special Briefing on Women in the Military, July 29, 1994, at 4 (The Federal News, Reuters Transcript Service) [hereinafter Special Briefing].

[FN316]. *See* Letter from William J. Perry, Secretary of Defense, to Senator Sam Nunn, Chairman, U.S. Senate Committee on Armed Services (July 28, 1994) (reporting actions taken to expand the role of women in the military) (on file with author).

[FN317]. *See* Letter from Perry, *supra* note 316, at 2.

[FN318]. *See id.,* Enclosure 2, at 5.

[FN319]. These percentages for the Army include reserve and national guard positions together with active duty positions. The Army currently does not know the percentage of active duty positions that were open before or after the policy change. Telephone Interview with Major Anita Minniefield, Public Affairs, Public Communications Division, U.S. Army (Aug. 19, 1994).

Considerable controversy among forces in the Army and the Department of Defense attended the decision of which Army positions were to open to women. Secretary of the Army Togo West favored but was not successful in achieving the opening of virtually all positions not considered to involve direct ground combat, which was narrowly defined. *See* Eric Schmitt, *Army Will Allow Women in 32,000 Combat Posts,* N.Y. TIMES, July 28, 1994, § A, at 12.

[FN320]. *See* Special Briefing, *supra* note 315, at 4-5.

[FN321]. Press Release, *supra* note 315, at 1.

[FN322]. *See* Special Briefing, *supra* note 315, at 5.

[FN323]. *Id.* (anonymous reporter).

[FN324]. *Id.*

[FN325]. *See* Rodman D. Griffin, *Women in the Military,* 2 CONG. Q. RES. 835, 836-37 (1992).

[FN326]. Telephone Interview with female former Army Captain, *supra* note 304.

[FN327]. It is important additionally to observe that, unfortunately, the very occupational fields, centered in the Army and Marine Corps, that have been chosen to remain all male encompass the very units most at risk to rape in war. They are the units that occupy the ground, take prisoners, and come into contact with civilians. As Hays Parks has observed,

> The problem [of crimes of violence, including rape, in the combat context] most directly involves members of the Army and Marines, for they have the greatest face-to-face confrontation with enemy forces and civilians on the battlefield. Additionally, certain triggering factors generally are found only in the area of ground operations.

William H. Parks, *Crimes in Hostilities: Conclusion,* MARINE CORPS GAZETTE, Sept. 1979, at 18. At the time of that writing, Parks was a Major, U.S.M.C. He is now Chief, International Law Branch, International Operational Law Division, Office of the Judge Advocate Gen. (JAG), U.S. Army, and Special Assistant for Law of War Matters, Office of the JAG, U.S. Army.

[FN328]. *See* STIEHM, *supra* note 228, at 155, 158.

[FN329]. *See* Telephone Interview with Capt. Ted Triebel, U.S. Navy (Ret.) (Nov. 2, 1994).

[FN330]. *See id.*

[FN331]. *See id.*

[FN332]. Regarding the Air Force gender-neutral accessions policy, see STIEHM, *supra* note 228, at 155. Regarding the Navy gender-neutral accessions policy, see Telephone Interview with Capt. Triebel, *supra* note 329.

[FN333]. *See* Telephone Interview with Capt. Triebel, *supra* note 329. A predicted percentage for the Air Force was not available.

[FN334]. STIEHM, *supra* note 228, at 157, 165, 175.

[FN335]. *Id.* at 155-158; Telephone Interview with Capt. Triebel, *supra* note 329.

[FN336]. *See* STIEHM, *supra* note 228, at 157.

[FN337]. *See supra* text accompanying note 321.

[FN338]. *See* Telephone Interview with Capt. Triebel, *supra* note 329.

[FN339]. *See* Interview with Capt. Ted Triebel, U.S. Navy (Ret.) in Durham, N.C. (Aug. 26, 1994).

[FN340]. *See supra* text accompanying note 317.

[FN341]. For a review of military research on female participation in the military generally, see STIEHM, *supra* note 228, at 134-54.

[FN342]. *See* Diane N. Ruble & E. Tory Higgins, *Effects of Group Sex Composition on Self-Presentation and Sex-Typing,* 32 J. OF SOC. ISSUES 125, 125-31 (1976); James H. Thomas & Dirk C. Prather, *Integration of Females into a Previously All-Male Institution,* FIFTH ANNUAL SYMPOSIUM ON PSYCHOLOGY IN THE AIR FORCE 8 APRIL-10 APRIL 1976, at 100, 100-01 (1976); Ross A. Webber, *Perceptions and Behaviors in Mixed Sex Work Teams,* 15 INDUS. REL. 121, 121-29 (1976).

[FN343]. ROSABETH M. KANTER, MEN AND WOMEN OF THE CORPORATION 239 (1977).

[FN344]. STIEHM, *supra* note 228, at 152.

[FN345]. *Id.* at 174.

[FN346]. In 1993, the percentage of recruits in each service who were female was 16% in the Army, 13% in the Navy, 5% in the Marine Corps, and 22% in the Air Force. Defense Manpower Data Center, Non-Prior Service Accessions to Active Forces, Attained Age By Race By Service and Sex, Oct. 1992-Sep. 1993 (Jan. 23, 1996) (computer printout provided by the U.S. Defense Manpower Data Center, on file with author).

[FN347]. Telephone Interview with Sgt. Anita Bailey, Public Affairs Manager, Lackland Air Force Base, San Antonio, Tex. (July 14, 1994). All activities in Air Force basic training are gender-integrated and include identical curricula except for some differences in physical training requirements. Men and women are billeted on the same barracks floors in different rooms (two men or two women to a room). Telephone Interview with Maj.

Valerie Lofland, Chief, Force Management Directorate, Military Personnel Policy, Lackland Air Force Base, San Antonio, Tex. (Feb. 10, 1994).

[FN348]. Interview with Capt. Ted Triebel, U.S. Navy (Ret.), in Durham, N.C. (March 9, 1994).

[FN349]. Telephone Interviews with Raymond Harp, Public Information Specialist, U.S. Army Training and Doctrine Command (Sept. 1, 1994 and Nov. 2, 1994).

[FN350]. Marine Corps basic training is sex-segregated at the battalion level (approximately 1,200 personnel), and there exist no plans for integration. Telephone Interview with Cpl. Daniel Jones, Press Chief, Marine Corps Recruit Depot, Parris Island, S.C. (July 14, 1994).

[FN351]. Based on what is known about the consequences of placing a small proportion of women or other out-group members into a predominantly male or otherwise dominant-majority group, we may predict that those few women placed in each Air Force basic training unit would tend to be more subject to marginalization than would be the case if they constituted a more substantial proportion of their units. *See* KANTER, *supra* note 343, at 206-42 (discussing the marginalizing effects on women of constituting a small proportion of an otherwise male group); Kanter, *supra* note 248, at 987 (observing that constituting "less than 20% [of the group] in any particular situation ... is not always a large enough number to overcome the problems of tokenism"); Thomas & Prather, *supra* note 342, at 100-01 (finding that marginalization of females in a previously all-male institution is more common when women constitute less than 25% of the new group); *see also* MICHAEL RUSTAD, WOMEN IN KHAKI: THE AMERICAN ENLISTED WOMAN 228-35 (1982) (arguing for a 65:35 male/female ratio in the U.S. Army as necessary to improve the status of enlisted women soldiers).

[FN352]. Even for those Army recruits trained in "gender-integrated" units, their training occurs in units in which females are in the minority. (The Army sets a minimum of 25% female for its gender-integrated basic training units. *See supra* text accompanying note 349.) As in the Air Force context, this minority status may diminish the beneficial effects of the females' presence. *See supra* note 351 and accompanying text.

[FN353]. *See* WILLIAMS, *supra* note 238, at 67 ("Because of the segregation of basic training, military women are an enigma to most servicemen."). An additional problem with segregated basic training is that it does not prepare female recruits for their military life to come in the way that it does for male recruits. As Stiehm has noted, "[B]asic does not serve the same initiation function for women that it serves for men.... [I]t is only at her first assignment that a woman is likely to encounter a nearly all-male and sometimes hostile environment." STIEHM, *supra* note 228, at 4.

[FN354]. Patricia J. Thomas & Capt. Kathleen M. Bruyere, U.S. Navy (Ret.), Gender Integrated Recruit-Training 2 (1993) (unpublished manuscript, on file with author) (Ms. Thomas is Director of Women and Multicultural Research, Navy Personnel Research and Development Center; Captain Bruyere was Chief of Staff at the Treasure Island Naval Base, San Francisco, CA).

[FN355]. *See supra* text accompanying note 215.

[FN356]. Telephone Interview with female Marine Gunnery Sergeant, Name Withheld, Parris Island Marine Recruit Depot (May 23, 1994).

[FN357]. Together with thoroughgoing integration of women, acknowledged integration of gays in the armed forces also would likely be a valuable means for transforming the gender and sexual norms of military culture. A candid recognition of military participation by gays would be helpful in severing the association of military

service with the set of sexual norms that casts men as promiscuous heterosexual consumers and women as sexual adversaries or targets. That particular construction of masculine sexuality could no longer remain central to military group identity if gays were recognized as part of the military group.

There has been some minimal movement in recent years toward acknowledgement of gay participation in the military, though far less extensive than the movement toward gender integration. The "compromise" resolution of the intensive debate on the legal status of gays in the military was the adoption in 1993 of the "don't ask, don't tell" rule. That policy provides that

> a. ... Applicants for enlistment, appointment, or induction shall not be asked or required to reveal whether they are heterosexual, homosexual or bisexual. Applicants also will not be asked or required to reveal whether they have engaged in homosexual conduct, unless independent evidence is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.
>
> b. Homosexual conduct is grounds for barring entry into the Armed Forces. ... Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage....
>
> (2) An applicant shall be rejected for entry if he or she makes a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further determination that the applicant has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

DEPARTMENT OF DEFENSE DIRECTIVE 1304.26, CHANGE 1, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION 1-5 to 1-6 (March 4, 1994) (made effective Feb. 28, 1994), *reprinted in* 10 U.S.C. § 654(b)(2) (1994). The "don't ask, don't tell" policy attempts precisely to reduce legal impediments to gay military participation while also protecting the traditional sexual and gender norms of the military by precluding *acknowledgement* of gay military participation.

While the effects of sexual-orientation integration on the gender and sexual culture of the military would be a potentially profitable line of inquiry, any extensive treatment of the issue is beyond the scope of the present paper. For analysis of the issue of gays in the military and military culture generally, see Michelle M. Benecke & Kirstin S. Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals,* 13 HARV. WOMEN'S L.J.. 215 (1990); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces,* 38 U.C.L.A. L. REV. 499 (1991). For analyses of the constitutionality of the "don't ask, don't tell" policy, see David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct,* 29 HARV. C.R.-C.L. L. REV.. 319 (1994); David A. Schlueter, *Gays and Lesbians in the Military: A Rationally Based Solution to a Legal Rubik's Cube,* 29 WAKE FOREST L. REV. 393 (1994).

[FN358]. The point of all of the foregoing is not to say that the presence of women in military organizations will ensure that no rapes by military personnel will occur. In fact, the increased presence of women in the military might actually result in an increase in military rape rates in the short term as rape opportunities immediately increase with the increased presence of women. However, taking a long-term view, the increased presence of women in the services would likely result in a reduced rape rate as the integration of women causes associated changes in the gender and sexual norms of military culture. (In addition, the increased presence of women would increase the opportunities not only for rape but also for consensual sexual relationships between men and women from different units, which also might tend, according to one possible theory of the military rape differential, to reduce military rape rates. *See supra* notes 75-81 and accompanying text (discussing sexual deprivation explanation for military rape differential). Thus, there are reasons to believe that the increased presence of women in the armed forces would result in a net reduction in rape by military personnel at least in the long run.

Nevertheless, we would not expect rape by military personnel--in peace or in war--to be entirely eliminated. The Russian Army in WWII, for instance, in which women constituted approximately 8% of combatants, *see* Anne E. Griesse & Richard Stites, *Russia: Revolution and War, in* FEMALE SOLDIERS--COMBATANTS OR NONCOMBATANTS? 61, 73 (Nancy L. Goldman ed., 1982), reportedly raped very pervasively. *See* BROWNMILLER, *supra* note 5, at 63-71; COSTELLO, *supra* note 5, at 140-42. Indeed, some Russian military women in WWII reportedly collaborated in rapes. *See, e.g.,* COSTELLO, *supra* note 5, at 142. Thus, the point is not that the presence of women precludes rapes. Rather, the suggestion here is that, to the extent that certain gender and sexual norms contribute to rape propensity, and to the extent that integration of women may help to change those norms, rape incidence in military organizations may be reduced by the integration of women. We may be witnessing some such effects in Peru's Communist Party, Shining Path. Human Rights Watch has speculated that the large number of female militants in Shining Path may have reduced its rape incidence: "Rape of women by the Shining Path is much less common [than rape by government forces], perhaps due to ... the high number of women militants." AMERICAS WATCH & THE WOMEN'S RIGHTS PROJECT, *supra* note 5, at 4.

[FN359]. I add the "ist" suffix to "masculine" to indicate "one who practices or is occupied with, or a believer in," WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 975 (2d ed. 1971), a particular construction of masculinity. Thus, I do not intend for the word "masculinist" to carry a particular evaluative valence. Rather, I aspire for it to take its place among the multifarious group of "ist" words such as herbalist, specialist, feminist, dermatologist, racist, therapist, capitalist, somnambulist, sexist, proctologist, economist, criminalist, cultist, novelist, and of course, The Shootist.

[FN360]. I will not distinguish here between causes and functions. For a discussion of the importance of this distinction in some contexts, see Marc Galanter, *News From Nowhere: The Debased Debate on Civil Justice,* 71 DENV. U. L. REV.. 77 (1993). For present purposes, the question is whether the causes *or* functions of the masculinist-military phenomenon necessitate its retention.

[FN361]. Marlowe, *supra* note 132, at 191 (citations omitted).

[FN362]. A broader version of the physical-suitability-for-combat explanation for the link between combat and maleness would address not only the strength differences between men and women but also the fact that males are not subject to pregnancy and lactation as are women. However, technological progress, including the availability of contraception and of bottle feeding, lessen the import of these additional physical factors favoring males as fighters just as the advent of lighter firepower reduces the import of the strength differences between the genders.

[FN363]. *See* NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 173-77 (1978); WILLIAMS, *supra* note 238, at 13-15; *see also* STIEHM, *supra* note 228, at 226-27 (observing that this psychoanalytic explanation of the implications of female primary parenting may go far in explaining why males, especially young males, are so susceptible to motivational ploys, such as the military's, that offer a confirmation of masculine identity). For an anthropological analysis relating male initiation rites to societal levels of gender role differentiation, see Roger V. Burton & John W.M. Whiting, *The Absent Father and Cross-Sex Identity,* 7 MERRILL-PALMER Q. 85 (1961).

[FN364]. *See* WILLIAMS, *supra* note 238, at 15, 32, 66-67, 134-35. Other such groups would include gangs, fraternities, sport teams and the like.

Regarding the process of initiation into college fraternities, for instance, Peggy Sanday observes that

> [the] cycle is not unlike that described by anthropologists for male initiation rites elsewhere.

> Generally speaking, these rites separate boys from psychological and social bonding to their mothers and forge new bonds centered around men. This process is accomplished by a symbolic death of the old and rebirth of the new.

SANDAY, *supra* note 153, at 141.

[FN365]. *See* WILLIAMS, *supra* note 238, at 47.

[FN366]. Marlowe, *supra* note 132, at 191.

[FN367]. *See supra* notes 170-72 and accompanying text.

[FN368]. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Related to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter, collectively, Geneva Conventions].

Compassion, understanding, and "taking care of your troops" also are important attributes in officers and unit leaders, as is taught in, for example, the Navy's "LMET" (Leadership, Management, Education, Training) classes. *See* Interview with Capt. Ted Triebel, U.S. Navy (Ret.), in Durham, N.C. (August 18, 1994).

[FN369]. The recruiting slogan "The Marine Corps Builds Men," used from the 1960s to early '70s, Telephone Interview with Gunnery Sgt. Thomas Neal, U.S. Marine Corps Recruiting Command, Marketing Branch (Sept. 21, 1994), presumably reflected a recognition by the Marine Corps of this broadbased aspect of the service's appeal to potential recruits.

[FN370]. As Judith Stiehm notes, "[S]ome have argued that the 'woman debate' has been functional for the military because it enhances the unity of Black and white men, whose own integration is relatively recent." STIEHM, *supra* note 228, at 154.

The analogous group bonding function of group sexual identity in college fraternities has been noted by anthropologist Peggy Sanday. As she observes, "The sexual desire [the fraternity members] talk about provides the means and the mechanism to bond among themselves. Women are objects used to bring the brothers together as virile, heterosexual, loyal comrades." SANDAY, *supra* note 153, at 133. *See generally* DUNPHY, *supra* note 120, at 54-55 (discussing the psychological needs of group members as the source of collective group mythologies).

[FN371]. *See supra* notes 299-301 and accompanying text.

[FN372]. MIEDZIAN, *supra* note 238, at 275.

[FN373]. *See* Manning, *supra* note 135, at 456-65; *see also* Maurice Garnier, *Technology, Organizational Culture, and Recruitment in the British Military Academy,* 3 J. OF POL. & MIL. SOC. 141, 143 (1975) (discussing the importance of regiment affiliation to the group identity of units in the British military).

[FN374]. DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 143-46 (1985) (citations omitted).

[FN375]. William Manchester, *The Bloodiest Battle of All,* N.Y. TIMES MAG., June 14, 1987, at 84.

[FN376]. *Id.*

[FN377]. *See* Manning, *supra* note 135, at 462 ("[H]eterogenous ethnic, racial, class, even regional origins tend to inhibit the development of unit cohesion.... Few if any modern armies make much of an effort to create [sic] homogeneous units around any of these variables.").

Regarding the process of racial desegregation of the U.S. armed forces, see Karst, *supra* note 357, at 516-22 and sources cited therein.

[FN378]. *See supra* notes 163-64 and accompanying text.

[FN379]. Of course, a male heterosexual group identity may exist despite the presence of homosexual group members, particularly if their presence is unacknowledged. For discussion of acknowledged integration of gays into the military, see *supra* note 357.

[FN380]. *See supra* notes 163-64 and accompanying text.

[FN381]. *See supra* note 162 and accompanying text (referring to familial incest taboo).

[FN382]. *See supra* notes 138-45 and accompanying text.

[FN383]. The level of "unit" (squadron, platoon, etc.) to which the "incest taboo" would apply would need to be defined and might vary depending on the functional needs of the different components of military organizations (e.g., the cohesion needs of combat versus noncombat groups). Presumably, an essential criterion for defining "unit" for purposes of the incest taboo would be whether and to what extent the grouping in question is intended to have primary group characteristics. Another important criterion would be practicability: The narrower the definition of "unit," the smaller the range of potential relations would be prohibited and, in turn, the greater the likelihood that the taboo would be observed in practice.

[FN384]. *Cf.* Little, *supra* note 134, at 198 (observing the existence of a norm even in all-male units that limits the potentially divisive effects of exclusive "buddy" pairs within the groups). As Little states, "[A]n interview or conversation [with combat veterans] about 'buddies' always elicited additional comments about a context of solidarity in which distinctions among individuals did not appear." *Id.*

[FN385]. Currently, the anti-fraternization rule as a criminal prohibition arises from Article 134 of the Uniform Code of Military Justice and applies only to inappropriate relationships between officers and enlisted personnel. *See* 10 U.S.C. § 934 (1994), *implemented by* Executive Order No. 12,473, 3 C.F.R. 201 (1985), *amended by* Executive Order No. 12,767, 3 C.F.R. 334 (1992). In addition, however, each military Service has promulgated regulations governing fraternization and professional relationships. These tend to cover a broader range of relationships than only officer/enlisted. *See, e.g.,* Air Force Instruction 36-2909, Fraternization and Professional Relationships, Attachment 1 (Feb. 20, 1995) ("[U]nprofessional relationships can develop between officers, between enlisted members, and between officers and enlisted members. Such relationships create the appearance that personal friendships and preferences are more important than individual performance and contribution to the mission.... Any relationship that harms [a] unit's morale, discipline or efficiency requires action ....").

Regarding the need for an adapted anti-fraternization type policy in a gender-integrated military, see Lt. Commander William J. Davis, Jr. (U.S.N.), *Nobody asked me, but* ..., PROCEEDINGS, Sept. 1994, at 105 ("Currently stated Navy policy fails to address the issues that must be resolved for a commanding officer to lead a gender-integrated wardroom. The Navy's fraternization policy, for example, does not address the particulars of intra-wardroom relationships among peers.").

[FN386]. Laura L. Miller, Creating Gender Detente in the Military 2 (1994) (unpublished manuscript written for Army Chief of Staff, Gen. Sullivan, and also distributed to Navy Flag Officers, on file with author).

[FN387]. *See supra* text accompanying note 373; JOHN M. BROWNLEE, TOWARD DIVERSITY IN THE LOCAL CHURCH 76, 88, 116-17, 184 (doctoral dissertation, Columbia Theological Seminary) (1993) (discussing religious bases of group unity in Christian churches in the light of gender, race, and cultural diversity); MARC GALANTER, CULTS: FAITH, HEALING, AND COERCION 176, 187 (1989) (noting the highly cohesive nature of zealous "healing groups" such as Alcoholics Anomymous and Federation of Parents for Drug Free Youth, which are mixed-gender groups).

[FN388]. *See generally* Griesse & Stites, *supra* note 358, at 68-85 (regarding Russian women in the combat units of World War II); Anne R. Bloom, *Israel: The Longest War, in* FEMALE SOLDIERS--COMBATANTS OR NONCOMBATANTS?, *supra* note 358, at 137, 137-62 (discussing the history of women's participation in the Israeli military); William J. Duiker, *Vietnam: War of Insurgency, in* FEMALE SOLDIERS--COMBATANTS OR NONCOMBATANTS?,,,,,,,, *supra* note 358, at 107, 107-22 (discussing women's roles in Vietnam's wars).

[FN389]. THE PRESIDENTIAl Commission on the Assignment of Women in the Armed Forces, Report to the President C-82 (1992).

[FN390]. For instance, some have speculated on a possible genetic basis for the link between combat and masculinity. *See, e.g.,* William Matthews, *Military Has Basic Link to Sex,* ARMY TIMES, July 27, 1992, at 16 (quoting Charles Moskos). For a review of the research on gender and aggression, see MIEDZIAN, *supra* note 238, at 39-74.

[FN391]. *See* BINKIN, *supra* note 68, at 59-60 (describing how such experimental programs and research should be designed).

[FN392]. *See, e.g.,* BINKIN & BACH, *supra* note 132, at ch. 4 (equal opportunity); BINKIN, *supra* note 68, at 26-47 (military readiness).

[FN393]. Rape of civilians is a violation of humanitarian law. *See supra* note 108 and accompanying text. Conventional and customary humanitarian law require that states work to ensure respect for those bodies of law. *See, e.g.,* Geneva Conventions, *supra* note 368, at Common Art. 1. A broad interpretation of the obligation to "ensure respect" includes an obligation to desist from policies that unduly foster a military culture that results in heightened rates of violation of humanitarian law, including rape by military personnel.

National obligations to prevent rape by military personnel arise not only under international humanitarian law but also under international human rights law, such as the International Covenant on Civil and Political Rights (ICCPR), *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), or the American Convention on Human Rights (ACHR), Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978), *reprinted in* 9 I.L.M. 673 (1970). The ICCPR prohibits "unlawful attacks on honor," ICCPR, art. 17, and "torture and other cruel, inhuman or degrading treatment or punishment." *Id.* art. 7. The ACHR provides that "[e]very person has the right to have his physical, mental, and moral integrity respected" and that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading ... treatment." ACHR, art. 5, 9 I.L.M. at 676. Presumably, rape can be considered in some circumstances to fall within each of these prohibitions. *See* INTERNATIONAL HUMAN RIGHTS LAW GROUP, NO JUSTICE, NO PEACE: ACCOUNTABILITY FOR RAPE AND GENDER-BASED VIOLENCE IN THE FORMER YUGOSLAVIA 7 n.74 (1993); Elizabeth A. Kohn, *Rape as a Weapon of War: Women's Human Rights During the Dissolution of Yugoslavia,* 24 GOLDEN GATE U. L. REV. 199, 211 (1994). States are obligated under both the ICCPR and the ACHR to respect, protect, and ensure individuals' human rights. *See* ICCPR, art. 2(1); ACHR, art. 1, 9 I.L.M. at 675. *See generally* DOMINICK MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT

OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 269 (1991); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 26 (1993); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations, in* THE INTERNATIONal Bill of Rights: The Covenant on Civil and Political Rights 72, 77-79 (LOUIS HENKIN ED., 1981).

Under the doctrine of state responsibility, a state is accountable for breaches of customary international law or treaty obligations committed by or attributable to the state. Regarding developments in the law of state responsibility, see SHABTIA ROSENNE, THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY (1991). A breach, such as rape, may be attributable to the state if the perpetrator is acting as an agent of the state or if the breach occurs under circumstances in which the state has failed diligently to fulfill its duty to prevent or to prosecute such offenses. *See* Rebecca J. Cook, *State Responsibility for Violations of Women's Rights,* 7 HARV. HUM. RTS. J.. 125, 145 (1994); *see also* Kenneth Bullock, *United States Tort Liability for War Crimes Abroad: An Assessment and Recommendation,* LAW & CONTEMP. PROBS., Winter 1995, at 139 (specifically examining U.S. civil liability). As the Inter-American Court of Human Rights has stated in interpreting the ACHR,

> [A]ny violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but *because of the lack of due diligence to prevent* the violation ....
>
> .... This duty to prevent includes all those means of a legal, political, administrative *and cultural* nature that promote the protection of human rights ....

Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R., Series C No. 4, at 154-55, *reprinted in* 28 I.L.M. 291, 325 (1989) (emphasis added). Recent litigation before the International Court of Justice (ICJ) provides an example of an attempt to obtain civil relief against a State for wrongs including rape. In 1993, Bosnia-Herzegovina instituted ICJ proceedings against Serbia and Montenegro for violating the Genocide Convention. The ICJ issued provisional measures ordering Serbia and Montenegro to "take all measures within [their] power to prevent commission of the crime of genocide," including rape as a manifestation of genocide. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Yugoslavia), 1993 I.C.J. 3, 24 (Apr. 8), *reprinted in* 87 AM. J. INT'L L. 505, 519 (1993).

Regarding national obligations to prevent rape under international law, see generally Chinkin, *supra* note 5.

[FN394]. "Evaluation research is the systematic application of social research procedures for assessing the ... utility of social intervention programs." PETER H. ROSSI & HOWARD E. FREEMAN, EVALUATION: A SYSTEMATIC APPROACH 5 (5th ed. 1993) (emphasis omitted).

[FN395]. *See supra* notes 361-66 and accompanying text. Indeed, having seen how the rape propensity of a military unit may inadvertently be heightened, we may also be able to gain insight into how a military organization can be intentionally shaped and *deployed* as an instrument to carry out an official military policy of rape such as those in WWII Japan and 1990s Bosnia. *See supra* note 5.

[FN396]. Susan Brownmiller described the tragic experience of both victim and perpetrator of a rape in WWII:

> Klaus Küster, a member of the Hitler Youth, saw three Russians grab a woman on the street and take her into a hallway. He followed. One soldier trained his pistol on Klaus. The second held the screaming

> woman while the third raped her. Klaus watched the Russian who had done the raping emerge from the doorway. Tears were streaming down the soldier's face as he wailed, "*Ya bolshoi svinya*"--"I am a big pig."

BROWNMILLER, *supra* note 5, at 67.

[FN397]. UCR 1992, *supra* note 33, at 196; UCR 1991, *supra* note 33, at 192; UCR 1990, *supra* note 33, at 156; UCR 1989, *supra* note 33, at 154; UCR 1988, *supra* note 33, at 150; UCR 1987, *supra* note 33, at 146.

[FN398]. For total U.S. civilian population data, see BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, PPL-8, APPENDIX C, *Civilian Population--Estimates, by Age, Sex, Race, and Hispanic Origin* (July 1, 1992) [[[hereinafter BUREAU OF THE CENSUS 1992]; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P25-1095, *Table 3: Civilian Population-- Estimates, by Age, Sex, Race, and Hispanic Origin* (July 1, 1991) [hereinafter BUREAU OF THE CENSUS 1991]; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P25-1095, *Table 3: Civilian Population--Estimates, by Age, Sex, Race, and Hispanic Origin* (July 1, 1990) [hereinafter BUREAU OF THE CENSUS 1990]; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P25-1095, *Table 3: Civilian Population--Estimates, by Age, Sex, Race, and Hispanic Origin* (July 1, 1989) [hereinafter BUREAU OF THE CENSUS 1989]; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P25-1095, *Table 3: Civilian Population--Estimates, by Age, Sex, Race, and Hispanic Origin* (July 1, 1988) [hereinafter BUREAU OF THE CENSUS 1988]; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P25-1095, *Table 3: Civilian Population--Estimates, by Age, Sex, Race, and Hispanic Origin* (July 1, 1987) [hereinafter BUREAU OF THE CENSUS 1987].

The U.S. civilian population, as opposed to the U.S. resident population (which includes U.S. troops stationed in the United States), is used as the demographic base for UCR analysis throughout this study. It is possible that some error is introduced by using the civilian population measure. While much or most serious crime by military personnel is handled through military channels and therefore does not appear in the UCR statistics (which reflect only crimes handled through civilian authorities), some crimes committed by military personnel are handled through civilian authorities and therefore do appear in the UCR statistics. For that reason, using a population base of civilians results in a slightly inflated civilian offense rate per person. This is so to the extent that military personnel's offenses are included in the raw UCR numbers of offenses known, but military personnel are not included in the civilian population to whom those offenses are attributed in calculating the rate per person.

The alternative approach, using not the civilian but the resident population measure, would introduce the opposite (and presumably a greater magnitude of) error. Using a population base of civilians *and* troops stationed in the United States (the resident population) would result in a *deflated* civilian offense rate per person to the extent that military personnel's offenses are excluded from the raw UCR numbers of offenses known (because they were handled through military channels), but military personnel are included in the resident population to whom the offenses are attributed in calculating the rate per person.

Therefore, some error may be introduced whichever base population is used. The decision in this study to use the civilian population base rests on the view that the magnitude of the error thus introduced is smaller than that which would be introduced by use of a resident population base because the majority of serious crime by military personnel is handled through military channels. *See* Interview with Wilbur L. Hardy, Director, U.S. Army Crime Records Center, in Baltimore, Md. (May 19, 1994) (discussing the distribution of handling of crimes by military personnel between military and civilian authorities); Interview with personnel at the Navy Criminal Investigative Service, in Washington, D.C. (May 4, 1994) (same).

[FN399]. Males constituted approximately 90% of U.S. military personnel during the period studied. *See*

Defense Manpower Data Center, Active Duty by Age and Gender 1986-1992 (Feb. 15, 1994) (computer printout provided by the U.S. Defense Manpower Data Center, on file with author). In addition, males commit virtually all rapes, *see, e.g.,* UCR 1992, *supra* note 33, at 234 (stating that the persons arrested for forcible rape were 98.7% male in 1992), as well as the great majority of murder/nn.m's, aggravated assaults, and robberies. *See id.* (listing the respective percentages as 90.3%, 85.2%, and 91.5%). For those reasons, the important group to examine in attempting to compare the rape incidence of military and civilian populations is the male component of those populations.

[FN400]. For age distributions of civilian males, see BUREAU OF THE CENSUS sources cited *supra* note 399.

[FN401]. For arrest data on males by age group, see UCR 1992, *supra* note 33, at 229-30; UCR 1991, *supra* note 33, at 225-26; UCR 1990, *supra* note 33, at 186-87; UCR 1989, *supra* note 33, at 184-85; UCR 1988, *supra* note 33, at 180-81; UCR 1987, *supra* note 33, at 176-77.

[FN402]. Because the military crime statistics provided do not include attempts in the numbers of crimes committed, except in the case of aggravated assault in which attempts are included in the definition of the crime, *see* 10 U.S.C.A. § 928 (West 1983), the UCR data must be adjusted to exclude attempted crimes other than aggravated assault.

For murder/nn.m, completed crimes by definition equal 100% of UCR offenses known. The UCR excludes attempted killings from the murder/nn.m category. *See* UCR 1992, *supra* note 33, at 13; UCR 1991, *supra* note 33, at 13; UCR 1990, *supra* note 33, at 8; UCR 1989, *supra* note 33, at 7; UCR 1988, *supra* note 33, at 8; UCR 1987, *supra* note 33, at 7.

For rape, the proportion of attempts to completed crimes for each year is published in the UCR. *See* UCR 1992, *supra* note 33, at 24; UCR 1991, *supra* note 33, at 24; UCR 1990, *supra* note 33, at 16; UCR 1989, *supra* note 33, at 15; UCR 1988, *supra* note 33, at 16; UCR 1987, *supra* note 33, at 14.

For robbery, an estimate of the proportions of attempted to completed crimes was derived from data stating those proportions for 1991 and 1992 provided by four states (Idaho, Iowa, North Dakota, and South Carolina) that have begun (since 1991 or 1992, depending on the state) gathering that information under the new National Incident Based Reporting System currently being instituted by the FBI. The estimated percentage of robberies completed was 88%.

[FN403]. To obtain the rate of arrest per offense known for the crime, divide the total yearly arrests for the crime by the total yearly offenses known for the crime. For total arrest data, see UCR 1992, *supra* note 33, at 227; UCR 1991, *supra* note 33, at 223; UCR 1990, *supra* note 33, at 184; UCR 1989, *supra* note 33, at 182; UCR 1988, *supra* note 33, at 178; UCR 1987, *supra* note 33, at 174. For total offenses known data, see UCR 1992, *supra* note 33, at 208; UCR 1991, *supra* note 33, at 204; UCR 1990, *supra* note 33, at 165; UCR 1989, *supra* note 33, at 163; UCR 1988, *supra* note 33, at 159; UCR 1987, *supra* note 33, at 155.

[FN404]. For age and sex distributions of military personnel, see Defense Manpower Data Center, *supra* note 400.

[FN405]. The Naval Criminal Investigative Service (NCIS) provided the offense data on Navy and Marine populations (on file with author). The NCIS does not keep murder/nn.m statistics separately from statistics for negligent/involuntary manslaughter. For that reason, the following procedure is used to estimate the number of founded investigations of murder/nn.m for the Navy and for the Marine Corps.

Identify the proportion of all *Army* cases (murder/nn.m plus negligent homicide plus involuntary manslaughter founded cases investigated) that are murder/nn.m cases. That proportion is .74. *See* U.S. Army Crime Records Center, CID/MPR Reports 1986/1993 (May 11, 1994) (computer printout provided by the Army

Crime Records Center, on file with author). Multiply the number of founded investigations of (murder/nn.m plus negligent/involuntary manslaughter) for the Navy and for the Marine Corps by that proportion (.74) to estimate the number of founded cases of murder/nn.m investigated for the Navy and for the Marine Corps.

[FN406]. The statistics provided by the military services are numbers of "founded investigations" of each crime. This measure most nearly equates with the UCR "actual offenses known," which includes all offenses brought to the attention of the police but excludes any "complaints of crime [that] are determined through investigation to be unfounded or false." UCR 1992, *supra* note 33, at 376.

Different law enforcement agencies, both civilian and military, may vary somewhat in their standards and practices for founding and unfounding cases. To the extent of that variation, "founded investigation" or "offenses known" data from different jurisdictions may reflect the actual underlying crime rates somewhat differently.

Additionally, while one "founded investigation" generally equals one UCR "offense known," the count of crimes by military personnel may be slightly conservative because the method employed for counting investigations will on occasion include more than one UCR "offense known" within one "investigation." For example, there could be one military "investigation" into the rape of two women raped in the same episode by the same individual or gang. Interview with Kelli Carroll, Program Analyst, Naval Criminal Investigative Service, in Washington, D.C. (May 4, 1994). Under the UCR, that event would constitute two rapes known to the police because there are two victims. Or if a rapist confessed in a single confession to three rapes, that confession might result in one, two, or three Navy "investigations," *see id.*, while it would constitute three rapes under the UCR because of the number of victims.

Both the UCR and the data from the military services record only the most serious offense occurring in any criminal episode. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTING HANDBOOK 33 (1984) (regarding "hierarchy rule" for crime recording).

[FN407]. As indicated in Table I, the assault rates for the Navy and for the Marine Corps were each, on yearly average, 4% of the civilian rate. In fact, the Navy and Marine assault rates may actually be even *less* than 4% of civilian rates because the statistics kept by the Naval Criminal Investigative Service (NCIS), which supplied the Navy and Marine data, do not separate simple assault from aggravated assault. Therefore, the assault numbers obtained for the Navy and Marine Corps included simple assaults along with aggravated assaults. Those assault numbers are compared in the present analysis with UCR aggravated assault numbers only. The reason for comparing all reported Navy and Marine assaults with only *aggravated* UCR assault figures is that many or most simple assaults by military personnel would be handled at the company level (through nonjudicial punishment) and, therefore, would not be reflected in the NCIS's assault statistics. Interview with Brigadier General George Walls, U.S.M.C. (Ret.), in Durham, N.C. (March 25, 1994). Thus, the assault data provided by NCIS likely reflects primarily *aggravated* assaults. For that reason, including simple assaults in the UCR comparison data would tend to overestimate the Navy and Marine diminution of assault from civilian levels. Comparison with only UCR *aggravated* assault figures should produce the more accurate or, at least, the more conservative estimate of the Navy and Marine diminution factor for aggravated assault. By minimizing the assault diminution measure, this approach is the measure least favorable to the Article's thesis.

[FN408]. The offense data on the Army and Air Force populations were provided by the U.S. Army Crime Records Center and the U.S. Air Force, respectively. *See* U.S. Army Crime Records Center, *supra* note 406; Computer Printout provided by U.S. Air Force (Feb. 16, 1994) (on file with author). The crime statistics kept by the Air Force prior to 1992 did not separate out unfounded cases. Therefore, the raw Air Force numbers were adjusted to exclude the approximate proportion of unfounded cases by the following procedure. Determine for each crime the percentage of cases classified by the Air Force as "unfounded" in 1992-93. Multiply the raw

number of Air Force cases for each crime in the years prior to 1992 by the percentage of "*founded*" cases for that crime in 1992-93 to obtain the approximate number of founded cases of each crime for the years prior to 1992.

[FN409]. *See* UCR 1987-92, *supra* note 404. The assumption here is that the distribution of crime commission between males and females is the same in the military and civilian populations. That assumption may or may not be correct.

[FN410]. The founded investigation numbers reported by the four military services should cover very close to all of the murder/nn.m, rape, and aggravated assault committed by active duty military personnel. Such crimes would either be investigated by military authorities or, even if handled through civilian channels, would come to the attention of military authorities by formal notification by the civilian agency or, in cases where no formal notification occurred, by the absence of the service member if he is placed under arrest (as presumably would occur for the serious crimes here examined). Interview with Wilbur L. Hardy, *supra* note 399; Interview with personnel at the Navy Criminal Investigative Service, *supra* note 399.

[FN411]. The one exception has been the analysis for the Marine Corps when excluding the observations for 1987. Crime ratios for the Marine Corps in 1987 are strikingly different from the data for other years. Thus, an additional analysis was required to evaluate the effect of this series of influential cases. After elimination of the 1987 observations, the autocorrelation became pronounced enough to warrant reference to the maximum likelihood estimators rather than OLS ones.

[FN412]. Any discrepancies between yearly rates and average rates are due to rounding.

[FN413]. Index combining murder/nn.m and aggravated assault.

[FN414]. UCR 1945, *supra* note 59, at 89; UCR 1944, *supra* note 59, at 66.

[FN415]. For total U.S. civilian population data, see BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, P12-98, CURRENT POPULATION REPORTS, *Table 2: Civilian Population--Estimates by Age, Color, and Sex: 1940-1950* (Aug. 13, 1954).

The U.S. civilian population, as opposed to the U.S. resident population (which includes U.S. troops stationed in the United States), is used as the demographic base for UCR analysis throughout this study. For discussion of the ramifications of using the civilian demographic base, see *supra* note 399. For a discussion of the preferability of using civilian rather than resident population data for studying crime during World War II specifically, see Darrell J. Steffensmeier et al., *World War II and Its Effect on the Sex Differential in Arrests: An Empirical Test of the Sex-Role Equality and Crime Proposition,* 21 SOC. Q. 403, 407 (1980).

[FN416]. Until 1958, the UCR used the population statistics of the *decennial* census, unadjusted for population growth, throughout each decade between decennial censuses. *See* Marvin E. Wolfgang, *Uniform Crime Reports: A Critical Appraisal,* 111 U. PA. L. REV. 708, 725 (1963). Thus, throughout the 1940s, the UCR used the population statistics from the 1940 census, unadjusted for population growth. Ordinarily, the result of that practice would be to create an artificial appearance of rising crime rates throughout the decade. This would occur because as an actually growing population produced higher numbers of crimes, that crime number would be transformed into a crime "rate" by dividing the number by a population figure that was inaccurately low--and became more inaccurately low each successive year after 1940.

However, during the period 1944-45, the normal population growth of the civilian population was approximately counterbalanced by the induction of personnel into the WWII military force. *See* BUREAU OF

THE CENSUS, U.S. DEP'T OF COMMERCE, *supra* note 416. Thus, as it happens, the total civilian population base on which the 1944 and 1945 data are based may be relied upon as relatively accurate. The population changes in the U.S. civilian population from 1940 to 1944-45 were not changes in total population but changes in age and gender distribution of that population. Those changes are, of course, accounted for in the age and gender controls used in the present study.

[FN417]. During the World War II period, there was in fact a small number of troops stationed abroad who were under the age of 18. The available data indicates only that they were over 14 and under 18 years old, but we may assume that they were more likely than not close to 18. Because the age groupings in the census data for the World War II period do not permit an age grouping for 17 year olds only, and because a 15-17-year-old age range would be unworkable for attributing crime rates to this group (violent crime rates increase exponentially within the 15-17-year-old age range), the present study places these "under-age soldiers," for purposes of statistical analysis, in the 18-19 age group.

[FN418]. Males constituted approximately 99.3% of U.S. military personnel abroad during the World War II period studied. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *supra* note 416; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P-25, *Table 3: Total Population Including Armed Forces Abroad--Estimates by Age, Color and Sex, 1940-1950* (Aug. 13, 1954). In addition, males committed virtually all rapes, *see* UCR 1945, *supra* note 59, at 113; UCR 1944, *supra* note 59, at 91, as well as the great majority of murder/nn.m's, aggravated assaults, and robberies. *See* UCR 1944-45, *supra.* For those reasons, the important group to examine in attempting to compare the rape incidence of military and civilian populations in 1944-45 is the male component of those populations.

[FN419]. For age distributions of civilian males, 1944 and 1945, see BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *supra* note 416.

[FN420]. For arrest data by sex, see UCR 1945, *supra* note 59, at 113; UCR 1944, *supra* note 59, at 91. UCR arrest data for this period do not provide separate figures for aggravated assault and other assault. *See* UCR 1944-45, *supra.* Therefore, the combined "assault" category data must be used to approximate the sex distribution of arrestees for aggravated assault. Similarly, because UCR arrest data for this period do not provide separate figures for murder/nn.m and negligent manslaughter, *see id.,* the combined "criminal homicide" category data must be used to approximate the sex distribution of arrestees for murder/nn.m.

[FN421]. For arrest data by age group, see UCR 1945, *supra* note 59, at 117; UCR 1944, *supra* note 59, at 96. Because UCR arrest data for this period do not provide separate figures for aggravated assault and other assault, *see* UCR 1944-45, *supra,* the combined "assault" category data must be used to approximate the age distribution of arrestees for aggravated assault. Similarly, because UCR arrest data for this period do not provide separate figures for murder/nn.m and negligent manslaughter, *see id.,* the combined "criminal homicide" category data must be used to approximate the age distribution of arrestees for murder/nn.m.

[FN422]. For total arrest numbers, see UCR 1945, *supra* note 59, at 117; UCR 1944, *supra* note 59, at 96.

[FN423]. For average daily offenses known data, see UCR 1945, *supra* note 59, at 89; UCR 1944, *supra* note 59, at 66.

[FN424]. The UCR monthly offenses known figures are based only on data collected from cities over 25,000 in population. Those cities have higher violent crime rates than smaller towns or rural areas. *Compare, e.g.,* UCR 1945, *supra* note 59, at 5 (crime rates of cities and towns of various sizes) *with id.* at 28 (crime rates of rural

areas). For that reason, crime rate estimates based on UCR monthly offenses-known figures somewhat overestimate actual national crime rates. This factor may cause the civilian crime rates estimates in the present study to be somewhat in excess of actual national civilian crime rates. Because the difference between urban and rural rates is particularly marked for aggravated assault, the overestimation of that crime may be greatest.

[FN425]. For number of forcible and statutory rapes for both 1944 and 1945, see UCR 1945, *supra* note 59, at 103.

[FN426]. *See* Office of the Judge Advocate Gen., *supra* note 47, at 251, 254.

[FN427]. Because the ETO crime statistics do not include attempts in the numbers of crimes investigated, *see* A MANUAL FOR COURTS MARTIAL, U.S. ARMY, ¶ 152(c), at 190 (1943) (defining crimes to exclude attempts), other than in the case of aggravated assault, *see id.* ¶ 149(l) (defining crime of "assault with intent to commit any felony" to include attempts), the UCR data must be adjusted to exclude attempted crimes other than aggravated assault.

For murder/nn.m, completed crimes by definition equal 100% of UCR offenses known. The UCR excludes attempted killings from the murder/nn.m category. *See* UCR 1945, *supra* note 59, at 120; UCR 1944, *supra* note 59, at 101.

For rape, the proportion of attempts to completed crimes for each year has been published in the UCR only since 1964. For that reason, an estimate of the percentage of all rapes that are completed is drawn by averaging the completed rape percentages for the five years between 1964-68. That average percentage (approximately 66%) is then used as an estimate of the percentage of rapes completed in 1944 and 1945.

[FN428]. An offense is "cleared" by arrest or exceptional means. An offense is cleared by exceptional means when the offender has been identified and there is sufficient information to support an arrest and charge, but the offender cannot be arrested because of some circumstance outside the control of the law enforcement agency. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *supra* note 407, at 42.

[FN429]. For clearance rate data, see FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1946 UNIFORM CRIME REPORTS 54 (Total Groups I-VI) (citing 1945 data); UCR 1945, *supra* note 59, at 40 (Total Groups I-VI) (citing 1944 data).

[FN430]. The military population used for age distribution of males includes all U.S. Armed Forces Abroad, not just Army personnel in the ETO. Separate age distribution data on the Army in the ETO are not available. *See* MACHINE RECORDS BRANCH, WAR DEP'T GENERAL STAFF, STRENGTH OF THE ARMY (monthly reports August 1944-May 1945) [hereinafter STRENGTH OF THE ARMY].

[FN431]. The available ETO assault investigations data reflect only assault with a dangerous weapon. *See* 1944 SEMI-ANNUAL REPORT, *supra* note 41. The ETO data thus exclude assaults with intent to do murder or to do manslaughter, which should be included to create a category comparable to UCR aggravated assault. Therefore, the assault with a dangerous weapon numbers must be adjusted to include an estimated number of assaults with intent to do murder or to do manslaughter in order to produce a figure representing a category comparable to the UCR aggravated assault category.

[FN432]. For courts martial numbers, see THE GENERAL BOARD, U.S. FORCES, EUROPEAN THEATER, MILITARY JUSTICE ADMINISTRATION IN THEATER OF OPERATIONS 23 (UA 25 U586 no. 83).

[FN433]. In the ETO from late 1942 until May 1945, there were 687 courts martial for assault with a dangerous weapon, and 90 courts martial for assault with intent to do murder or manslaughter. *See id.* Thus, the number of

courts martial for assault with intent to do murder or manslaughter was approximately 13% of the number of courts martial for assault with a dangerous weapon. Therefore, the total number of (courts martial for assault with a dangerous weapon plus courts martial for assault with intent to do murder or manslaughter) is approximately 113% of the number of courts martial for assault with a dangerous weapon.

[FN434]. For the ETO, the available data measures "personnel investigated" rather than "investigations conducted." *See* 1944 SEMI-ANNUAL REPORT, *supra* note 41. This means that the ETO measure (of *subjects*) differs from the UCR measure (of *offenses* cleared). This difference in measures results in two types of error in rate comparisons. First, if three individuals commit a crime together and are then identified as the offenders, that counts as one UCR "offense cleared" and as three ETO "personnel investigated." This error would cause the ETO count to be inflated relative to the UCR count. The second error factor cuts in the opposite direction. If one individual is identified as the offender for killing three people, that counts as one ETO "personnel investigated" and as three UCR "offenses cleared." Because we do not know the magnitude of these two error factors for any crime category, we cannot know whether or to what extent they cancel each other out. In addition, it should be noted that comparing ETO "personnel investigated" with UCR "offenses cleared" may somewhat inflate the ETO rates relative to UCR rates insofar as some proportion of ETO "personnel investigated" may be exonerated prior to arrest.

[FN435]. These ETO investigation rates are derived by using continental ETO troop strength numbers, *see* STRENGTH OF THE ARMY, *supra* note 431, together with numbers of ETO personnel investigated for the crimes in question as recorded in reports from the Office of the Theater Provost Marshal, ETO. *See* 1944 SEMI-ANNUALL REPORT,,,,,,, *supra* note 41 (citing 1944 data); European Theatre of Operation Historical Division, Dep't of War, *supra* note 45 (citing 1945 data).

Women's contribution to ETO violent crime rates was negligible. Females constituted only .06% of the U.S. armed forces abroad in 1944-45, *see* STRENGTH OF THE ARMY, *supra,* and women commit far less violent crime than men per person. *See, e.g., supra* notes 400 and 419. For that reason, no adjustment is made here to exclude female crime from the ETO crime rates.

Because continental ETO troop strength data were not available for December 1944, continental ETO troop strength for that month was estimated as an average of the troop strengths for November 1944 and January 1945.

Data on nonnegligent manslaughter was available only for the 1944 months. The nonnegligent manslaughter numbers for the ETO from January to May 1945 have therefore been estimated by establishing that, during the 1944 months, the number of nonnegligent manslaughters in the ETO had been 84% the number of murders, and then estimating that, for each of the 1945 months, the number of nonnegligent manslaughters was 84% of the of the number of murders.

The ETO definitions for the crimes examined were essentially consistent with the UCR definitions used at the time except for the ETO rape definition's exclusion of statutory and attempted rape, which has been adjusted for in the present study, and the ETO data's inclusion of assault with a deadly weapon but not assault with intent to kill, which also has been adjusted for in the present study.

Consistent with UCR practice, the ETO reports recorded only the most serious crime occurring in any criminal episode (e.g., if a murder, robbery, and rape occurred in one episode, only the murder would be recorded). *See* FIRST UNITED STATES ARMY, REPORT OF OPERATIONS, 1 AUGUST 1944-22 FEBRUARY 1945, ANNEX 12, PROVOST MARSHAL SECTION REPORT 237 (1945).

[FN436]. *See supra* text accompanying note 37.
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ROGER SALHANY,CRIMINAL TRIAL HANDBOOK

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Criminal Trial Handbook

The Honourable
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passage that he relied upon. What the Report said was that " . . . joinder may occur only where trial on the indictable offence is to take place before the provincial court" [at pp. 251-252 C.R.]. The reason why joinder of a summary conviction offence and an indictable offence cannot take place before a judge alone, even where there has been waiver of the preliminary inquiry, is clear. The jurisdiction of a superior or county court judge sitting without a jury to try an indictable offence is the preferment of an indictment under s. 566 of the Code. Section 566 only authorizes the preferment of indictable offences in the indictment. A judge sitting alone has no jurisdiction (as does a provincial court judge) to try a case on an information.

(iv) Duplicity (or Multiplicity)

Duplicity arises where the count charges two or more offences in the alternative. This may arise because the enacting section, by its very language, creates two or more offences and both offences are contained in a single count of the indictment. The historical rationale underlying an objection to a duplicitous charge is that by charging an accused with having committed A or B, the accused does not know which charge to defend. Moreover, he or she cannot plead *autrefois* if charged again because the accused does not know if he or she was acquitted or convicted of A or B. This rule developed during the period of the common law when criminal pleading was a technical art. Neither reason has any substance in law today. There is nothing to prevent an accused from defending either A or B or pleading *autrefois* to either A or B.

Nevertheless, the rule against duplicity is still recognized by s. 590(1)(*a*) of the Code. That section provides that if the matters, acts or omissions stated alternatively in an enactment are not separate offences but are merely descriptive of the manner of ways of committing the offence created by the section, then a charge is not duplicitous.

A number of tests, which were applied by the courts over the years in order to determine whether a charge was duplicitous, were swept away by the Supreme Court of Canada in *Sault Ste Marie (City)* (1978), 3 C.R. (3d) 30 (S.C.C.). There the Supreme Court of Canada adopted a new test based on practical considerations. It was held that the primary test should be based only on the valid justification for the rule, "does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by the ambiguity in the charge?"

The more difficult question arises where it is argued that a conspiracy charge is duplicitous because the accused is charged with two or more conspiracies. In *Cotroni; Papalia* (1979), 7 C.R. (3d) 185 (S.C.C.), Dickson, J. wrote at p. 198:

> A distinction must be drawn between a conspiracy count which charges the accused with two or more conspiracies and a count which charges one conspiracy only but is supported by proof during trial of more than one conspiracy. The former gives rise to a question of duplicity. The latter raises the question of whether the Crown

has proven the conspiracy charged against two or more of the accused, notwithstanding evidence of a second conspiracy.

In *Selles* (1997), 34 O.R. (3d) 332 (C.A.), the Ontario Court of Appeal noted that although s. 581(1) of the Code requires each count in an indictment to relate to a "single transaction", a "single transaction" is not synonymous with a single incident, occurrence or offence. Separate acts which are successive and cumulative and which comprise a continuous series of acts can be considered as one transaction. Here the accused was charged in a single count with sexually assaulting the complainant over a five year period. The Court found that on its face, the indictment did not offend the rule against duplicity. However, the Court pointed out that when the evidence was examined, it was discovered that the occurrences relied upon by the Crown did not constitute one transaction but six and therefore the conviction was multifarious and prejudicial to the accused and must be quashed. The Court also said that it was an error for the trial judge, following the verdict, to ask the jury if they were unanimous in finding the accused guilty of any of the six incidents and, if so, which ones. In doing so, the trial judge had infringed the prohibited practice of asking the jury to explain their verdict.

COMMENTARY: It has become a common practice for the Crown, particularly where the offence involves the sexual assault of a child over a period of weeks, months or even years, to frame the charge as having occurred between certain dates. This is because the child may have been unable to specify exactly when the abuse occurred. The *Selles* case demonstrates the difficulties that may arise if the evidence does not fall within the exact wording of the charge or indicates separate and distinct incidents. Therefore, it might be prudent for the trial judge to draw this case to the attention of the Crown before the evidence is led to ensure that only evidence that falls within the words of the charge is led.

(d) Application to Amend

Section 601 of the Code permits the court, where an objection is taken to an indictment or a count thereof for a defect apparent on the face, to order the indictment or count to be amended to cure the defect.

Section 601(2) of the Code authorizes the court, on the trial of an indictment, to amend an indictment, a count or a particular to make it conform to the evidence where there is a variance between the evidence and the charge in a count as preferred, or as amended by the court or as amended pursuant to a particular that the court has ordered be furnished by the Crown under s. 587 of the Code.

Section 601(3) of the Code further empowers the court to amend an indictment at any stage of the proceedings where it appears that it was preferred under the wrong act of Parliament; it fails to state or defectively states anything that is

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

Commentary [Display Introduction] [Display Full text] [Display articles]

Part II : Humane treatment

[p.1367] Article 4 -- Fundamental guarantee

[p.1368] General remarks

4515 Article 4, paragraphs 1 and 2, reiterates the essence of common Article 3, in particular paragraph 1, sub-paragraph (1)(a), (b) and c) thereof. These rules [p.1369] were supplemented and reinforced by new provisions inspired by the Conventions and the International Covenant on Civil and Political Rights. (1)

4516 The rule on quarter is given at the end of paragraph 1. This provision originates in Hague law and is based on Article 23, paragraph 1(d), of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land.

4517 Paragraph 3 is devoted more particularly to the protection of children and reiterates some principles already contained in the fourth Convention, especially in Articles 17, 24 and 26.

4518 The diversity of the subject matter dealt with in this article can be explained in the light of a review of the history of the negotiations. The fundamental guarantees as provided in Article 6 of the ICRC draft correspond to paragraphs 1 and 2 of the present article, with the exception of the provision on giving quarter. The rule on quarter was contained in Article 22 of the draft, which also proposed some other rules on conduct in combat; (2) this was an abbreviated version of Part III, Section I, of Protocol I ' (Methods and means of warfare). ' These articles, which were adopted in Committee, were not retained when the Protocol was adopted in plenary meetings with the exception of the rule on giving quarter, which the Pakistani delegation had retained in its proposal for a simplified Protocol. (3) In the absence of any further rules in the Protocol for the conduct of combatants it seemed logical to include the rule on quarter amongst the fundamental guarantees, and this proposal did not encounter any opposition.

4519 Protection of children was also included in a separate provision of the draft (Article 32). The article as such was not retained when the Protocol was adopted, but the most essential elements of its content were included in Article 4 in the form of the present paragraph 3. (4)

Paragraph 1

' First two sentences -- General principle of humane treatment '

4520 The scope of application as defined here applies not only to Article 4, but also to Part II as a whole. ' Ratione personae ' it covers all persons affected by armed conflict within the meaning of Article 2 of the Protocol ' (Personal field

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paragraph is illustrated with a non-exhaustive list of prohibited acts. The term "without prejudice to the generality of the "foregoing" means that none of the specific prohibitions can have the effect of reducing the scope of the general principle.

[p.1372] 4528 The prohibitions are explicit and do not allow for any exception; they apply "at any time and in any place whatsoever". They are absolute obligations. (17)

4529 For reasons of a legal and political nature, (18) there are no provisions prohibiting "reprisals" in Protocol II.

4530 The list of prohibited acts is fuller than that of common Article 3 . That being so, and because of the absolute character of these prohibitions, which apply at all times and in all places, there is in fact no room left at all for carrying out "reprisals" against protected persons. Such an interpretation was already given in the commentary on common Article 3 . In the absence of an express reference to "reprisals", the ICRC considered that they were implicitly prohibited.

[p.1373] 4531 The argument for this view was based on both the spirit and the letter of common Article 3 :

"The acts referred to under items (a) to (d) are prohibited absolutely and permanently, no exception or excuse being tolerated. Consequently, any reprisal which entails one of these acts is prohibited, and so, speaking generally, is any reprisal incompatible with the "humane treatment" demanded unconditionally in the first clause of sub-paragraph (1)." (19)

The strengthening of fundamental guarantees of humane treatment in Protocol II and, in particular, the inclusion of a prohibition on collective punishments (20) confirms this interpretation without calling into question the refusal of the negotiators to introduce the legal concept of reprisals in the context of non-international armed conflict.

' Sub-paragraph ' (a) -- ' Violence to the life, health and physical or mental well-being of persons '

4532 This sub-paragraph reiterates paragraph 1, sub-paragraph (1)(a) of common Article 3 . The scope of the prohibition was considerably strengthened; "violence to the life, health, and physical or mental well-being" is further-reaching in protection than the sole mention of violence to life and person, as contained in Article 3 . The list is of course non-exhaustive, as shown by the words "in particular". Murder covers not only cases of homicide, but also intentional omissions which may lead to death; the prohibition of torture covers all forms of physical and mental torture.

4533 The practice of torture is prohibited by international law, (21) and is universally condemned. It is one of the evils which the international community seeks to eradicate. Therefore, for many years torture has been one of the United Nations'concerns. The General Assembly of the Organization has adopted a number of resolutions which, although they do not create mandatory obligations, do have an important moral force; the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 9 December 1975 (Resolution 3452 (XXX)) deserves particular mention. Finally, the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly on 10 December 1984 (Resolution 39/46). The most widespread form of torture is practised by public officials for the purpose of obtaining confessions, but torture in not only condemned as a judicial institution; the act of torture is reprehensible [p.1374] in itself, regardless of its perpetrator, and cannot be justified in any circumstances. (22)

4534 The mention of corporal punishment is new, as it did not appear in common Article 3 ; (23) it met the wish of a number of delegations that corporal punishment be explicitly mentioned in the text. (24)

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' Sub-paragraph ' (f) -- ' Slavery and the slave trade '

4541 This sub-paragraph reiterates the tenor of Article 8, paragraph 1, of the Covenant. It is one of the "hard-core" fundamental guarantees, now reaffirmed in the Protocol. The prohibition of slavery is now universally accepted; therefore the adoption of this sub-paragraph did not give rise to any discussion. However, the question may arise what is meant by the phrase "slavery and the slave trade in all their forms". It was taken from the Slavery Convention, the first universal instrument on this subject, adopted in 1926 (Article 1). A Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practises Similar to Slavery, was adopted in 1956, and supplements and reinforces the prohibition; certain institutions and practices comparable to slavery, such as servitude for the payment of debts, serfdom, the purchase of wives and the exploitation of child labour are prohibited. (35) It may be useful to note these points in order to better understand the scope of the prohibition of slavery in all its forms.

' Sub-paragraph ' (g) -- ' Pillage '

4542 The prohibition of pillage is based on Article 33, paragraph 2 [], of the fourth Convention. It covers both organized pillage and pillage resulting from isolated acts of indiscipline. (36) It is prohibited to issue order whereby pillage is authorized. The prohibition has a general tenor and applies to all categories of property, both State-owned and private.

' Sub-paragraph ' (h) -- ' Threats to commit any of the foregoing acts '

4543 This offence concludes the list of prohibited acts and enlarges its scope. In practice threats may in themselves constitute a formidable means of pressure and undercut the other prohibitions. The use of threats will generally constitute violence to mental well-being within the meaning of sub-paragraph (a).

[p.1377] Paragraph 3

' Opening sentence -- The principle of aid and protection for children '

4544 Children are particularly vulnerable; they require privileged treatment in comparison with the rest of the civilian population. This is why they enjoy specific legal protection. (37)

4545 The general principle of protection laid down at the beginning of the paragraph is illustrated with a list of obligations implied by it (sub-paragraphs (a)-(e)). As indicated by the words "in particular", this list is illustrative only and does not in any way prejudice other measures which may be taken.

4546 In the territory under their control, the authorities, both de jure and de facto, have the duty to protect children from the consequences of hostilities by providing the care and aid they require, preventing physical injury or mental trauma, and ensuring that they develop as normally as circumstances permit. (38)

4547 This duty is expressed by the use of the word "shall": "children shall be provided" (the French equivalent is "les enfants recevront"). (39)

4548 The words "they require" were chosen in accordance with a proposal by a delegation. This flexible formula means that all the factors relevant for determining the aid required must be taken into account in each individual case. (40)

4549 The Conference intentionally did not give a precise definition of the term "child". (41) The moment at which a person ceases to be a child and becomes an adult is not judged in the same way everywhere in the world. Depending on the culture, the age may vary between about fifteen and eighteen years. Subparagraph (c) determines the lower limit of fifteen years for recruitment into the armed forces. The text refers to "children who have not attained the age of

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right of families to be informed of the fate of their relatives and to be reunited should be fully recognized, and that steps to this end should be facilitated.

' Sub-paragraph ' (c) -- ' The principle that children should not be recruited into the armed forces '

4555 The prohibition against using children in military operations is a fundamental element of their protection. Unfortunately this happens frequently, and children are all too often ready to follow adults without weighing up the consequences of their acts.

4556 The setting of an age-limit gave rise to lengthy discussion; a number of delegations considered that the age of fifteen was too low, and would have [p.1380] preferred eighteen. The great divergence of national legislations on this question did not make it possible to arrive at a unanimous decision. The age of fifteen proposed on the basis of realistic considerations in the ICRC draft was ultimately adopted. (51) To enhance the chances of this proposal being accepted the ICRC had followed the age limit laid down in the fourth Convention to ensure that children enjoy privileged treatment. (52)

4557 The principle of non-recruitment also prohibits accepting voluntary enlistment. Not only can a child not be recruited, or enlist himself, but furthermore he will not be "allowed to take part in hostilities", i.e., to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage. (53)

' Sub-paragraph ' (d) -- ' Continued protection in the case that sub-paragraph (c) is not applied '

4558 This sub-paragraph is the result of the parallel negotiation of the drafts of both Protocols in Committee, which, in this particular case, ended in an apparent weakening of the text, though this should have no practical consequences. In fact, it should be noted that the preceding sub-paragraph (c) contains an absolute obligation, while Article 77 [] ' (Protection of children), ' paragraph 2, of Protocol I, which corresponds to it, is less constraining and reads as follows: "The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities"; the term "all feasible measures" leaves the door open to exceptions which justify the provision that if children under fifteen nevertheless participate in hostilities, they still continue to enjoy the special protection laid down for children. (54) On the other hand, in Protocol II the text is worded in such a way that there is no escape clause: "Children [...] shall neither be recruited in the armed forces or groups, nor allowed to take part in hostilities."

4559 It should be recalled that the aim of this provision is to guarantee children special protection in the turmoil caused by situations of conflict. For this reason it seemed useful to specify in this sub-paragraph that children will continue to enjoy privileged rights in case the age limit of fifteen years laid down in subparagraph (c) is not respected. In this case making provision for the consequences of any possible violation tends to strengthen the protection.

[p.1381] ' Sub-paragraph ' (e) -- ' Temporary evacuation '

4560 The evacuation of children, as provided in this sub-paragraph, must have an exceptional and temporary character. It should be noted that the possibility of evacuation to a foreign country was not retained; the text refers to "a safer area within the country." (55)

4561 The consent of parents or persons primarily responsible is required "whenever possible". As one delegation argued, it would be unrealistic to make the consent of parents a mandatory requirement as the parents might have disappeared or it may be impossible to contact them. (56)

4562 The question may arise what is meant by persons who "are primarily responsible for their care". It would seem that this term covers not only cases in which the care of the child has been legally entrusted to a guardian (such as in

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(16) [(16) p.1371] See Art. 41, Protocol I, and the commentary thereon, supra, p. 479;

(17) [(17) p.1372] The absolute character of these obligations is the same as that of a large number of rules in the Protocols and in international humanitarian law in general. On considering the nature of absolute obligations, the International Law Commission stated that: neither juridically, nor from the practical point of view, is the obligation of any party dependent on a corresponding performance by the others. The obligation has an absolute rather than a reciprocal character." (Cf. ' ILC Yearbook ', 1957, Vol. II, p. 54, paras. 125-126). It also means that no derogation is allowed, in line with the rule on derogations in the Covenant, in particular with regard to arbitrary deprivation of life (Art. 6), torture and cruel, inhuman or degrading treatment or punishment (Art. 7) and slavery (Art. 8);

(18) [(18) p.1372] Aware of the fact that the lack of any mention of reprisals in common Article 3 could give rise to a contrario interpretations, the ICRC had proposed in its draft specific prohibitions in the different Parts whenever this seemed necessary for the protection of the persons and objects concerned. This question gave rise to discussions in the three Committees concerned of the Conference. Discussion focused on the scope of such prohibitions, the best place to include one or several references to such prohibitions in the text of the Protocol, and the terminology to be used. Several delegations argued that rules on reprisals concerned only relations between States, as subjects of international law possessing ' facultas bellandi '. However, it was recognized that analogous measures, such as acts of retortion (this term, which is incorrect in law, was repeatedly used during the debates) or punitive measures, could be taken by parties to a non-international armed conflict, though such acts would always lack the element of enforcing the law which characterizes reprisals in international armed conflict. For its part, the ICRC based its proposals on the following legal arguments: application of common Article 3 has no legal effect on the status of the parties confronting each other, and consequently does not imply in any way recognition of belligerency. The same applies for application of Protocol II. But that does not take away the fact that the parties to the conflict are still subjects of international law in the limited context of humanitarian rights and obligations resting upon them under these two instruments. Whenever there is a possibility of rules of international law not being respected, there may be reprisals. A Working Group of Committee I worked at length on drawing up a formula which from the humanitarian point of view would be equivalent to a prohibition of reprisals without using the actual word "reprisals". Its endeavours resulted in the adoption in Committee of an article on unconditional respect in which it was provided that the provisions of Parts II and III and those of Articles 26, 26 bis, 27 and 28 should not in any circumstances be contravened, not even in response to a breach of the provisions of the Protocol (Articles 26, 26 bis, 27 and 28 dealt with protection of the civilian population, of civilian objects, of objects indispensable to the survival of the civilian population and of works and installations containing dangerous forces). The proposed simplified version of the Protocol recommended deleting this article. The decision to delete it was not carried out by consensus; the article was the object of a vote and was rejected by 41 votes to 20, with 22 abstentions. See, in particular, O.R. IV, p. 37, CDDH/I/302 and CDDH/427. O.R. X, pp. 107-109, CDDH/I/287/Rev.1 and Annex; pp. 231-235, CDDH/SR.51, paras. 4-16; pp. 119-123, CDDH/SR.51, Annex (ad Art. 10 bis). Draft Articles 8, 19 and 26. ' Commentary Drafts, ' pp. 139, 151 and 157;

(19) [(19) p.1373] ' See Commentary IV ', pp. 39-40 (Art. 3);

(20) [(20) p.1373] See commentary para. 2(b), infra, p. 1374;

(21) [(21) p.1373] International Covenant on Civil and Political Rights, Art. 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3; American Convention on Human Rights, Art. 5; African Charter on Human and People's Rights, Art. 5; Geneva Conventions, common Art. 12/12/17//32; Protocol I, Art. 75, para. 2(a);

(22) [(22) p.1374] The Convention refers to torture or other punishments inflicted by a public official or any other person acting on official orders, but Art.

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(42) [(42) p.1377] See Arts. 14, 23, 24, 38 and 50 of the Fourth Convention;

(43) [(43) p.1378] The commentary on Art. 24 of the Fourth Convention gives the following explanations: "An age limit of fifteen was chosen because from that age onwards a child's faculties have generally reached a stage of development at which there is no longer the same necessity for special measures" (' Commentary IV ', p. 186);

(44) [(44) p.1378] This measure is stipulated in Art. 77, para. 4, Protocol I. The prohibition on indecent assault laid down in para. 2(e) of the present article should also be called to mind;

(45) [(45) p.1378] See draft Art. 32;

(46) [(46) p.1378] O.R. IV, p. 162, CDDH/III/309 and Add.1 and 2. This amendment is based in particular on Art. 18, para. 4, of the Covenant on Civil and Political Rights, which provides that: "The States Parties to the present Covenant
undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions". This provision is one of the articles from which no derogation can be made within the meaning of Art. 4, para. 2;

(47) [(47) p.1378] See O.R. XV, p. 79, CDDH/III/SR.46, para. 11;

(48) [(48) p.1379] See ' Commentary IV ', pp. 195-198 (Art. 26). This sub-paragraph corresponds to Art. 74 of Protocol I: Reunion of dispersed families, supra, p. 857;

(49) [(49) p.1379] Draft Art. 32, para. 2(d), and Art. 34: Recording and information;

(50) [(50) p.1379] Arts. 26/19/122/24, 136, 137 and 138;

(51) [(51) p.1380] See ' Commentary Drafts ', p. 163 (Art. 32, para. 2(e));

(52) [(52) p.1380] See Arts. 14, 23, 24 and 38 of the Fourth Convention;

(53) [(53) p.1380] See, in particular, O.R. XV, pp. 65-69, CDDH/III/SR.45, paras. 11-31;

(54) [(54) p.1380] This solution is a compromise which the Committee adopted for Protocol I on the basis of the fact
that sometimes, especially in occupied territories and in wars of national liberation, it would not be realistic to totally prohibit participation of children aged under fifteen. O.R. XV, p. 465, CDDH/407/Rev.1, para. 61;

(55) [(55) p.1381] See commentary Art. 78, Protocol I, supra, p. 907;

(56) [(56) p.1381] O.R. XV, p. 82, CDDH/III/SR.46, para. 23;

(57) [(57) p.1381] This proposal was directly integrated in the text submitted by the Rapporteur to the Committee, without an amendment having been submitted. It was accepted by consensus and no special statements were made thereon in the plenary meetings of Committee III;

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LAWRENCE URDANS
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For Irena, Nicole, and Alexa

goody: *A terrible prig, the headmaster forbade even the slightest hint of slang usage.*

priggish *adj.* (ultra-)conservative, prim, demure, prudish, purist, puristic, pedantic, schoolmarmish, strait-laced, hidebound, stiff-necked, puritanical, conformist, (Mrs) Grundyish, punctilious, formal, formalistic, strict, severe, fastidious, fussy, particular; precious, *précieux* or *précieuse*, niminy-piminy, over-nice, *Colloq* stick-in-the-mud, goody-goody, prissy, old-maidish, stuffed-shirt, stuffy, uptight, nit-picking, *Brit* twee: *Victorians were less priggish in their private behaviour than in their public image.*

primarily *adv.* **1** principally, mainly, chiefly, especially, at bottom, particularly, first of all, pre-eminently, basically, essentially, fundamentally, on the whole, for the most part, mostly, predominantly *or* predominately, generally: *The rain in Spain falls primarily in the plain.* **2** initially, originally, from or at the start, first (and foremost), in the first instance, *ab initio*: *The colonists, primarily refugees from England, began to settle the New World in the 17th century.*

primary *adj.* **1** first, prime, principal, chief, main, leading, pre-eminent, cardinal, fundamental, basic, essential, predominant, elementary, elemental, underlying: *The primary reason I want to see you is to discuss your future with the company. The primary meaning of a word is given first.* **2** earliest, first, original, initial, primitive, primeval *or Brit also* primaeval, primordial, embryonic, germinal, beginning, ultimate: *The primary source of life was possibly a sort of soup containing proteins and other molecules.* **3** firsthand, direct, immediate: *Bauxite is the primary source of aluminium ore.* **4** elementary, basic, rudimentary, fundamental: *One of the primary lessons we are taught is consideration for others.* **5** unmixed, unadulterated, pure, simple, rudimentary, fundamental, principal: *The primary colours in art are red, yellow, and blue.*

prime *adj.* **1** See **primary, 1**, above. **2** best, first, chief; first-rate, first-class, choice, select, superior, pre-eminent, leading, ranking, predominant, unparalleled, matchless, peerless, noteworthy, outstanding, admirable, worthy, exceptional, excellent, extraordinary: *She is a prime example of the results of a modern education. Arthur is certainly a prime candidate for the position.* **3** original, fundamental, basic, elemental, elementary: *The prime cause of scurvy is lack of fresh fruit and vegetables.* **4** youth, springtime; best years, heyday, pinnacle, acme, peak, zenith: *Some people reach the prime of life at 60.*

5 (make *or* get) ready, prepare, educate, teach, instruct, coach, train, tutor, drill: *Has Sonia been primed to take over the chairmanship when Sir William steps down?* **6** inform, advise, notify, advise, brief: *Having read your book, I am fully primed on American history.*

primitive *adj.* **1** first, original, aboriginal, earliest, primordial, primal, primeval *or Brit also* primaeval, prime, prehistoric; antediluvian, Noachian *or* Noachic, old, ancient: *In its most primitive state, life probably originated from some random strings of molecules. The most primitive farming tools date from some 9 years ago.* **2** crude, rude, unrefined, raw, barbaric, uncultured, barbarian, coarse, rough, uncivilized, savage, uncultivated, unsophisticated, naïve: *I cannot tolerate Nigel's primitive table manners.* **3** simple, basic, simplistic, naïve, childlike, unsophisticated, uncultivated, unrefined, unpolished, rough, untutored, untaught, untrained, unschooled, undeveloped: *Gary collects paintings of the primitive school and has one by Grandma Moses.*

v. preen, prink, prettify, titivate *or* tittivate, dress up, groom, *Colloq* doll up, get (all) spruced up, spruce up, put on one's best bib and tucker, *Chiefly Brit* tart up, get (all) tarted up, *Slang* tart up, trick out *or* up, put on one's glad rags, *Brit* *US* gussy up, get (all) gussied up, dude up: *Sl*

was primping before the mirror, awaiting the arrival of her beau.

princely *adj.* **1** lavish, bountiful, generous, liberal, ample, substantial, huge, enormous: *They paid a princely sum for their stately home in Surrey.* **2** lavish, magnificent, splendid, luxurious, majestic, royal, regal, sumptuous, superb, *Colloq* ritzy, swank(y), posh, plush: *The hotel laid on princely accommodation for us with rooms overlooking the sea.* **3** royal, noble, regal, sovereign, of royal *or* noble blood *or* birth: *Who would have thought that our humble home would ever shelter a princely guest?*

principal *adj.* **1** chief, primary, prime, paramount, main, first, foremost, ranking, pre-eminent, predominant, dominant, prevailing; leading, starring: *The principal reason I'm here is to see you. The principal food of the people is corn. The principal role was sung by Pavarotti.* **2** important, prominent, leading, cardinal: *Cuba is a principal source of sugar.*

principal *n.* owner, proprietor, chairman, chairwoman, person, (managing) director, head, president, chief executive officer, CEO, manager *or Brit* -eress, superintendent, supervisor, *Colloq* boss, *US* (head *or* chief) honcho: *We should talk to the principals about buying that company.* **4** dean, *Chiefly Brit* headmaster, headmistress, master, (vice-)chancellor: *His appointment as principal is for a two-year period.* **5** (working) capital, capital resources, investment, backing, (cash) asset(s), assets; money: *She is fortunate to be able to live on the income from her investments, without touching the principal.* **6** star, lead, heroine, hero, leading lady *or* man, leading role, main part; diva, *Fr* *première danseuse, premier danseur*, prima donna, ballerina: *The principal in the ballet company is Russian.*

principally *adv.* chiefly, mainly, first (and foremost), primarily, above all, in the main, mostly, for the most part, largely, predominantly, on the whole, bottom, in essence, essentially, basically, fundamentally; especially, particularly: *He seems to be motivated principally in money, with little regard for anything else.*

principle *n.* **1** truth, given, precept, tenet, fundamental, grounds, law, rule, dictum, canon, doctrine, teaching, dogma, proposition, (basic) assumption, postulate, axiom, maxim, truism, yardstick, standard, criterion, model: *The perpetual-motion machine violates a basic principle of physics.* **2 *principles***: philosophy, code, attitude, (point of) view, viewpoint, sentiment, belief, credo, creed, idea, notion, ethic, sense of right and wrong: *He cynically conducts his life on the principle, 'Do unto others before they do unto you'. I am not sure I condone his principles.* **3** (sense of) honour, uprightness, honesty, morality, morals, probity, integrity, conscience: *If you don't think him a man of principle, don't do business with him.* **4 *in principle***: in principle, in theory, theoretically, basically, fundamentally, at bottom, in essence, essentially, ideally: *Your plan in principle, but in practice it cannot be accomplished that way.*

principled *adj.* moral, righteous, right-minded, virtuous, noble, high-minded, ethical, honourable, upright, correct, right, just, upright, honest, scrupulous: *Michael is too highly principled to take bribes.*

print *v.* **1** impress, imprint, stamp, publish, issue, run off, put out; copy; (pull a) proof: *We decided to print 500 copies of the book. You may have your name printed on the cover for an additional amount.* **2** reproduction, copy, replica, facsimile; positive, photograph, etching, (steel *or* wood-)engraving, lithograph, woodcut, linocut, silk screen, rotogravure, *Trade Mark* Xerox; picture, illustration; *Colloq* pic, cut, pic (*pl.* pix): *Today, a good print of a Monet costs more than an original did fifty years ago.* **3** printed matter, type, writing; language, wording, (choice of) words, phrasing: *You'd be well advised to read the small print before signing the agreement.*

prior *adj.* **1** former, previous, earlier, one-time, ex-, erstwhile; old, last, late, latest, *Literary* quondam, whilom: *If you overdraw your account without prior arrangement, you will automatically be charged a higher rate of interest.* **2 *prior to***: before, previous to, previously to, till, until, preceding: *Prior to the earthquake, Valdivia was a river port.*

priority *n.* precedence, precedency, primacy, urgency, immediacy, predominance, pre-eminence, preference, rank, superiority, prerogative, right, seniority, importance, weight: *The applications for aid will be processed in order of priority.*

prison *n.* jail *or Brit also* gaol, dungeon, oubliette, lock-up, penal institution, house of correction, correctional institution, reformatory, house of detention; confinement, detention; *Old-fashioned* reform school, *Military* guardhouse; *Brit* remand centre, detention centre, remand home, community home, *Military* glasshouse, *Formal* CHE (= 'community home with education on the premises'), *Old-fashioned* approved school; *US* penitentiary, *Military* brig; *Archaic Brit* bridewell; *Slang* clink, can, cooler, jug, stir, *Brit* quod, chokey *or* choky, *US and Canadian* pokey *or* poky; *US* pen, calaboose, slammer, hoosegow, *Old-fashioned* big house: *He was released from prison last Friday after serving six months for burglary.*

prisoner *n.* convict, trusty; internee, detainee; *Colloq* jailbird *or Brit also* gaolbird, lifer, *Slang* con, *Brit* (old) lag, *Old-fashioned* ticket-of-leave man, *US* two-time *or* three-time loser: *Prisoners' letters were censored.*

prissy *adj.* fussy, precious, over-nice, finicky *or* finical, strait-laced, school-marmish, prim (and proper), prudish, squeamish, fastidious, *Colloq* old-maidish: *He is awfully prissy about changing on the beach.*

pristine *adj.* **1** original, primal, basic, primeval *or Brit also* primaeval, primitive, primordial, earliest, first, initial: *It is impractical to try to return the world to what some regard as its pristine purity.* **2** uncorrupted, pure, unsullied, undefiled, virginal, virgin, chaste, untouched, unspoiled *or* unspoilt, unpolluted, untarnished, spotless, immaculate, natural: *One must travel far today to experience the pristine beauty of nature. The car was in pristine condition.*

privacy *n.* **1** seclusion, retirement, solitude, isolation, retreat, sequestration, reclusiveness, reclusion, solitariness; monasticism: *Coleman very much enjoys the privacy of living alone.* **2** secrecy, secretiveness, clandestineness, confidentiality, surreptitiousness, covertness, concealment: *Many feel that the questions on census forms invade their privacy.*

private *adj.* **1** (top) secret, confidential, undisclosed, hidden, clandestine, concealed, covert, surreptitious, off the record, not for publication, unofficial, *Colloq* hush-hush: *I think our relationship should be kept private for the time being. What I am about to tell you is strictly private.* **2** privileged, restrictive, restricted, exclusive, special, reserved, personal, inaccessible, non-public; hidden, secluded, concealed, secret, sneaking: *The house is situated on a private road. I had a private suspicion that they would cancel their trip.* **3** personal, individual, own, intimate, particular: *My private affairs are none of your business.* **4** solitary, seclusive, reclusive, withdrawn, retiring, reticent, ungregarious, non-gregarious, unsocial, unsociable, antisocial, reserved, uncommunicative, hermitic(al), hermit-like, eremitic(al); sequestered, secluded, retired: *You have to bear in mind that Edmund is a very private person.*

—*n.* **5** private soldier, infantryman, foot-soldier, *US* enlisted man, *Colloq Brit* Tommy, Tommy Atkins, squaddie, *US* GI (Joe), *Slang US* grunt: *Before cashiering him, they reduced him from colonel to private.* **6** *in*

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furtive 1
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inside 4
interior 3
intimate[1] 2
knowing 1
mystical 1
occult 1
outside 7
personal 2
privileged 4
prefied 3
record 8
secluded 1,2
seclusion
secret 1,2,3
sneaking 2
surreptitious
tête-à-tête 1,3
ulterior 1
undercover
underground 2
unofficial
untold 2
withdrawn 2
-private°
private 6
personally 3
tête-à-tête 2
privates°
private 7
genitals
privateer
pirate 1
robber
thief 3
private eye
detective
operative 3
sleuth
snoop 2
privately
back 6
confidence 3
personally 3
private 6
record 8
scene 5
secrecy 2
secret 4
secretly
tête-à-tête 2
private parts°
private 7
genitals

private school
school 1
private show
preview
private soldier
private 5
privation°
hardship
loss 1
misery 2
need 4
self-denial 2
want 5
privilege°
charter 2
faculty 4
freedom 4
honour 3
immunity 1
indemnity 2
liberty 2,3
licence 1
option 2
passage 8
power 6
precedence
prerogative
refusal 2
right 9
title 5
use 10
privileged°
élite 1,2
favoured 2
inside 4
preferential
private 2
select 3
privy°
close 16
facility 2b
familiar 4
inside 4
intimate[1] 2
lavatory
occult 1
privileged 4
toilet 1
prize°
appreciate 1
award 2
catch 15
cherish 1
choice 4
esteem 1
force 8
gem 2
gift 1
honour 5
jewel 2
joy 3
loot 1
pearl
plaque 3
plum
premium 1
price 3
pride 3
purse 3
quarry[1]
reward 2
treasure 2,3
trophy 1
-prizes
plunder 4
spoil 6
prized
beloved 1
dear 1
pet[1] 3
precious 1,2
sweet 5
prizefight
bout 3
prizefighter
bruiser
pugilist
prizefighting
pugilism
prizewinner
champion 1
victor
winner

hasty, *short-sighted: It was unthinking of
r mother to go out to dinner with us.*
erate, *impolite, *tactless, *rude, *thought-
omatic, *discourteous, uncivil, *imprudent,
discreet, neglectful: *On the other hand, it
been unthinking of me not to ask her*

*disorderly, messy, dishevelled,
lovenly, slatternly, *bedraggled, rumpled,
ouzy *or* frowsy, *sloppy, *dirty; littered,
haotic, *helter-skelter, jumbled, *Archaic*
ed, *Colloq US* mussy, mussed-up: *You
go to the door looking so untidy. Ken's
ways so untidy.*

unflagging, *determined, indefatigable,
evering, perseverant, *tireless, unweary-
ed, dedicated, unfailing, unfaltering,
has always been an untiring perfectionist*

countless, uncounted, uncountable,
*numberless, innumerable, myriad,
*immeasurable, measureless, *unlimited;
s are lost through tax fraud each year
, unnarrated, undescribed, unpub-
aled, undisclosed, undivulged, unrep-
hidden, *secret: *How many untold stories
e naked city?* **3** *inexpressible, unutter-
able, unimaginable, *inconceivable,
unspeakable: *The untold agony that
ugh because of his family's illnesses!*

1 adverse, unfavourable, unpropi-
ging, *inopportune, *unpromising,
icious, *bad, *unfortunate: *The rain-
ntoward conditions, causing the river to
y.* **2** *unbecoming, unfitting, *awkward,
unapt, unsuitable, *improper, *im-
porish, ungentlemanly, unladylike, in-
cate, *unwarranted, uncalled-for,
eemly, unwise, *imprudent, undiplo-
untactful, ill-conceived, *silly,
ill-timed, vexatious, vexing, irritat-
*harles made some untoward remark
Sandra's feet.*

ested, unproved *or* unproven, *new:
t homes, but he is as yet untried as the
ary.*

faithful, *faithless, *disloyal, *fickle,
pendable, *unreliable, *dishonour-
hy, *false, *hypocritical, *dishonest,
iced, duplicitous, *devious, *deceit-
perfidious: *Only when I saw her with
that Pauline had been untrue to me.*
naccurate, *incorrect, *erroneous,
ken, distorted: *What you said about
y untrue.* **3** *inexact, non-standard,
recise, *imperfect: *How unfortunate
iam Tell's aim been untrue!*
and-)*new, untouched, *pristine,
resh, firsthand: *He sold me his
r half what it cost.* **2** *disused,
ct, neglected, given up: *We hid in
ry building.* **3** unconsumed, *left-
eft: *If dissatisfied with this product,
rtion for a full refund.* **4** ***unused***
o, *unfamiliar with, *inexperi-
eurish at, unpractised in *or* at,
quite unused to doing that sort of

mon, *exceptional, atypical,
unexpected, *singular, out of the
nary, *odd, *peculiar, *curious,
ueer, *remarkable, *unique,
ted, unconventional, *unortho-
l: *It takes an unusual person to
n. Don't you agree that an egg-
it unusual?*

lain, *simple, *pure, unembel-
d, *straight, *direct, *honest,
*stark, *sincere, *frank, *candid,

unveil *v.* *reveal, *expose, uncover, *lay *bare *or
outspoken: *My dear, let me tell you the unvarnished
ruth about Marnie and Jim.*

unveil *v.* *reveal, *expose, uncover, *lay *bare *or
pen, *bare, bring to *light: *They will unveil a rival
t tomorrow's meeting. Only after William died did
ia unveil the truth about his double life.*

unwarranted *adj.* uncalled-for, *unasked (for),
stified, indefensible, unjust, unfair, *unconscion-
unworthy, *improper, *inexcusable, *gratuitous,
cited, undeserved, unprovoked, *outrageous,
ssive, *unreasonable, unrestrained, intemperate,
mpered, *immoderate, undue, *unnecessary: *The
were accused of unwarranted use of force in eject-
rowdies from the pub.*

unwary *adj.* *heedless, *careless, *hasty, incautious,
arded, *imprudent, *rash, *foolhardy, *reckless,
ntless, *indiscreet, *unthinking, *mindless,
*Many perils await the unwary traveller. It was
y of you not to lock the doors and windows.*

unwashed *adj.* **1** *dirty, uncleaned, unclean,
ansed: *Separate your personal things from the
shed laundry in the hamper.*
2 ***the (great) unwashed***: *Derogatory* the rabble,
sses, the *mob, the plebs, *people (at large *or* in
l), the *population, the *populace, the man *or
an in the street, Mr (& Mrs) Average, the working
s), most *people, the (silent) majority, *US* John
blic: *The effort to sell expensive brandy to the
unwashed failed miserably.*

unwelcome *adj.* **1** uninvited, unsought for, unwished
undesired, *undesirable, displeasing, unpleasing,
tasteful, unpleasant: *My day was further ruined by
unwelcome arrival of all those bills.* **2** unwanted,
ected, unaccepted, excluded; *persona non grata,
athema: *Following that episode, Curshaw was made
feel unwelcome at the club.*

unwholesome *adj.* **1** *unhealthy, unhealthful,
rimental, deleterious, pernicious, insalubrious,
nhygienic, insalutary, *harmful, noxious, toxic,
nurious, *destructive: *Fernthwaite finally suc-
mbed to the unwholesome climate and had to be sent
me.* **2** *corrupt, *immoral, *bad, *wicked, *evil,
nful, *perverted; demoralizing, depraved, *degrad-
g, corrupting, perverting: *The social worker said it
as wrong for a child to be raised in such an unwhole-
me atmosphere.* **3** *ill, ailing, *sickly, *sick, *pale,
an, anaemic, pallid, *pasty: *Their unwholesome com-
exion comes from malnutrition.*

unwieldy *adj.* *awkward, *clumsy, *bulky, oversized,
umbersome, ungainly, unmanageable, unhandy,
nmanoeuvrable: *The huge oil tankers, though eco-
nomical, often proved unwieldy in the ports they visited.*

unwonted *adj.* infrequent, *unusual, uncustomary,
ncommon, *unfamiliar, unprecedented, *rare, *singu-
ar, atypical, *abnormal, *peculiar, *odd, *strange,
rregular, unconventional, *unorthodox: *All this
unwonted physical exercise made them exhausted by
pening.*

unworthy *adj.* **1** unequal, meritless, unmerited, sub-
standard, *inferior, second-rate, *menial, *puny,
petty, *paltry, *unprofessional, *mediocre, *despic-
able, *contemptible, *dishonourable, ignoble, *disrep-
utable, discreditable, *unqualified, *ineligible, unfit,
undeserving: *I consider Patrick an unworthy opponent.*
2 ***unworthy of***: *unbecoming to, *inappropriate to,
unsuitable for, unfit for, out of *character for, *incon-
sistent with *or* for, out of *place with *or* for, *incongru-
ous with *or* for: *That sort of petty haggling is unworthy
of your position and of you.*

upbeat *adj.* *positive, *optimistic, *sanguine, *favour-
able, *cheerful, encouraging, heartening, *buoyant,
light-hearted: *Christopher has a very upbeat attitude
towards life despite his age.*

upbraid *v.* *scold, *rebuke, *reprimand, reproach,
*berate, *castigate, *chastise, *reprove, chide, censure,
take to *task, *Colloq* *tell off, tick off, *dress down, give
a dressing-down, give (someone) a piece of (one's)
*mind, *tell (someone) a thing or two, rake (someone)
over the coals, *jump on *or* all over, *bawl out, *US*
*chew out: *The boys were soundly upbraided for going
near the railway tracks.*

upbringing *n.* rearing, raising, training, *education,
cultivation, nurture, *breeding: *The way one behaves
through life is really a matter of upbringing.*

upheaval *n.* *upset, *unrest, commotion, *change,
cataclysm, disruption, *disturbance, *disorder, *confu-
sion, *chaos, *furore *or US* furor: *Those were times of
drastic political upheaval in Asia.*

uphold *v.* *support, *maintain, *sustain, *preserve,
*hold up, *defend, *protect, *advocate, *promote,
espouse, *embrace, *endorse, *back, *champion, *stand
by: *All demagogues claim to uphold democratic
principles.*

upkeep *n.* **1** *maintenance, *repair, *support, *susten-
ance, *preservation, *conservation, *subsistence,
*running, *operation: *The upkeep of the infrastructure
came to ten per cent of the annual budget last year.*
2 (operating) *costs, (*running) *expenses, *outlay,
*expenditure, *Brit* *overheads, oncosts, *US* *overhead:
Have you included upkeep in the annual expenses?

upper *adj.* **1** higher (up), loftier, topmost, more *elev-
ated, *uppermost: *Air is less dense in the upper parts of
the atmosphere. Our flat is on an upper floor. Her best
notes are sung in the upper register.* **2** higher, upland,
more *elevated; (more) northerly, northern: *We visited
the cataracts on the upper reaches of the Nile. We spent
the holiday in upper Canada.* **3** later, more *recent:
*These strata were laid down in the Upper Cretaceous
period.* **4** ***upper case***: *capital letter(s), *capital(s),
majuscule (letters *or* characters): *The heading ought
to be in upper case.* **5** ***upper crust***: upper *class, *élite,
aristocrats, *nobles, blue bloods, *wealthy, *US* Four
Hundred: *Gregory thinks of himself as a member of the
upper crust and won't associate with us.* **6** ***upper
hand***: *advantage, *control, *authority, *power, *sway,
*superiority, *supremacy, *command, dominance,
ascendancy, *Colloq* *edge: *Purvis kowtows to whoever
has the upper hand.*
—*n.* **7** ***on (one's) uppers***: *poor, *indigent, *destitute,
poverty-stricken, *Colloq* *broke: *Stanley has been on
his uppers since losing his job.*

upper-class *adj.* **1** *élite, aristocratic, blue-blooded,
well-born, *noble, high-born, patrician, *Colloq* *upper
crust: *Eunice comes from an upper-class Irish family.*
2 *high-class, *elegant, *fancy, *luxurious, *first-rate,
de luxe, *royal, *regal, *sumptuous, *Colloq* swank(y),
ritzy, *posh: *I'll have you know that we stayed only in
upper-class hotels on our tour.*

uppermost *adj.* **1** highest, topmost, loftiest, *top:
*These curious animals live in the uppermost branches
of the trees.* **2** *foremost, *first, most *important *or*
*prominent *or* *influential *or* *telling, *principal, *para-
mount, *pre-eminent, *predominant: *Uppermost in my
mind is the safety of the children.*

uppish *adj.* *affected, putting on airs, *snobbish, *con-
ceited, overweening, *self-important, *Colloq* uppity,
snooty, *high and mighty, *hoity-toity, highfalutin *or*
hifalutin, stuck-up, on (one's) high horse, *Slang*
snotty, *Brit* toffee-nosed: *Even if she is in charge she
doesn't have to be so uppish.*

upright *adj.* **1** *erect, *perpendicular, vertical, on
*end, *straight up and down, *plumb, stand-up, *stand-
ing up, *Brit* upstanding: *Few upright columns of the
Greek temple remained.* **2** *moral, *principled, high-
minded, *ethical, *virtuous, upstanding, *straight,
*righteous, straightforward, *honourable, *honest,
*just, *trustworthy, unimpeachable, uncorrupt(ed),
incorruptible, *decent, *good: *David had long been an
upright member of the church council.*
—*n.* **3** *post, *pole, column, vertical, *perpendicular:
We need another upright to support the floor over here.
—*adv.* **4** perpendicularly, vertically, upward(s),
*straight up (and down): *The javelin was sticking
upright out of the ground.* **5** *right side up: *Miracu-
lously, the platter with the roast on it landed upright on
the floor.*

ELIMINATION OF ALL FORMS OF DISCRIMINATION AND VIOLENCE AGAINST THE GIRL CHILD

EGM/Girl Child/2006/REPORT

Elimination of all forms of discrimination and violence against the girl child

Report of the Expert Group Meeting*

Organized by
The Division for the Advancement of Women
in collaboration with UNICEF

Innocenti Research Centre
Florence, Italy

25-28 September 2006

Division for the Advancement of Women
Department of Economic and Social Affairs
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*The views expressed in this document are those of the experts and do not necessarily represent the views of the United Nations

63. Child marriage typically transits girls from sexual abstinence to high levels of unprotected sexual relations, often with older partners. In the context of the HIV/AIDS epidemic, this significantly increases the risk of HIV/AIDS, and indeed prevalence rates among married girls are often strikingly higher even compared to sexually active age mates. Married girls who have been abandoned, divorced or widowed may be at a particular risk of HIV/AIDS as a result of their vulnerability post-marriage.[43]

2. Child mothers and girl heads of household

a) Child mothers

64. Young brides often become mothers before they are physically and emotionally ready. Other young girls also become mothers as a result of rape, commercial sexual exploitation and forced marriage. Millions of girls between the ages of 15 and 19 – both married and unmarried – give birth each year. For this age group, complications of pregnancy and childbirth are a leading cause of death, with unsafe abortion being a major factor. There is a strong correlation between the age of the mother and maternal mortality and morbidity. Girls under the age of 15 are five times more likely to die in pregnancy and childbirth than women in their twenties.[44] Early childbirth is linked to the risk of obstetric fistula (see section 4.b). Teenage mothers are more likely to have children with low birth weight owing to inadequate nutrition and anemia.[45]

Child mothers resulting from early marriage

65. Girl brides and subsequent young mothers have often been neglected in the reproductive adolescent health agenda[46] due to the incorrect assumption that their married status ensures them a safe passage to adulthood. Married girls usually end up as young mothers and, in some settings, are much younger than their husbands, which has been associated with a particularly pronounced risk of early childbearing.[47] They have limited access to friends or other social support and limited or no schooling options, with resulting low levels of educational attainment. These girls have restricted social mobility, limited access to modern media and lack of skills to be viable to the labour market.[48]

Child mothers resulting from rape and sexual exploitation

66. The educational, employment and future marriage prospects of girls who become mothers due to sexual exploitation and abuse are typically severely curtailed. Young mothers who have given birth to children as a result of rape, particularly in conflict situations, face significant social stigma and may find themselves completely marginalized in their communities, without support, income or access to social networks. Their children may experience similar or even worse forms of stigma, exclusion and physical and mental abuse.[49]

Child mothers resulting from forced marriage to members of armed forces and groups

67. The practice during armed conflict of armed groups and forces abducting girls and young women and forcibly marrying them, as well as forcing parents to give their daughters to them as wives in exchange for security, is widespread.[50] Significantly, several elements of forced marriage are crimes codified within international law, most notably in the Rome Statute of the

International Criminal Court, including rape, enslavement, torture and forced pregnancy.[51] The violations experienced by girls and young women subjected to forced marriage are often severe and long-lasting and encompass a number of psychological, emotional, physical, social, economic and cultural elements.

68. Among these elements are forced pregnancy, child-bearing and the raising of children born of rape in societies where those children are often rejected and physically abused by members of the extended family and community members (including by withholding of food and medicines). These young mothers report that because they are often cut out of family and social networks, they struggle to provide education, food and health care to their children. Many of these young mothers have lost years of education and lack the skills needed to pursue productive livelihoods. Their situation is exacerbated by the stigma they face from their past experiences and their exclusion from social networks.[52]

b) Girl heads of households

69. Extreme poverty, disease and armed conflict have resulted in increased numbers of child-headed households in many parts of the world, including many households headed by girls. A girl who acts as a head of household must serve as parent, home-keeper, breadwinner and protector of her younger siblings. As a result, she has little time or resources to ensure she is able to participate in education and or exercise other basic rights regarding her own development. With no adults to protect her, she and members of her household are at a high risk of exploitation and violence. In order to maintain the household, she may be forced into sexually exploitative activities, including prostitution, or engage in criminal activities, thus putting her at risk of physical and sexual abuse, HIV infection, early pregnancy, and incarceration.

70. The number of child-headed households grows during armed conflict. Such child-headed households often lack adequate shelter, food, basic materials for cooking or agricultural tools.[53] Child heads of households face enormous challenges in trying to acquire material goods to sustain their families. During times of armed conflict, they must contend with adults in a struggle over increasingly scarce resources. Girl heads of households are particularly marginalized in such contexts.[54] They experience low status as female adolescents, the social stigma of being without parents, and a lack of protection.[55] During armed conflict, girl heads of household may be at additional risk of having to leave the relative safety of their village or town to search for food or fuel. In trying to ensure the survival of their families, they may have to fend off sexual advances and harassment or submit to abuse. Girls who head households are at an extremely high risk of contracting HIV due to rape and coerced sex in exchange for items they need to support themselves and their siblings and/or parent(s), who may be disabled.[56]

3. Girls in the worst forms of child labour

71. According to the International Labour Organization (ILO), 218 million children around the world are engaged in child labour, of whom 126 million are in hazardous work. Seventy-four million children occupied in hazardous work in 2004 were under the age of 15.[57] In 2000, the ILO reported that 5.7 million children were in forced or bonded labour, 1.8 million in prostitution and pornography, and 1.2 million were victims of trafficking.[58]

Reports

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AMNESTY INTERNATIONAL , KENYA: RAPE: THE INVISIBLE CRIME

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AFR 32/001/2002

KENYA
Rape – the invisible crime

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> influence the relationship between the various groups in society and...some cultural practices, beliefs and traditions have had the tendency to relegate women to a second class status in society thereby not only violating their rights as human beings [but] leading to discrimination against women. Some...customs and cultural practices have found their way not only into law but...[are used] as justification for violence against women."[2]

Yet, despite its moral and legal obligations, the government has not reformed Kenya's laws to make all acts of violence against women criminal offences, nor has it addressed the discriminatory practices of the police force, prisons services and court system.

Police statistics over the years have shown an increase in the number of reported rapes; 515 in 1990 and 1,675 in 2000.[3] These figures are likely to reflect an under-reporting of rape and not its actual incidence. Local women's groups believe that the true figures are much higher.

This report is the third in a series focusing on torture and impunity in Kenya within Amnesty International's Campaign against Torture.[4] It is based on research undertaken by Amnesty International over the years, including a mission in Kenya in August 2001. It is being published on 8 March 2002 to mark International Women's Day. While women's achievements are being celebrated all over the world on that day, Amnesty International seeks to ensure that those women who continue to be raped and beaten and denied their basic rights – whether by state officials or family members – are not forgotten.

This report sets out to answer some of the questions put to Amnesty International by women victims of violence. It looks at violence against women, particularly sexual violence, and focuses on rape committed by both security officials and private individuals. It examines why women subjected to violence are not adequately protected by the law and why those who commit violence against women continue to operate with impunity.

Kenya has agreed to be bound by international human rights standards such as the United Nations (UN) Convention on the Elimination of All Forms of Discrimination against

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[2] Statement by the Hon. S Amos Wako, the Attorney General, during the 16 Days of Activism Against Violence Against Women, 10 December 1999.

[3] Statistics given by the Kenya Police Headquarters, Nairobi. The Kenya Anti-Rape Organisation also stated that reported rapes range from between 900 and 1,500 a year.

[4] See also *Kenya: Prisons: Deaths due to torture and cruel, inhuman and degrading conditions*, December 2000 (AI Index: AFR 32/010/2001); *Kenya: Ending the cycle of impunity*, June 2001 (AI Index AFR 32/011/2001).

> "violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms. The long standing failure to protect and promote those rights and freedoms in the case of violence against women is a matter of concern to all States and should be addressed."[6]

In General Recommendation 19, the CEDAW Committee stated that

> "the definition of discrimination includes gender-based violence, that is, violence that is directed at a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty."

The Committee goes on to say that "gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence." In the same General Recommendation, in paragraph 24 (t), the Committee called on states parties to take all measures necessary to prevent gender-based violence. Such measures would include not only legal measures such as penal sanctions, civil remedies and avenues for compensation, but also preventive measures such as public information and education programmes, and protective measures, including support services for victims of violence.

The Optional Protocol to the CEDAW offers women direct means to seek redress at the international level for violations of their rights under the CEDAW: it opens the door to the UN Committee that monitors implementation of the CEDAW, enabling it to be applied directly to actual situations that women in all parts of the world face in their daily lives and ensuring that it does not remain a distant and abstract set of rules and principles for them.[7]

International standards also recognize that the continuing discrimination that women encounter in their communities, often stemming from poor socio-economic conditions, makes women vulnerable to acts of violence. The UN Economic and Social Council recognized that sexual violence is "pervasive and cuts across lines of income, class and culture... [V]iolence

[6] UN Doc A/CONF.177/20, para 112.

[7] See Amnesty International's report, *Claiming women's rights: the Optional Protocol to the UN Women's Convention* (AI Index: IOR 51/001/2001).

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, for such purposes as obtaining... information, or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official..."

Rape causes severe physical or mental suffering, is a deliberate act by the perpetrator and is carried out with the intention to intimidate, degrade or humiliate the victim.

The UN Special Rapporteur on violence against women, in her 1996 report, argued that, "depending on its severity and the circumstances giving rise to State responsibility, domestic violence can constitute torture or cruel, inhuman and degrading treatment or punishment under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This view challenges the assumption that intimate violence is a less severe or terrible form of violence than that perpetrated directly by the State."[10] The report stated further, in paragraph 44, that domestic violence may constitute torture as it "involves some form of physical and/or psychological suffering, including death in some cases." It defined violence in the family as "violence perpetrated in the domestic sphere which targets women because of their role within that sphere or as violence which is intended to impact, directly and negatively, on women within the domestic sphere."[11] In her 1999 report the Special Rapporteur stated that "violence within the family comprises, *inter alia*, woman-battering, marital rape...[and] traditional violent practices against women including forced marriage..."[12]

2.2 *National law*

Section 74(1) of the Kenyan Constitution prohibits torture, inhuman or degrading treatment. Discrimination on grounds of gender was incorporated into the Constitution through a constitutional amendment in 1997. Under amendments in November 1997 to the Police Act, Section 14A(2) and (3) declares torture, cruel, inhuman or degrading treatment committed by a police officer to be a criminal offence.

[10] UN Doc E/CN.4/1996/53, para 42.

[11] Ibid. para 28.

[12] UN Doc E/ CN.4/1999/68 para 17.

They can sentence rapists to any amount of time below life. Several organisations have therefore called for a minimum sentence."[14]

The Penal Code does not recognize marital rape as a criminal offence because of the presumption, especially in customary law, that consent to sexual intercourse is given by the act of marriage. No legal challenge to this presumption has been made through the courts in Kenya. The lesser charge of assault is more commonly used in marital rape cases, carrying with it a lower maximum sentence. FIDA (K) reported one case in which a man was convicted of assault causing actual bodily harm to his wife and fined 10,000 shillings (US$12), or four months' imprisonment in default, having spent a year in prison on remand. Evidence was introduced in court that he had pushed the broken legs of a stool into her vagina. FIDA (K) later reported that he had again been charged with assault after allegations that he had beaten his wife again and threatened to kill her in reprisal for his imprisonment.

Kenya has not incorporated into domestic law any of the international or regional human rights instruments that it has ratified. The government has consistently stated its intention to promote gender equality through legislation, but has failed to implement constitutional provisions and domesticate international or regional human rights treaties that promote and protect women's rights. In 1999 the Attorney General promised to establish a National Gender and Development Council, which would work with the Attorney General's office and the Kenya Law Reform Commission to ensure "the amendment and development of laws and regulations necessary to remove the sources of gender inequality. The Council will not only initiate laws but will also initiate polices and programmes which will lead to gender equality." To date this Council has not been established, and one Kenyan human rights organization described the statement as "simply rhetoric".

Although proposed new laws should address some concerns about women's human rights, they have been delayed in their progress through Parliament by lack of government support. The Criminal Law (Amendment) Bill, published in April 2000, "seeks to amend the penal laws to facilitate expeditious disposal of cases, discourage torture and harmonize penalties relating to sexual offences", including the offences of rape, defilement and incest.[15] The Bill aims to ensure that there is an element of privacy and confidentiality for a victim giving testimony. The proceedings for trials of certain sexual offences, such as defilement and rape, would be held *in camera* to protect the identity and safeguard the privacy of the victims. While measures to

[14] Interview in *East African Standard*, 18 February, 2001.

[15] If the Bill is enacted the following statutes would be amended: the Penal Code (CAP 63), the Criminal Procedure Code (CAP 75), the Evidence Act (CAP 80) and the Prevention of Corruption Act (CAP 65).

3. THE STATE AND THE PRINCIPLE OF 'DUE DILIGENCE'

Articulated through many international instruments and reports, states now recognize that they have a responsibility towards their citizens, including women, not only to protect them from abuses committed by state officials but also those committed by private individuals. States can be held responsible, in the implementation of their efforts to protect their citizens and to bring perpetrators of abuses to justice, if they do not exercise "due diligence".

The Special Rapporteur on violence against women in 1996 commented that governments should "ensure that there exists no impunity for the perpetrators of such violence,"[20] further adding that "a State can be held complicit where it fails systematically to provide protection from private actors who deprive any person of his/her human rights."[21]

The principle of due diligence was re-affirmed by the CEDAW Committee in General Recommendation 19, which emphasized that,

> "under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."

Paragraph 9 further states that it is also the responsibility of States parties under the Convention to eliminate gender-based discrimination by any person, organization or enterprise. State responsibility may therefore be invoked not only when a government official is involved in an act of gender-based violence, but also when the state fails to act with due diligence to prevent violations of rights committed by private persons or to investigate and punish such acts of violence, or to provide compensation. In accordance with Article 4 of the Declaration on the Elimination of Violence against Women, states must "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."

[20] UN Doc. E/CN.4/1996/53, para 29.

[21] UN Doc. E/CN.4/1996/53, para 32.

provide effective protection."[26] The organization considers that, unless the state actively and generally seeks to prevent rape and violence against women and to bring perpetrators to justice, such torture will persist and perpetrators of these crimes will continue to act with impunity. Thus, the Kenyan government is obliged to ensure that it provides for adequate prevention, investigation and prosecution of acts of sexual violence and redress to their victims.

4. DISCRIMINATION AGAINST WOMEN IN KENYA

The status and role of women in Kenya is that of second class citizens. Discrimination against women is widespread.

Article 1 of the CEDAW defines "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Kenya is a patriarchal society, where the husband is the head of the household and women often have little influence in decisions affecting their lives. This extends to sexual relations, where woman are frequently unable to refuse to have sex with their husbands. Violence pervades the lives of many women.

The Economic and Social Council noted that poverty in general inhibited the full enjoyment of human rights and that the situation where women had unequal access to resources ensured continuing discrimination.[27] In Kenya, customarily women do not own property or the land they work, which causes them economic hardship and places them in positions of dependence. Yet Article 15 of the CEDAW requires states parties to give women equal rights to administer property.

In some rural communities attitudes persist that put women at particular risk of violence. The UN Commission on Human Rights, in a resolution on women's equal ownership of, access to and control over land and equal rights to own property and to adequate housing, stated that "women's poverty, coupled with a lack of alternative housing options, makes it difficult for women to leave violent family situations."[28] Paragraph 24(o) of General Recommendation 19 of

[26] Ibid.

[27] UN Doc E/CN.4/1998/22.

[28] UN Doc. E/CN.4/RES/2001/34.

court by widows trying to reclaim property from their husband's family, but in some instances they have been unable to prove that they were legally married and therefore have a legal right to the property. In many cases it is reported that women, and their children, have found themselves homeless.

Forced marriage is customary in some communities, contravening Article 16 of the CEDAW which guarantees, on the basis of equality of men and women, the same right to freely choose a spouse and to enter into marriage only with free and full consent. On the death of her husband, a woman is "inherited" by his brother or close relative. The woman's consent to this new marriage or to sexual relations with her new "husband" is not sought. The community uses the custom to further discriminate against women and entrench their secondary position in society. Amnesty International was told by one human rights lawyer that even the adult sons of a woman, believing that this was a customary requirement, would force their mother to be inherited for fear of terrible consequences. "So, children marry off their mothers, usually to the [dead husband's] elder brother, but the children cannot do any cultivation until the elder brother has had sexual intercourse with his new wife. The children cannot cultivate or build a permanent house, for the elder brother determines everything, otherwise there is *chira* (negative consequences for the family)."[32]

One of hundreds of women marching through Nairobi, Kenya, to campaign against violence against women holds a placard reading "Thanks, mum, for not circumcising me". ©AP

In the case of Phelista from Nairobi, who was married in 1965, her husband died in 1983 and, according to her community's customs, she was "inherited" by her husband's brother. He reportedly verbally abused, beat and raped her repeatedly. She told Amnesty International that she did not report the abuse to the police as she thought that they would demand money but in 1992 she reported it to the village chief's office. The Chief's advice was that, if she could not stay with her new husband, she should leave him. When she told her husband that she was leaving him, he allegedly beat her and forced her to have sex with him.

For many women who are forced into a new marriage there is the added worry of the health risks associated with the marriage. "Inherited" women may become infected with HIV and eventually die of AIDS, leaving children orphaned. As a Kenyan social worker remarked

[32] Interview with Hezekiah Abuya, lawyer and human rights activist, 28 August 2001.

5. WOMEN'S LACK OF ACCESS TO POLICE AND LEGAL PROTECTION

The lack of an effective system to investigate allegations of sexual violence and rape in Kenya is reflected in the procedure that a woman victim must go through in order to bring her case to court. Women victims face obstructions in the criminal justice system and in the lack of facilities for gathering essential medical evidence, and most cases are never heard in court.

5.1 *Reporting to the police*

The statistics published by the Kenyan police show the extent to which rape is reported, but do not show how many cases were investigated and prosecuted. The percentage of cases in which there is a prosecution is widely believed to be very low.

For an investigation to be initiated, a woman victim has to report the crime to the police. Her statement regarding the alleged abuse should be recorded in the Occurrence Book held in each police station. However, the majority of police officers are not trained in gender issues or how to handle cases of domestic violence, especially marital rape. Most police officers regard violence within the home as a domestic matter, and enforce and uphold discriminatory attitudes against women. In August 2001 the Kiambu Divisional Police Chief, Mr Njue Ngagi, reportedly freed a church leader, arrested on suspicion of the crime of defilement of a six-year-old girl, because he was a "married man with children and, therefore, incapable of committing such an offence."

Special provisions for women have not been established in any police station or police post in Kenya, despite commitments made by both the Attorney General and the Police Commissioner in August 2000 to introduce "rape desks" at police stations to make the police more responsive to gender-based crimes. These desks would be separate from the main police desk, to enable victims of rape and sexual violence to report the offence in more privacy and to police officers trained to interview victims and investigate the offence in a sympathetic and sensitive manner.

Women who seek police intervention are often embarrassed, ridiculed, verbally abused and made to feel as if they are wasting police time. In many of the interviews carried out by Amnesty International, women said that they were reluctant to approach the police and had only reported their case when the violence had become so extreme that they needed intervention to protect their lives.

There are fears among local women's activists and victims that the offence of rape is subject to less vigorous police investigation than other crimes and, therefore, that victims are less inclined to report such crimes to the police. As the police are both investigator and prosecutor in the Kenyan legal system, Amnesty International has concerns about whether police

the victim in cases of torture and ill-treatment and provides no opportunity to record a detailed examination of a rape victim. An amended P3 form, which would standardize medico-legal examination, was presented to the Attorney General by the Kenyan Independent Medico-Legal Unit (IMLU), the Kenyan Medical Association (KMA) and other organizations in August 2001. The amended form consists of about a dozen pages, which allows for the reporting of a more detailed examination of the rape victim, including provision for the examination of the whole body for cuts and bruises and not only of the genitals.

Police who are responsible for registering these complaints rarely carry out the correct procedure. Louise, aged 33, from Nairobi, Langata went to the police in May 2001 after reportedly suffering abuse from her husband, a hotel employee. Although she gave her husband a letter from the village chief in March 2001, urging reconciliation, the beatings reportedly worsened. She told Amnesty International, "I went to the police in May and told them about the beatings and how I left... The police told me that they would arrest my husband, but they never did because [he] bribed the police." She was not offered a P3 form by the police even though the beatings had left her with bruised eyes. Although by July 2001 she had left her husband, she reportedly continued to be beaten, and raped, by him. She decided not to go to the police as they had previously not helped her and instead sought sanctuary with a women's organization in Nairobi that runs a shelter and counselling programme.

Doctors interviewed by Amnesty International argued that, although the police still need to request a medical examination, the P3 form should be placed in their surgeries to make it readily accessible and available to the public. Better access to a P3 form would enable the doctor to see the victim and record the medical evidence as soon as possible, regardless of when the crime is reported. Professional associations such as the KMA told Amnesty International that a "one-stop" rape crisis centre would be able to provide a service to women victims who fear the police or who are ashamed of what they have been through, which would include reporting the crime, accessing P3 forms, and obtaining medical and counselling services.

Victims of rape have an enormous problem to persuade the police and prosecuting authorities that they were raped. Police are prosecutors in rape cases. A person accused of rape will only be convicted if the victim can prove that she did not consent to the sexual act or that her agreement was obtained through threats or intimidation. The onus is on the women to prove non-consent and makes "rape the only crime in the statute books in which the victim is also on trial and is required to have resisted the attack in order to prove her innocence."[36]

[36] "Burden of proof in sexual offence", Gender violence workshop. FIDA (K), 18-19 April 1994.

injuries sustained by women victims to the court, but this is rare and most courts prefer documentation, specifically the P3 form signed by a government doctor. When the police escort a woman complainant to a government doctor, for medical examination and completion of the P3 form, the woman often cannot be seen straight away and must wait a number of days before being examined because the doctor is too busy. Women victims have sometimes been told by the police to wash themselves after their ordeal, thus losing vital evidence. With delays in reporting and in being examined by a doctor, vital evidence can be lost. The lack of care and assistance for the victim at this time can exacerbate the post-traumatic shock that the woman may be experiencing.

Many doctors are said to be reluctant to examine women victims or fill in a P3 form, especially when a police officer is the perpetrator. Doctors regularly examine torture victims but few are called to court to give evidence. P3 forms completed by doctors are often 'lost' by the police and not produced in court. Government doctors are not allowed to keep a copy of the completed P3 form for their records. They are rarely notified about impending court cases and, without copies of the P3 form, cannot recall the case for the purposes of giving evidence.

The UN Commission on Human Rights, in its resolution on the elimination of violence against women, calls for the state to provide "access to just and effective remedies and specialized, including medical, assistance to victims."[38] Yet, the cost of a medical consultation with a doctor, plus the lack of adequate health care facilities, denies many women victims in Kenya recourse to appropriate medical care. The inaccessibility to medical services also makes it extremely hard to ensure that vital evidence is preserved. Hospitals may be far from the victim's home, and many do not have adequate facilities or skilled staff to ensure proper treatment and medical examination of women victims. The IMLU told Amnesty International that storing medical evidence is difficult as many hospitals and medical centres do not have adequate refrigeration facilities.

5.3 *Taking legal action*

Women needing legal advice about concerns such as maintenance, other matrimonial issues and inheritance usually go to non-governmental human rights or women's organizations, such as FIDA (K). In the majority of cases, domestic and sexual violence plays a major part in the women's request for action from such groups. However, local organizations report that few women victims of such violence leave their husbands or pursue a legal case against them. This is mainly because of economic dependence on their husband, high legal costs, fear of losing custody of the children and of being ostracized by family and community, and a lack of

[38] UN Doc. E/CN.4/RES/2001/49, April 2001, para 2.

Access to justice for women victims of marital rape is extremely difficult. It is rare for a case of marital rape to reach the courts, and the perpetrator is more commonly charged with assault than rape. Often courts take the view that there was some provocation by the woman and treat cases of domestic violence lightly. In August 2000 a High Court, under Justice Vitalis Juma, set free Dickson Chege Mwangi, who had admitted stabbing to death his wife, Regina Wawira, because of her alleged infidelity. The court reasoned that the accused had been highly provoked by his wife's infidelity.[40]

5.4 *Women's shelters from violence*

There are very few avenues which offer redress for women victims. The government is ill-equipped to provide services to these women when they are most urgently needed. For women who have been victims of sexual violence, there is no governmental housing to ensure their safety. Once a complaint is filed, there are few opportunities open to women who do not want to return to an abusive household or places that provide protection to women and children who have suffered domestic violence.

A small number of women's organizations have established centres which provide counselling or therapy, but they have resources only to offer temporary protection. A few shelters are now being established. For example, the Nairobi's Women Hospital offers psychological services for victims of rape and domestic violence, and the shelter established by the Women's Rights Awareness Programme (WRAP) now accommodates approximately 60 women and children. This shelter provides counselling, medical and psychiatric services, legal aid and assistance, though women can only stay there on a short-term basis.

However, the biggest problem observed by organizations that run shelters and women's organizations is that, because of women's economic disempowerment, many victims of abuse still return to their husbands. As WRAP told Amnesty International, "The silence has been broken to a degree. The women come here for refuge but still negotiate to return home."

6. SEXUAL VIOLENCE BY LAW ENFORCEMENT OFFICIALS

On 2 December 1999 it was reported in the media that a senior police officer had raped a woman after giving her a lift in his vehicle in Kakamega. Another police officer was also reported to have raped a mentally disturbed woman at Kabrasi town on 6 December 1999.[41]

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[40] *Quarterly Human Rights Report*, Kenya Human Rights Commission (KHRC), Vol. 2, No. 3, 2000.

[41] *Quarterly Human Rights Report*, KHRC, Vol. 1, No. 4, 1999.


Hadaja Choro and her son ©AI

Kenyan human rights group, People Against Torture, demanded that the Attorney General and the Police Commissioner ensure that the police officers who tortured her were arrested and prosecuted. To date, no action is known to have been taken against those responsible.

Women who are imprisoned and who suffer abuses committed by law enforcement officials often lack adequate health facilities at their places of detention and are denied medical care for their injuries. Several victims of police and prison brutality told Amnesty International that they were given aspirin for all injuries, even those that required hospital treatment. Hadaja Choro, aged 30, from Teso District, told Amnesty International that she was raped and beaten while serving a two-and-a-half year prison sentence for manslaughter. She said that female prison warders at GK Prison in Kakanuga regularly beat her, usually on the soles of her feet with sticks, and only gave her paracetemol for her injuries.


Mary Muragwa ©AI

She also told Amnesty International that she was raped by an *askari* (a security guard) on 8 March 1999, after being sent outside the prison with two other women prisoners to fetch water. "When [we] reached the gate of the Water Department [we] saw the *askari* give the woman prison warder some money." The three women were told to follow the *askari* and were threatened that if they asked questions they would be "beaten and left to die." Hadaja Choro was then allegedly raped by the *askari*. When she realized that she was pregnant, she informed the officer in charge at the prison, who told her not to tell anyone. She was not allowed outside the prison again and was kept away from the other prisoners. She explained, "If I was found with others then I would be beaten, but if I stayed alone then I was not beaten." She bore a son as a result of the rape and was released on 12 December 2000 under a general presidential pardon. Her husband divorced her because of her child and she is forced to do menial work in order to survive. Although she reported the incident to Kakamega police station she was not asked to make a formal statement. To her knowledge has there not been any investigation by the police.

One woman told Muslims for Human Rights, a Kenyan human rights organization, that officers from the General Service Unit and Administration Police had entered her house 2000 searching for guns and had put their fingers and hands in her vagina, all the while asking her

true extent of marital rape reported to the police. However, as FIDA (K) told Amnesty International, "The women with whom FIDA (K) has interacted this year, from clients at the legal aid clinic to members of the public at debates, agree that sexual and domestic violence exists. However, positions vary as to what should be done - that is, should it be reported to authorities such as the police or should it be dealt with otherwise, for example through members of the family, the Church, elders in the community or the Chief?"[46]

Women's organizations in Kenya agree that "domestic violence is the most commonly hidden form of violence, and wife beating is considered a private affair of the home."[47] Many of the women's organizations, and some of the victims, told Amnesty International that some forms of domestic violence are perceived as a form of discipline or as, one women's organization put it, "a routine chastisement". As one local human rights organization told Amnesty International, many women do not perceive being slapped as an assault. Many of the women interviewed by Amnesty International, although disturbed by the physical and psychological abuse they suffered from their husbands, did not consider sexual violence in the home a crime. It was not until the violence had become extreme that many sought outside intervention. When questioned as to why they had not sought help sooner, some of the women victims said they considered the abuse as part of a normal way of life and even as a sign of love. Women interviewed by Amnesty International gave a myriad of reasons for the abuse, ranging from their husband being drunk to accusations they were having an affair.

Annette, aged 25, was married in 1996 as the second wife of a farm manager and pastor in Misikhu, Bungoma District. In 1998 he had allegedly started mistreating her. He would come home late and quarrel with her over unsubstantiated allegations that she had a boyfriend. "He used to shout at me and wanted me to admit that I had boyfriends - he would beat me to get a confession with a cane. He also demanded to have sex with me." She told Amnesty International that, between 1998 and 2000, she was repeatedly raped by her husband but had never told anyone. Her last two children, born in 1999 and 2001, resulted from these rapes. However, her husband denied that the children were his and continues to refuse to recognize them as his own. In 2000 she was allegedly beaten so badly that she needed hospital treatment but could not afford it. In January 2001, after she was away from the house attending her sister's funeral, her husband reportedly refused to let her back. She told Amnesty International how she first turned to her brothers who convened a meeting with her husband, and when this did not work to the village elders and later the Chief of their village. The Chief gave her husband five months to think about what he would like to do, but the period expired and she has still not

[46] FIDA (K), 3 October 2001.

[47] *Violence Against Women*, Eastern and Central Africa–Women In Development Network, Trainers Manual, 1997.

allegedly paid the police to withdraw the case. She told Amnesty International, "I reported to the police station, but the police have not taken action and will do [so] only for money. When my husband comes home after I have been to the police, he beats me because I have been to the police and [he] forces me into sex, even if the children are there. Sometimes I sleep outside." After visiting the police station over three days, she was able to obtain a P3 form, which the police filled in and which was then given to the doctor in order for him to examine her. However, the case was reported to have been dropped after her husband subsequently went to see the doctor.

Women have not been to the police because they fear that their husbands can bribe them to withdraw the case. Agnes, aged 36, from Nairobi, was married in 1982 to a government employee. The violence started in 1999 when her husband married another wife. He reportedly beat her and eventually left her that same year. She did not report the beatings to the police. In 2000 her husband started providing food for the family and paying school fees for the children. However, as she told Amnesty International, "He now always demands to have sex with me about once a month, which started this year [2001]. My husband did not want me to report this to the police. He has verbally threatened me - he thinks that the police are my boyfriends. He does not hit me but continues to have forced sex with me."

Mary, aged 42, from Nairobi, has never been to the police, even though she has reportedly been beaten and raped continuously by her husband. She was "inherited" by her husband's brother in 1993, and told Amnesty International that, "He beats me and forces me to have sex and, if I refuse, he beats me again. Many times he forces me, and uses force against me." He reportedly started to rape her in 1998.She told Amnesty International that she did not go to the police as she felt they would not take any action because it was "a home affair". She said she regularly had a swollen face from the beatings.

8. CONCLUSION

The Kenya government is failing in its human rights obligations towards half its citizens. It should reform both its law and practices to end impunity for violence against women. As a general election draws near, women's rights should be a top priority on the election agenda.

It is the failure of the state to take action against such abuses, whether they are committed by state officials or private individuals, that allows them to continue. The state has a responsibility to take action in order to protect women from continuing violence. Under international human rights law the state has a responsibility to ensure adequate protection for its citizens' human rights. By enacting national legislation and ratifying international and regional human rights instruments, particularly the CEDAW, and the African Charter on Human and Peoples' Rights, the Kenyan government is obliged to ensure that the rights of both men and women are protected, respected and fulfilled. However, violence against women continues while

Legislative safeguards to protect women from violence

review, evaluate and revise laws, codes and procedures to ensure that they do not discriminate against women and to enhance their effectiveness in eliminating discrimination against women. The government should remove provisions that allow for or condone discrimination against women

S review existing laws and/or introduce new ones to prohibit all acts of violence against women, whether committed by state officials or private individuals, and to establish adequate legal protection against such acts. These prohibited acts should include acts that take place within the community or within the family, such as marital rape. The government should not invoke any custom, tradition or religious consideration as a justification for laws, procedures or policies that fail to protect women from violence

respect and promote the provisions of international and regional human rights instruments already ratified that prohibit torture and other cruel, inhuman and degrading treatment and all forms of discrimination on grounds of gender. Such instruments include:the African Charter on Human and Peoples' Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination against Women; and the International Covenant on Economic, Social and Cultural Rights

ratify the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and comply with its reporting requirements

Investigation of allegations of violence against women and prosecution

ensure that prompt, thorough and impartial investigations are conducted into all reports of violence against women, whether perpetrated by law enforcement officials or private individuals. Those responsible should be brought to justice

issue clear guidelines to law enforcement agencies stating that deterring women from reporting acts of violence will not be tolerated and insisting on the duties of law enforcement officials to investigate acts of violence against women, whether perpetrated within their family or community or in custody

further build on the capacity of the police to handle cases of violence against women effectively and sensitively. Measures to strengthen such capacity should include:

human rights perspective, and to ensure its effectiveness in the prosecution of acts of violence against women

take steps, including education and training initiatives and the elimination of any discriminatory procedures, to ensure that women are adequately represented within the judiciary

educate and train judicial officers about gender-based crimes so that they are sensitive to the needs of women victims of violence, especially women victims of sexual violence

establish effective programs for the protection of victims and witnesses called to give testimony or evidence during the judicial process; take effective measures to ensure that women are able to participate actively in such processes without shame or fear of retribution. Such measures should not be prejudicial or inconsistent with the rights of the accused and a fair and impartial trial

Adequate remedies and reparations

ensure that hospitals or medical clinics provide special units or procedures to help identify women victims of violence and provide them with medical care and counselling

provide emergency services to women victims of violence, including providing well-funded shelters for women victims of violence; immediate medical attention; emergency legal advice and referral; crisis counselling; financial assistance; childcare support

ensure that victims of violence and their dependents obtain prompt reparation, including compensation, medical care and rehabilitation

Education and awareness raising

develop policies and disseminate materials to promote women's safety in the home, in society and in custody, and to raise awareness about violence against women. The government should promote the equality of women and men

undertake legal literacy and other educational campaigns to inform men and women of women's legal and other rights and to educate them specifically about domestic violence, in accordance with Article 25 of the African Charter on Human and Peoples' Rights and other relevant international standards

HUMAN RIGHTS WATCH, "WE'LL KILL YOU IF YOU CRY": SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT

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A woman receives psychological and medical treatment in a clinic to assist rape victims in Freetown. In January 1999, she was gang-raped by seven revels in her village in northern Sierra Leone. After raping her, the rebels tied her down and placed burning charcoal on her body. (c) 1999 Corinne Dufka/Human Rights Watch

I was captured together with my husband, my three young children and other civilians as we were fleeing from the RUF when they entered Jaiweii. Two rebels asked to have sex with me but when I refused, they beat me with the butt of their guns. My legs were bruised and I lost my three front teeth. Then the two rebels raped me in front of my children and other civilians. Many other women were raped in public places. I also heard of a woman from Kalu village near Jaiweii being raped only one week after having given birth. The RUF stayed in Jaiweii village for four months and I was raped by three other wicked rebels throughout this period.

-Testimony to Human Rights Watch

"WE'LL KILL YOU IF YOU CRY"
SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT

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SIERRA LEONE

"WE'LL KILL YOU IF YOU CRY"

Sexual Violence in the Sierra Leone Conflict

Leonean women and girls may have been subjected to sexual violence in the conflict period.[101] Although these figures are necessarily no more than estimates, they do give an indication of the widespread nature of sexual violence during the war.

Human Rights Watch has primarily documented sexual violence committed during the latter stages of the war when the organization had a full-time presence in the country, beginning April 1999. This does not mean that sexual violence was at its worse during this period. Since that time, Human Rights Watch extensively documented crimes of sexual violence during the January 1999 invasion of Freetown as well as ongoing human rights abuses. Human Rights Watch has also received numerous reports of sexual violence dating from earlier in the war.

Perpetrators

Survivors of sexual violence mostly reported being raped by rebel forces, but were at times not able to identify which rebel faction the perpetrators belonged to or whether—especially given the frequent collaboration between soldiers and rebels—the perpetrators were indeed rebels or rather soldiers from the Sierra Leone Army (SLA). In addition, survivors explained that they often deliberately did not want to look at their rapists out of fear and because they did not want to make eye contact. For example, D.T., a twenty-five-year-old woman raped by four rebels, including one child combatant, said that she would not be able to recognize any of the perpetrators, as she was too afraid to look at them (see below at p. 36).[102] A. B., a thirty-year-old who was raped by two rebels, also said that:

> When you are with these people [rebels], you do not ask questions. I did not even look into their faces. Many of them rubbed black chalk on their face and when you looked at them would say, "What are you staring at?"[103]

Rebel Forces

The RUF committed crimes of sexual violence—often of extreme brutality—from the very beginning of the war when they invaded Sierra Leone from Liberia in March 1991. RUF rebels committed crimes of sexual violence in the course of their military operations, during which thousands of women and girls were abducted and forced to "marry" rebel "husbands." These abducted women and girls were repeatedly raped and subjected to other forms of sexual violence throughout the duration of their captivity, which in many cases lasted years. During captivity, these women and girls were also made to carry out forced labor, including carrying heavy loads, cooking, cleaning, etc. Many women and girls have given birth to children fathered by rebels. Especially during the early years of the war, the RUF were assisted by Liberian forces, who also committed rape and other sexual violence.

The AFRC committed crimes of sexual violence from May 1997, using the same tactics as the RUF. Sexual violence by the RUF and the AFRC continued to be committed after the signing of the Lomé Peace Agreement on July 7, 1999, and they were joined in this by the West Side Boys, a splinter group of the AFRC formed after the signing of the Agreement. An unknown number of abducted girls and women still remain under the control of their rebel "husbands" who did not want or feel able to relinquish the "families" they had founded in the bush; in many cases the abductees' own families would not have welcomed them back.

Sexual violence peaked during the rebels' military operations, which occurred countrywide as the rebels sought to capture more territory. After capturing a town or a village, the combatants rewarded themselves by looting and by raping women and girls, many of whom they later abducted. Crimes of sexual violence committed during and following military operations, such as "Operation No Living Thing" and "Operation Pay Yourself"

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[101] Ibid., pp. 3-4. PHR's calculation is not inclusive of all categories of victim: to the IDP women reporting conflict-related sexual violence, PHR added non-conflict-related sexual violence among non-displaced women, assuming a prevalence rate of 9 percent.

[102] Human Rights Watch interview, Foriah, March 6, 2002.

[103] Human Rights Watch interview, Bo, February 9, 2000.

that took place in 1998, have been documented by Human Rights Watch.[104] Human Rights Watch has also extensively documented the January 1999 invasion of Freetown by the RUF/AFRC, during which sexual violence was systematically committed against women and girls on a massive scale. The sexual violence committed during January 1999 serves as an illustration of the widespread nature of sexual violence committed by the rebel forces. Among the perpetrators were child combatants, and many of the victims were also children. Members of the Small Boys Units (SBUs) within the rebel forces were known to be particularly cruel and committed egregious human rights abuses.

Although there are no exact figures for the number of women and girls subjected to sexual violence during the January 1999 invasion, Médecins Sans Frontières (MSF) and the Sierra Leone chapter of the Forum for African Women Educationalists (FAWE Sierra Leone), a nongovernmental organization that has been treating survivors of sexual violence since 1999, provided medical treatment and counseling to 1,862 female survivors of sexual violence who had been raped and/or abducted during the invasion. According to MSF, 55 percent of these survivors reported having been gang raped and 200 had become pregnant.[105]

As the RUF/AFRC rebels controlled most of the countryside apart from pockets of government-controlled areas in the south and some key towns, including Bumbuna and Freetown, at different times throughout the war, women and girls living in these rebel-held areas were also subjected to sexual violence when the rebels went on patrol or simply sought to assert their domination over the population. Women and girls in government-controlled areas also lived in fear of rebel hit-and-run attacks, during which many women and girls were subjected to sexual violence and abducted. Women and girls residing in Freetown were "spared" until the January 1999 invasion by the RUF/AFRC.

Pro-Government Forces

Human Rights Watch has not documented any cases of sexual violence by the Sierra Leone Army (SLA) prior to the time of the 1997 AFRC coup. According to the survey conducted by Physicians for Human Rights, of seventy-five women and girls who reported having been raped and identified the rapists' affiliation, only three said they were raped by SLA soldiers.[106] This may in part be due to the fact that survivors would have often found it difficult to distinguish between the rebel factions and the SLA. With the "sobel" phenomenon, the SLA soldiers would disguise themselves as rebels (the rebels were also known to disguise themselves as members of the SLA or the ECOMOG peacekeeping force).

Human Rights Watch has documented only a few cases of sexual violence committed by the pro-government Civil Defence Forces (CDF). The CDF movement consists of groups of traditional hunters and young men organized into militia. They were initially only deployed by the government in their own chiefdoms, in order to ensure their loyalty and discipline and make the best use of their superior bush knowledge.[107] The government provided training, weapons and food to the units. The relatively small number of identified cases of sexual violence perpetrated by the CDF may be related to the CDF's internal rules that stipulate that warriors cannot have sexual intercourse before going to battle, as they would lose some of their protective powers that are bestowed on them during their initiation ceremonies. These powers are meant to make the fighters invincible and immortal. During the initiation ceremonies, the fighters are also instructed not to harm civilians, and required to take an oath to that effect. Thus, it is likely that the pro-government forces did not actually commit sexual violence on a widespread and systematic basis; however, the low number of identified cases may also be partially due to Human Rights Watch's human resource constraints, faced with the overwhelming number of abuses committed by the rebel forces. Research on the CDF was mainly conducted in the south where the Kamajors, the

[104] *See* Human Rights Watch, "Sowing Terror: Atrocities against Civilians in Sierra Leone," *A Human Rights Watch Report*, July 1998.

[105] Human Rights Watch interview with MSF, Freetown, March, 2000.

[106] PHR report, p. 48. and Table 5 on p. 52. *See* also Binta Mansaray, "The Invisible Human Rights Abuses in Sierra Leone: Conflict-related Rape, Sexual Slavery and Other Forms of Sexual Violence," June 2001. On file with UNAMSIL human rights section.

[107] The Kamajors operate predominately in the south and east, the Tamaboros in the far north, the Gbettis in the north and the Donzos in the far east. See also "Background" section.

largest and most powerful group of the CDF, are based. In recent years, as the Kamajors have been moved away from their villages of origin and the influence of their traditional chiefs, they have become increasingly undisciplined and cases of rape by Kamajors have become more common.

Peacekeeping Forces

Human Rights Watch has documented several cases of sexual violence by UNAMSIL peacekeepers, including the rape of a twelve-year-old girl in Bo by a soldier of the Guinean peacekeeping contingent in March 2001 and the gang rape of a woman by two Ukrainian peacekeepers in April 2002 near Kenema (see below). There appears to be reluctance on the part of UNAMSIL to investigate and take disciplinary measures against the perpetrators. Reports of rape by ECOMOG peacekeepers, the majority of whom were Nigerian, were rare.

Both ECOMOG and UNAMSIL peacekeepers have sexually exploited women and solicited child prostitutes.

Sexual Violence Committed by the Rebel Forces

"Virgination"—Targeting Young Girls

The rebel forces subjected women and girls of all ages, ethnic groups, and socioeconomic classes to individual and gang rape. Although the rebel forces raped indiscriminately irrespective of age, the rebels favored girls and young women whom they believed to be virgins. This was evident not only by their actions, but was also explicitly stated by them as they chose their victims. As in many countries, Sierra Leonean society places a high value on virginity. Girls who have been "virginated" and are therefore no longer virgins, are considered less eligible for marriage. M.B., a fifteen-year-old girl from Freetown, described how RUF/AFRC rebels deliberately sought out virgins for violation during the January 1999 invasion of Freetown:

> We were hiding in the mosque when two rebels dressed in civilian [clothing] entered. It was dark but they shone their flashlights looking for girls and said, "We are coming for young girls ... for virgins, even if they tie their heads like old grandmothers, we will find them." They also said that if the people did not hand over the young girls, they would open fire on all of us.[108]

Some victims explained that female rebels physically checked girls to see whether they were virgins.[109] M.W., a thirty-eight-year old nurse who was captured by the RUF/AFRC during the January 1999 invasion of Freetown and forced to treat wounded rebels and civilians, said that the youngest rape victim she treated was "a little nine-year-old from Calaba Town [an area of Freetown]. Her perineum was bleeding and had been badly torn. Every day we gave her sit baths and she eventually recovered."[110] The consequences of sexual violence for virgins can be particularly severe as these testimonies highlight, although mature women also reported experiencing similar consequences.[111]

R.T. was about sixteen when she was brutally raped vaginally and anally by ten RUF rebels in the forest near Koidu in Kono district in January 1997. R.T. developed vasico-vaginal fistula (VVF) and vasico-rectal fistula (VRF) from her brutal gang rape:

> I was hiding in the bush with my parents and two older women when the RUF found our hiding place. I was the only young woman and the RUF accused me of having an SLA husband. I was still a virgin. I had only just started my periods and recently gone through secret society. There were ten rebels, including four child soldiers, armed with two RPGs [rocket propelled grenades] and AK-47s. The rebels did not use their real names and wore ski masks so only their eyes were

[108] Human Rights Watch interview, Freetown, May 1, 1999.

[109] It should be noted that virginity can not be medically proven.

[110] Human Rights Watch interview, Freetown, October 21, 1999. The victim probably suffered from vasico-rectal fistula (a tear or opening in the tissue between the rectum and the vagina, usually resembling an open blood vessel), which would have left her incontinent.

[111] International humanitarian law prohibits all rape and other acts of sexual violence, of course irrespective of whether the victim was a virgin or not.

visible. The rebels said that they wanted to take me away. My mother pleaded with them, saying that I was her only child and to leave me with her. The rebels said that "If we do not take your daughter, we will either rape or kill her." The rebels ordered my parents and the two other women to move away. Then they told me to undress. I was raped by the ten rebels, one after the other. They lined up, waiting for their turn and watched while I was being raped vaginally and in my anus. One of the child combatants was about twelve years. The three other child soldiers were about fifteen. The rebels threatened to kill me if I cried.

My parents, who could hear what was happening, cried but could do nothing to protect me. I was bleeding a lot from my vagina and anus and was in so much pain. My mother washed me in warm water and salt but I bled for three days. I can no longer control my bladder or bowels as I was torn below. We stayed in the bush until ECOMOG took over Koidu. When we came out of the bush, even adults would run away from me and refused to eat with me because I smelled so badly. I had an operation in 2000 but it did not work. Before I got a catheter in 2001, I had no friends, as I smelled too bad. I am still in pain and have a problem with vaginal discharge. I also have nightmares and feel discouraged.[112]

This extreme sexual violence is illustrated also by the following testimony by F.B., who describes the resultant deaths of eight young girls in one Liberian refugee camp alone (no doubt many others died from similar treatment during the war). F.B.'s testimony also illustrates the RUF's connection to Liberia and the role of Liberian mercenaries in the RUF movement. F.B. was a ten-year-old girl living in Mano village in Kailahun district near the Liberian border when the RUF accused civilians in her village of helping the SLA. Her family decided to flee to Liberia in November 1991, but was fired upon by the rebels as they fled. At least fifteen civilians were killed, including her father and several women with babies on their backs:

Only six of my family survived; my mother, one brother, two sisters, one uncle, and me. After hiding and fleeing through the bush for three days, Mohammed, my uncle, found someone with a boat to help us cross over to Liberia. We crossed into Vahun where there was a sort of refugee camp. We were there for two weeks and terrible things happened. We thought we had escaped from the rebels but we found many of them there. They controlled the camp. Even though food was being air dropped, the rebels took it all. They took everything we had, our money, salt, and all our food. The rebels were mixed Sierra Leoneans and Liberians.

About a week after arriving, the rebels came into our house in the evening and took my fifteen-year-old sister away. My mother stayed up the whole night. The next day my uncle went from hut to hut looking for her. He called her name and heard her groaning inside a hut. He picked her up and carried her home. When my mom saw her she burst out crying. I was only ten and didn't know anything about man business. My sister was crying all the time and couldn't walk. She cried, "Oh mother, I'm going to die." My mother just held her and told her it would be O.K. My uncle exchanged five gallons of palm oil so we could get some salt, which my mother later mixed with water and had my sister sit in. She was bleeding a lot. She told me they had tied her mouth and raped her many times, but I didn't know what rape was.

After that my uncle shaved my head, gave me trousers and made me look like a boy. When I was walking around a camp I saw a few girls aged under twelve years old, lying on the ground with their legs spread open and blood coming out between their legs. Some had their dresses pulled up and others had cloth stuffed in their mouths. During the two weeks I was in Vahun I saw eight girls like this. Sometimes their family would come and wrap them in white so I knew they had

[112] Human Rights Watch interview, IDP camp called "Lebanese Camp," March 2, 2002. Women and girls with obstetric fistulae suffer from a constant wetness that results in genital ulcerations, frequent infections and a terrible odor. These fistulae generally require surgery although occasionally they spontaneously heal.

died. Other times no one picked them up and they stayed there for days until someone buried them. There were so many girls who had lost their parents and were there alone, so no one would come for them.

I saw the rebels catching young and even older women. Once they caught an old woman. She said, "No, leave me. I'm too old for this business." But they made fun of her saying, "Oh look, we have caught a young *Bundu* [initiate into secret society] girl here." Other times I heard women screaming in the middle of the night. Everyday people were dying—from hunger, illness, and this rape. After that I had dreams about a dead person coming to hurt me.

The only reason we stayed that long was because people were still moving across the border and we figured things were even worse in Sierra Leone. Besides, the rebels stopped us from going back home, and we did not know anyone in Liberia so we would have died of hunger.[113]

M.M. was only eleven when she was abducted, together with her aunt and her aunt's four children, when Koidu was attacked during the dry season[114] in 1994. M.M. had not yet experienced her first period or been initiated into secret society:

I was raped by seven child combatants, who were aged between fifteen and sixteen years old, on the way to Kailahun. I was raped in my vagina and anally. Other rebels and also civilians saw me being raped but the civilians were too afraid to protect me. My aunt put native herbs on my genital area but I bled for five days. The RUF had medicine but would not give it to us civilians. My aunt carried me on her back, as I could not walk because of the pain. It took us five days to reach Kailahun. A rebel commander wanted my aunt to be his wife but she refused so he killed her. In Kailahun, I was not raped again. Since my rape, I have only experienced irregular periods and my belly is always swollen like I am pregnant.[115]

M.F. was abducted from Koinadugu town in Koinadugu district in September 1998 when the RUF/AFRC attacked the town. She was only thirteen at the time and was brutally raped both vaginally and anally by five RUF rebels. During the same attack, the RUF killed over thirty older women:

I was only thirteen and a virgin. They forced me to go down on my hands and knees with my bottom in the air and raped me both vaginally and anally. Five rebels raped me on that first day. My clothes were bloodied and it hurt to urinate and defecate afterwards. The rebels who raped me promised to take me to Freetown and give me money and dresses. They gave me nothing after they used me. I was given to one of them, Mohammed, as his wife. We stayed in Koinadugu town for four days. I was with my parents but could not tell them about the rapes although my mother heard me being raped.

The RUF said they came to kill civilians who were ungrateful and talked bad about the RUF. The RUF cut my grandmother with a knife and beat her with a pestle. She died. The RUF told the older women to go to the mosque to attend a ceremony. More than thirty women, some of whom had children, went to the mosque. The RUF set fire to the mosque. Another old woman was rolled into a mat and the mat was set on fire.[116]

[113] Human Rights Watch interview, Bo, February 9, 2000. *Bundu* is one of the secret societies that initiate girls and perform female genital cutting.
[114] The dry season in Sierra Leone is approximately between November and May.
[115] Human Rights Watch interview, Lebanese Camp, March 2, 2002.
[116] Human Rights Watch interview, Kabala, March 7, 2002.

Rape Victims Subjected to Multiple Human Rights Abuses

Rapes were often preceded by or followed by other human rights abuses against the victim, her family members and/or her community. Hardly any family was unscathed by abuse during the war. The PHR report highlighted that 94 percent of the 991 female-headed households surveyed had experienced at least one serious human rights abuse during the ten-year period.[117] M.P., who was twenty-four years old when the RUF attacked Jaiweii village in Kailahun district in May 1991, testified:

> I was captured together with my husband, my three young children and other civilians as we were fleeing from the RUF when they entered Jaiweii. Two rebels asked to have sex with me but when I refused, they beat me with the butt of their guns. My legs were bruised and I lost my three front teeth. Then the two rebels raped me in front of my children and other civilians. Many other women were raped in public places. I also heard of a woman from Kalu village near Jaiweii being raped only one week after having given birth. The RUF stayed in Jaiweii village for four months and I was raped by three other wicked rebels throughout this period.
>
> The rebels, who spoke Liberian English, said they were fighting for the SLPP to be in power. When the RUF first entered Jaiweii, they accused my husband of giving information to the SLA, so they tied his hands behind his back and beat him mercilessly. They kept him tied up and continued to beat him. After six days, he died and they threatened to kill me if I cried. The RUF also shot three other men whom they accused of giving information to the SLA. My three children all died because they became sick and there was no medicine. The older one who was five years died one week before the two younger ones who died on the same day. They were only three and seventeen months old.[118]

M.P. added that the RUF had said that they could do whatever they want with women whom they "owned." A.J., a fourteen-year-old student, was abducted by the RUF from Pujehun and was held by them from February to May 1994. She was first tortured, caged, and then brutally raped:

> On February 3, 1994 at around 8:00 p.m., the RUF attacked Pujehun. There was lots of firing because the SLA was deployed here. As we were fleeing, we ran straight into a group of over one hundred RUF. They were dressed in civilian clothes and nearly all had guns. Among those rebels was one named Maliki, who was actually from Pujehun. RUF Commander Bai Bureh started to select several people from our group. As he was doing the selecting, Maliki told him to choose me because if they let me go, I would go back to Pujehun and tell the SLA that he was there. They chose eight of us, four young men and four young women, including three of my cousins. They told the rest of the civilians to go back into the bush and said that if they found them the next day they would be killed. We were taken to their camp.
>
> Two weeks later, the four young men managed to escape. When the rebels found out, they blamed us for what happened. They said the boys were really SLA solders that were there to get information on the RUF. I was then tortured by a Liberian RUF commander named C.O. Rackin. He said I was "bright and bold" and must have known how they escaped. He interrogated me, asking me if the boys were SLA's. During the interrogation he cut me in twenty-one places with a knife including a deep cut on my left breast. He drew a small, small circle in the dirt and told me to step inside and walk around in it. Any part of my body left outside he stabbed with a knife.
>
> Then a commander called Momoh Rogers, who was the battalion commander, ordered that my cousin and I be put in a wooden cage smaller than one square meter. He said that if our brothers

[117] PHR gave the following examples of serious human rights abuses: beating, bodily injury, amputation, torture, killing, forced labor, captured for less than one day, sexual assault without rape, rape, abduction, burned dwelling, looting. PHR report, pp. 45-47.

[118] Human Rights Watch interview, Lebanese IDP Camp, March 2, 2002.

who had gone to tell the SLA came to attack, it would be very easy for them to kill us. The cage was what the village people used to store their husk rice in and it had almost no ventilation. We were only let out to defecate. They told me I had to pee on myself in the box. They poured water into the cracks but it was never enough and was dirty. Sometimes they dropped cassava and boiled bananas into the cage, feeding us like we were animals. The stab wounds I had got infected and I got sores all over my body. They were painful and smelled very badly.

After about two weeks in the cage, one of Patrick's bodyguards took me to C.O. Patrick's house. When I saw him, I told him about the sores on my feet and breasts. I told him I was in pain and asked for treatment. C.O. Patrick told me to shut up and ordered me to go into the house. He turned to his bodyguard and said that if I refused, I was to be taken behind the house and executed. When we got inside, Patrick told me to lie down on the floor. Then he forced himself upon me. I was a virgin. He was violent and rough. Then he told me to turn over and give him my behind. But I told him I could not lie down because my breast was so swollen. So he brought a chair and told me to stand up and lean onto the chair. Then he stood behind me and tried to shove his penis into my vagina. The first time he did this I fell over onto my chest, which was so painful. I started bleeding from my chest wound. Then he told me to get up and said if I did not hold the chair firmly he was going to kill me. He took a long time doing that thing to me. I was crying from the pain of my breast and because it was painful, being the first time. He told me to shut up. As he was sexing me he accused my brothers of being spies and said he was going to kill me and that he was only waiting for the others to come from the frontline to do it.

C.O. Patrick asked if I had done sex before and I told him "No, I am a school-going girl." Then he said, "Well, tonight you are going to have sex, because you are going to be killed and you should do it before you die." I was terrified. I started crying. All I could think of was my death and all that guy could do was do that thing to me. After he was satisfied, I was taken back to the cage.[119]

A.M. was eighteen when she fled Freetown with her two children, two sisters, and brother after the 1997 AFRC coup. Not only was she first forced to watch the execution of three male civilians by Nigerian ECOMOG soldiers in Fadugu, Koinadugu district, but also the rebel execution of her brother and sister. The RUF tried to get her to eat her brother's liver and heart. Her sister's head was also placed on her legs:

After the rebels were driven out of Kabala by ECOMOG, the rebels spread to different towns, including Mongo, Badela, and Dankawali. One day I went with my brother to wash in the stream, as I was afraid to go by myself. We heard shots, which my brother thought must have come from ECOMOG soldiers. I was afraid. We met three rebels with guns who accused my brother of being a SLA soldier. "Superman" was the commander. They beat my brother with their gun butts and took off his clothes. "Superman" forced my brother to go down on his hands and knees and made me sit beside him. They cut his neck from the back and then took an axe and cut his back. They removed his heart and liver and put them on my hands. The heart had more shape and the liver was flat. They tried to force me to eat them but I refused to. Another rebel, Colonel Titus, a mercenary who spoke Liberian English, arrived and told the others not to force me to eat my brother's heart and liver. He said he would show me how they will deal with me. He said they should abduct me. They took me back into the village of Dankawali where we met my grandmother on her veranda. She was tied up and she said that another rebel commander, Hakim, had carried my two children and small sister away in the first group.

The rebels had abducted another group of twenty-five persons and held them by the cotton tree. My big sister was under the cotton tree. I told her that the rebels killed our brother. Colonel Titus slapped my sister and told her not to cry. They killed my sister and two other women and placed

[119] Human Rights Watch interview, Pujehun, February 12, 2002.

> their cut off heads on my legs. The rebels also locked some villagers in the houses and set all houses on fire.[120]

H.K., a sixteen-year-old student, was abducted from Freetown during the January 1999 invasion. She was taken to Makeni where she was "virginated" and forced to be the wife of Colonel "Jaja," a twenty-two-year-old half-Liberian who threatened to kill her entire family if she escaped. H.K. was brutally tortured after Colonel "Jaja" accused her of stealing his money, which was in fact taken at gunpoint from her by "Superman," a notorious rebel commander and his bodyguard called "Yellowman." She described what happened afterwards:

> Then the rebels took me into a stream and tied me to a tree in the water. They told people to beat me. I was in water up to my head. "Jaja" said the boys should cut down the tree and let me drown. I was there for several days, maybe up to a week or so. Once a water snake swam by and ate my foot in the water. When I was tied there, Jaja cut my neck and put cocaine into my body. He also gave me marijuana cigarettes to smoke. Finally he untied me and put me in an old container where I stayed for several days. While in the guardroom Jaja and Alhaji "Cold Boots" came several times to give me drugs.[121]

The rebels often used psychological torture against civilians by, for example, making them clap or sing in praise while watching family and friends being killed, raped or mutilated. They further exerted their domination over civilians by not allowing them to show any emotion, and threatening to kill anyone who did. In 1997, when K.M. was abducted by the RUF from Kabala in Koinadugu district, her brother was shot in front of her. The RUF accused him of planning to escape. She was not allowed to show any emotion and was forced to throw his body in the river. In 1999, K.M.'s husband was killed in front of her by RUF Captain Solvelar in Yomandu in Tonkolili district, when a child combatant accused her husband of not doing his job properly. As Captain Solvelar shot K.M.'s husband, he warned her not to cry otherwise she would be killed. Later in the same year, K.M.'s baby was killed in front of her in Kambia district by a rebel captain who wanted to rape her:

> Captain "Danger" pulled my baby from my back and before I could do anything, he sliced my child in two. I was told not to cry as otherwise I would be killed as well.[122]

Rape with Objects and Other Sexual Torture, including Sexual Mutilation

The rebels frequently used objects, including weapons, burning wood, and hot oil, to rape or otherwise torture (including sexually torture) women and girls, sometimes resulting in their death. In 1994, J.M., an elderly man from Giehun village in Kailahun district, witnessed the killing of nine civilians accused of plotting to set Foday Sankoh up for a government ambush. One of those civilians, a woman named Janneh, was alleged to have been one of Sankoh's "wives." J.M. described how rebels brought her into the village square, forced her to lie down and then poured boiling palm oil into her vagina and ears:

> The RUF rounded up about seventy of us civilians, including Abi and Janneh, and accused us of making a plot to arrest Sankoh. The commmander said we were to be killed but that first he would do an investigation. First he called upon Abi who accused Janneh of calling people in Freetown to arrange something against Sankoh. So Janneh was the first to be killed. The rebels grabbed her, stripped her and threw her down in front of the whole village. Several of them pulled her legs apart and held her tightly. They poured a pan of boiling palm oil into her vagina and then into her ears. This terrified us. She started shaking all over and was bleeding from the nostrils and mouth. While on the ground they struck her with a gun and danced around her saying, "When you were loving with the old man [Sankoh], you didn't show us any respect, but now your time for punishment has come." She died about an hour later. The rebels said they were sent by Sankoh who was living in Kailahun about seven miles. Nothing small or big happened without his

[120] Human Rights Watch interview, Kabala, March 9, 2002.
[121] Human Rights Watch interview, Freetown, October 12, 1999.
[122] Human Rights Watch interview, Kabala, March 7 and 9, 2002.

knowledge. After killing Janneh they poured hot oil in the mouths, eyes and noses of three other villagers, and then shot five others. I guess Janneh must have known all of Sankoh's secrets.[123]

M.F., the thirteen-year-old who was raped by five rebels (see above, p. 30), witnessed how her stepmother's mother was beaten by the RUF with a long pestle in Momoria village in Koinadugu district in 1998. The rebels then shoved the pestle into her anus. M.F. said that her stepmother's mother was still alive when they left her with the pestle in her anus, which was bleeding.[124] One woman also reportedly had pepper put in her vagina as the RUF suspected her of being the wife of a SLA soldier. Rebels inserted burning firewood into the vagina of twenty-five-year-old F.T. and another woman during the January 1999 invasion of Freetown:

> On 21 January 1999, I went to a neighbor's house to buy rice, as I had not eaten for over two days. The rebels had been in the area and as I bought two cups from my neighbor, we heard the rebels coming again. My neighbor told me to leave quickly so that he could lock up his house. When I left with another woman and a man, we met a group of ten rebels who surrounded us. They were dressed in full combat [uniform] and asked us where we were going in Krio.
>
> The rebels asked us what we could give them, so the man took out all his money and gave it to them. He was then allowed to go. As the other woman and I did not have any money, they told us to take off our clothes at gunpoint. We begged them not to harm us. The rebels then told us to lie on the dirt ground and open our legs. They put their guns to our throats and stomachs to make sure that we followed their order. Once we were on the ground all the rebels surrounded us, and a tall rebel well over six feet went to the kitchen of Parliament House and took a piece of burning firewood from the fire. He then squatted down and with his two hands inserted it into my vagina. Then he returned to the fire and got another piece and then a third. I felt like I was being stabbed inside.
>
> He did the same to the other woman. While they did this to us, I heard them say "This is the way we are going to fuck you. We are not able to do to you half of the things we do to people in the provinces. You bastard civilians, you hypocrites; as soon as you see ECOMOG, you start to point fingers at us."
>
> They left shortly afterwards and I managed to drag myself to a nearby house with blood gushing from my vagina. I went to a clinic where the doctor removed bits of firewood from my vagina. I feel so unhappy and fear my husband will find another wife to satisfy his sexual desire. The treatment is very slow and I do not have money for treatment. There are sores inside me. I can not sleep at night or walk more than one hundred yards.[125]

H.K., the sixteen-year-old Freetown student forced to be the wife of Colonel "Jaja," had an umbrella shoved up her vagina as part of the torture that followed her being accused by "Jaja" of stealing his money:

> When Jaja came home, I told him what happened and instead of believing me, he blamed me and accused me of having stolen the money. He dragged me out of the house into the street and started beating me. He caused a great scene. He stripped me, tied me up and hit me again and again with a stick. He also beat with the butt of his gun. Then he took an umbrella and pushed it up inside me two times—he shoved it up into my privates—hard. Many people were standing around watching and even some of the other rebels told him to leave me. He went crazy. He started shooting up in the air. I lay there for a few days, naked and bleeding. I was three months pregnant but after this I aborted. I bled for over a month. Once a boy named Junior came by and put his hand inside my vagina. He brought out his hand, which was all bloody and said, "Look at

[123] Human Rights Watch interview, Freetown, November 11, 1999.
[124] Human Rights Watch interview, Kabala, March 7, 2002.
[125] Human Rights Watch interview, Freetown, May 21, 1999.

your blood, you're sick." All the civilians seeing this felt sorry for me, but of course they couldn't say anything.

Rebel forces were known for mutilating pregnant mothers to find out the sex of the unborn child. According to witnesses, they would bet large sums of money, and the rebel who had rightly guessed the sex of the unborn child after the women's belly had been cut open would keep the money. Some women were cut open alive, but sometimes the women were killed before the rebels cut their abdomens open. K.M. who was abducted during the 1997 attack on Kabala, witnessed the killing and sexual mutilation of a pregnant woman near Kono in Kono district (see above):

> They captured a Koranko woman who was pregnant. Two RUF, Captain "Danger" and C.O. "Cut Hand" argued about the sex of the child. They bet 100,000 leones [approximately U.S.$50] on the sex of the child. Then they shot the woman dead and opened her belly. The RUF held up the baby with the placenta, which they shook in the air. The baby cried and then died. I wanted to run away but my husband said that the civilians would think that I was a rebel and that they would kill me.[126]

Fifteen-year-old F.K. was raped by the RUF in Lunsar in Port Loko district in May 2000 and witnessed the sexual mutilation of a pregnant woman as well as the killing of her three male relatives, and six amputations:

> I was raped when the RUF attacked Lunsar in May 2000 by four rebels including one man called "Put Fire," who had made me his rebel wife from 1997 to 2000. One of the other rebels was called "Kill Man No Blood." While I was being raped, the rebels found my three male relatives who were hiding under their beds. They stabbed them with their bayonets and then shot them. They raped me in my bedroom and then brought me into the living room. Three men and three women were also brought into the room. They were put in line and then the rebels gave them the choice between their life or their money. The rebels strip searched each one and then killed them on the spot. The group was forced to watch as each was killed.
>
> One of the women was six months pregnant and slightly disabled. She was last in the row. When it was her turn, she was stabbed in the neck and fell down. The rebels started to discuss whether she was carrying a boy or a girl. They bet on the sex of the baby so they decided to check it. Kill Man No Blood split open her belly. It was a boy. One of the other rebels took the baby out and showed everyone that it was a boy. The baby was still alive when he threw it on the ground next to the woman but died shortly after. As the rebels took me away, I saw six men who had just been amputated. Some had an arm cut off below the elbow, others above the elbow. They were screaming, "Please kill us, don't leave us this way."[127]

Sexual Violence with the Added Element of Violating Cultural Norms

The rebel forces have used sexual violence as a weapon to terrorize, humiliate and punish, and to force the civilian population into submission. The rebels sought complete domination by doing whatever they wanted with women, including sexual acts that, by having the additional element of assailing cultural norms, violated not only the victim but also her family or the wider society. The rebels have forced civilians to commit incest, one of the biggest taboos in any society. One survivor witnessed the RUF trying to force a brother to rape his sister in Sambanya village in Koinadugu district. When the brother refused to do so, the rebels shot him.[128] Fathers were forced to rape their daughters. Fathers were forced to dance naked in front of their daughters and vice versa. In Sierra Leone, postmenopausal and breastfeeding women are presumed not to be sexually active, but rebels violated this cultural norm by raping old women and breastfeeding mothers. Child combatants also raped women who could have been their mothers or in some instances even their grandmothers. Many rapes were committed in

[126] Human Rights Watch interview, March 7 and 9, 2002.
[127] Human Rights Watch interview, Freetown, May 25, 2000.
[128] Human Rights Watch interview, Kabala, March 9, 2002.

full view of other rebels and civilians. Victims were also raped in mosques, churches, and sacred places of initiation.

During the January 1999 invasion of Freetown, A.C. was forced to watch the rape of his daughter by RUF/AFRC rebels:

> The rebel in charge was a thirty-year-old ex-SLA known as "Amos." I knew him from before. He had plasters on his face. The others were called "Junior" and "Blood," who did most of the talking. They gathered five young girls together, including my fifteen-year-old daughter, and put them in the back room. They asked us for five million leones [approximately U.S. $2,500] otherwise they threatened our girls would be killed. We managed to collect 350,000 leones [approximately U.S. $175], which we gave to them.
>
> Then they brought out the girls. They pushed my daughter and a seventeen-year-old on the bed in the parlor and started tearing off their clothes. I peeked through a crack in the door and could see them fighting with my daughter. They put clothes in her mouth so she would not scream. The rebels punched, slapped her and knocked her head with the butt of their rifle. Then one of them opened the door and asked who the fathers of the girls were. One of them took us and lined us up right in front of the bed and said, "Don't you want to see what we do to your daughters?" We begged them to leave them alone but they said, "If you continue to talk, we will burn this house and kill everyone of you." A rebel had his gun pointed at us the whole time and there were two more at the door. Amos raped my daughter and Blood raped another girl. Then the rebel with the gun and the one guarding took their turns. My daughter was crying but they covered her mouth and told her to shut up. Blood then told the girls to get dressed and they took them away.[129]

S.G., a fifty-year-old widow, was raped by a teenage rebel called Commander "Don't Blame God" and subsequently had both arms amputated in Mattru village in Bo district prior to the 1996 elections:

> I pleaded but Commander Don't Blame God said he was going to kill me if I didn't lie down. I told him it had been such a long, long time since I had sex. During the rape I was pleading with him saying, "Don't kill me, please don't kill me." He was so rough with me. Then he took me up a big dune above Mattru village. As we were walking, he said he was going to kill me. I pleaded with him and he then said, "I've changed my mind, I'm going to give you a letter." Once we got there I saw many more rebels, about twenty. I was stripped naked down to my underwear. It was humiliating. Then they asked me to sit down and wait. Commander Don't Blame God said: "I have a letter for you but wait for the cutlass man to come." Then the one with the machete came and told me to put out my left arm. It took them three chops with the cutlass to cut off my arm. After this I begged them not to cut my other arm but they struggled with me and a rebel held it down and cut it off. The cutlass man said, "We belong to Foday Sankoh's group." Then one of them took my left arm and put it under my vagina and kicked me twice in the vagina ... very, very hard.[130]

D.T. was gang raped by a child combatant and three other RUF rebels in the rainy season in 2000 near Foriah village in Koinadugu district:

> I was hiding in the bush from the rebels with about fifteen other villagers when the rebels found us. The rebels separated me from the others because my nine-month-old son was crying. A child combatant ordered me at gunpoint to put my son down. He then raped me. I do not know how young he was but he had not yet been circumcised. He was maybe as young as twelve. Then three other rebel men raped me. When I was being raped, I made no movement as they might think that

[129] Human Rights Watch interview, Freetown, May 3, 1999.
[130] Human Rights Watch interview, Bo, March 2, 2000.

> I was trying to resist. I was bleeding after being raped by four males. After being raped, the rebels forced me to carry a heavy load and walk to Kania town. I escaped the same day and returned to the farm. I explained to my husband that I had been raped but he was happy to accept me back.[131]

R.F., a thirty-three-year-old farmer, explained how she felt after she was gang raped by West Side Boys, including four child combatants, at Petifu village in Port Loko district in November 1999:

> Four children between ten and twelve years used me. They were so small I could barely feel them inside me. The small ones tried to imitate the older ones and one of them kept saying, "I'm trying it, I'm trying it." It was the war that brought that humiliation. I kept comparing them to my own children; my first-born son is ten. I forgave them because they are children. It was not of their own making. They must have been drugged.[132]

In December 1994, thirty-year-old A.B. was abducted with six other women from Yonibani in Tonkolili district by the RUF when they launched a surprise attack with the collusion of the SLA. The RUF made the women carry looted items to their camp, where A.B. stayed for a week before escaping. She herself was repeatedly raped by two rebels, including one Liberian, and witnessed the rape of an old woman with gray hair:

> At least four of the women I had been abducted with were raped. Before they raped me, the rebels went for an old woman with white hair. When she realized what they wanted, she took off her headscarf to show her white hair and said, "I'm old, I have stopped having sex." At first the commander said the rebels should not touch her because she was old. But the other rebels got annoyed and started insulting the commander saying, "Fine, you can fuck any woman you want, anytime you want, but now that we have one we want, you say no." The commander finally said that they could go ahead so all five rebels, including a small boy of fifteen years raped her. One was on his knees with his trousers down while the others stood around watching.
>
> When I saw that I felt sick. When I saw a young boy and that old woman, I realized they could do anything and that they were going to do the same thing to me. But I guess I was lucky as only two did it to me.[133]

S.J., a wealthy forty-five-year-old woman, was raped by RUF rebels, including a child combatant, and then burnt in late January 1999 in Manjoro village in Bombali district:

> Thirty rebels attacked our village. The rebels said that we, the civilians don't want peace. I saw them kill three people and were it not for God, I would have been the fourth. Then they burned thirteen houses and looted all our things. I ran with my four children to the house in the bush where we tend to the cows. We slept there with the cows for a few days but then seven rebels surprised us there. The commander of this group was called C.O. Caca Scatter. He was a Mende. Others were speaking Mandingo and Temne.
>
> They started stealing what few possessions I had and then C.O. Caca Scatter said that I should be raped. When I heard that order I pleaded, "Please, don't do that one to me." But they said they would do whatever they wanted. Four raped me and the last one to rape me was a fifteen-year-old. I could have given birth to him, he was so young. He put a knife to my throat and said he was going to kill me but the C.O. said I shouldn't be killed.
>
> Then they tied my hands behind me and C.O. Caca Scatter burnt me. He scooped up hot charcoal from the fire we had been cooking with and tried to burn my face with it. I struggled and turned

[131] Human Rights Watch interview, Foriah, March 6, 2002. The rainy season starts in May and ends in October.
[132] Human Rights Watch interview, Port Loko, November 27, 1999.
[133] Human Rights Watch interview, Bo, February 9, 2000.

> my face so he burned my chest instead. He did this four times on my front and seven times on my back. Each time they picked up the charcoal and held it on my body until it burned deep into my skin. They left me with my skin burning but I could not roll on the ground for fear it would catch fire and burn me even more. When they started to burn me I pleaded for them to kill me. I started screaming and my children came around to try and save me. They took two of my children, gave them looted property to carry and took them away. That is the last I have heard of them.[134]

T.B., a fifty-year-old woman was abducted from Freetown during the January 1999 invasion and made to walk to Magburaka in Bombali district. There, a RUF/AFRC rebel raped her until she developed an abscess in her vagina:

> In Magburaka, I was first raped by three rebels. While doing it they called me a bastard child and that civilians wanted to burn them all alive. After that I was taken as a wife by a commander called "Bird Bod" who was in his thirties. He raped me every day. They were always on drugs. He said he didn't have a wife so I cooked and washed for him. He roughed and beat me and used to put his fingers violently up inside me. He would get an erection while he was doing this and would sometimes rape me afterwards. I think this is how I started to get boils—I had five or six of them. It started to create an ulcer. Over the two months I was with them it got worse and worse. It was terribly painful but Commander Bird still raped me and put his fingers up me even though I had this problem. I don't know why the RUF would treat an old woman like me in such a way.
>
> The abscess got very swollen and started to hang down between my thighs. I could barely walk. It started to smell very bad and it was then that the commander finally drove me away. I walked for two to three weeks through the bush going from village to village until I got to Masiaka. In every village I went, the women felt for me and would give me food and make a bath of herbs and salt for me to soak in. Then when I felt strong enough, I would walk to the next village. When I reached Freetown, I received medical treatment. My husband has accepted me back and feels sorry for me.[135]

Breastfeeding mothers were also not spared by the rebel factions even though in Sierra Leonean culture, women are not supposed to have sexual intercourse until their children have been weaned and can walk, which can take up to three years.[136] Sierra Leoneans believe that doing so will weaken the breast milk and the ability of the child to fend off infection. Women whose infants died from malnutrition after they—the mothers—had been raped frequently attributed the death of their child to the fact that they had been raped. It is also a specific crime for a man to commit adultery with another man's wife while she is breastfeeding. Traditionally, the guilty spouses are thought to be under a curse and will suffer misfortune.[137] A.B., who was raped by two rebels and witnessed the rape of an old woman, tried at first to dissuade the first rebel from raping her by telling him that she was a breastfeeding mother with full breasts, but the rebel said he did not care.[138] M.C. was breastfeeding her two-week-old baby when she was brutally gang raped by RUF/AFRC rebels in early January 1999 near Mabang in Tonkolili district; she breastfed her baby while being raped. She suffered a prolapsed uterus[139] as a consequence of the rape:

> At the time of the January 1999 offensive, my husband who is a policeman was based in Mile 91. I became very worried about him and decided to travel to find him. I left Bo on January 8. I had just given birth to a baby girl two weeks before so was still feeling very weak but I desperately wanted to find my man.

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[134] Human Rights Watch interview, Freetown, September 17, 1999.
[135] Human Rights Watch interview, Freetown, July 8, 1999.
[136] Mariane C. Ferme, *The Underneath of Things: Violence, History, and the Everyday in Sierra Leone* (Berkeley: The University of California Press, 2001), p. 131.
[137] Joko Smart, *Sierra Leone Customary Law*, pp. 127-8 and 131.
[138] Human Rights Watch interview, Bo, March 2, 2000.
[139] A prolapsed uterus is a condition in which the uterus drops from its normal position. In severe cases, such as those that may be associated with injury from sexual violence, the cervix and uterus may protrude beyond the vaginal opening.

I arrived late in the evening. Then all of a sudden we heard firing. There was confusion and armed rebels captured me. They took me to their bush camp in a place called Mabang. They started sexing me two days later. I tried to fight and told them to leave me, but several times they put a pistol into my vagina. I gave myself up to God and asked that he save me. The first day, about ten sexed me. After the first day there were fewer men, between three and six a day. Every day they came and stood in line waiting to rape me. All together there were over thirty different men. They were aged between seventeen and twenty-five years old. The younger ones were rough and most of them seemed to be on drugs. I think these were RUF people. Most of them seemed to be Mendes. I saw many young girls in their camp. I guess the lucky ones only had one rebel. But I'm from Bo and wouldn't allow myself to be together with one of them. I told them I wasn't a Kamajor and that my husband was a policeman and they said, "Oh policemen are our enemies ... we've killed them all. Forget about your husband."

Sometimes they tied my legs to my arms with my legs spread and raped me one after the other. They said since I was from Bo and I was a Kamajor's wife that they were going to rape me to death. [Sometimes] I held my baby Hawanatu in my arms while they were raping me. When she cried they said they wanted to shoot her so I gave her the breast.

They raped me for two or three weeks and then in early February, my vagina came out [i.e. she suffered a prolapsed uterus]. It was so, so painful. I can't tell you how much it hurt. When this happened, I thought I was going to die. In order to get it to go back in I had to lie down and push it back in. To urinate, I had to lie down. They provoked me and made fun of me. They said now my Kamajor husband will not be able to have sex with me. A wife of one of the commanders told a villager to help me escape which they did. He took me to a nice woman in another village away from the rebel area and after explaining my problem, she helped me so much. She gave me herbs and tried to cure me and my baby who by that time was vomiting and very sick. It's only God that helped keep my little Hawanatu alive. He decided that this little child is mine to keep. Later, when I was stronger, I made it to Freetown and had an operation for my prolapsed uterus. I feel much better now.[140]

Rebels also raped pregnant women. In polygynous marriages, pregnant women generally stop having sexual intercourse with their husbands once their pregnancy has been confirmed, to protect the fetus. R.F, the thirty-three-year-old farmer gang raped by West Side Boys at Petifu, Port Loko, in November 1999 (see above, p. 39), was six months pregnant at the time. As the result of the gang rape she delivered prematurely, causing the baby's death:

I went with Isatu, her husband and my five-year-old son to harvest rice in Isatu's village, Petifu. We traveled by boat and at night to avoid the rebels. When we were resting having worked all the next day, we heard the rebels. They were all over the village and told us to give them our rice and palm oil. Several of them started hitting me on the head with their guns. Three were wearing uniform, the others wore civilian clothes. They spoke all different languages.

One of them tied a rope around my waist like a goat and pushed me out of the door screaming, "Show me where your people are." My little boy was left sleeping on the bed. Seven of the rebels then led me about a mile out of the village, screaming at me to tell them where we had hidden the rice and palm oil. I told them I was a stranger there but they did not believe me. They took me into a small farmhouse where they all used me. This went on for a few hours until the cloth I was lying on was soaked. I could barely walk. Then they ordered me to get up and dragged me like a sheep back to the village.

[140] Human Rights Watch interview, Freetown, September 5, 1999.

> Once back in the village, they put me in a house and more of them started raping me. I was used by at least twenty rebels. I think the whole unit raped me throughout the night. The only one who did not use me was the commander. He kept coming in and saying, "Have you had your turn?" He was the one they kept calling "Commander."
>
> When one of the Temne speaking rebels was raping me I said, "Please brother, talk to these people and ask them to leave me." But he said he could not do anything. Another rebel pulled out a knife when he was on top of me and said if I said anything he would kill me. I told them I was pregnant and said, "Can't you see? I have a six month belly." But they said, "We do not care. We see your belly but so what." Two of them told me to stoop down, but I couldn't and they just pushed me down and used me. After many had used me one of them said, "Oh, there is no more sweetness there," so they turned me over and did it to me from behind. Three of them did it to me like that, and now when I go to the toilet it is so painful; I am still bleeding and it feels like my insides are coming out. One rebel had sex with me several times. He said he was punishing me for not having shown him where the rice and palm oil was hidden. I yelled for the commander and complained, saying, "He wants to kill me, tell him to leave me!" but he said, "We have killed others that are better than you." I did not complain after that. They kept saying they were about to stop fighting—that they really want peace and that after peace comes, they won't do these things any more.
>
> In the early hours of the morning, they finally left. They wanted me to carry their looted items but I could not walk. They took other people whom they used to carry the looted goods. At one point I tried to get up but could not, I slipped and fell down to earth. By this time I had started bleeding. I felt my baby trembling in my belly. A few hours later the water broke and then I started to have contractions. I have five children and had never even had a miscarriage. I had about three hours of labor before giving birth. The little thing shook for a minute or so and then it died. It was so beautiful; it had fine hair and the face was so pretty. I wrapped it with a cloth. I could not bear to look whether it was a boy or a girl. I was gushing out blood and shortly after I delivered the placenta. I felt dizzy. I was barely able to walk.
>
> Later when I had a little more strength I covered my baby and threw it in a pit latrine. I felt so bad for throwing it away like that but I did not have the strength to bury it properly. After thinking everything over, I am only angry at this war and thankful that I still have my life and that the life of my child [her five-year-old] was spared. It's only God that saved him. He was lying on the bed the whole time.[141]

Forced Pregnancies

Many women and girls became pregnant as the result of the rape(s) they were subjected to. Although some women were reportedly able to abort without the knowledge of the rebels using traditional herbal treatments, the majority had no choice but to carry the child to full term. M.W., the abducted nurse already quoted above (see p. 28), said that many girls who had been raped had miscarriages that might have been self-induced with herbs. I.S., a twenty-seven-year-old student who was abducted by the AFRC during the January 1999 invasion, tried to abort, but was unsuccessful:

> When I got pregnant I didn't tell my rebel husband for months. I asked a woman who knows about medicine to give me herbs to abort the baby, but it never worked and after my belly started to swell, he found out. He warned me that if I tried to flush the baby out, he'd kill me. He said he wanted the baby and that he hoped it would be a boy.[142]

M.W., the abducted nurse, also mentioned that medical personnel were instructed by a rebel doctor, Dr.

[141] Human Rights Watch interview, Port Loko, November 27, 1999.
[142] Human Rights Watch interview, Freetown, September 17, 1999.

Lahai, not to perform abortions, give birth control, or advise that traditional herbal treatments be taken, as the rebels felt that too many people had died and they needed to increase the population.[143] Many women did have miscarriages because of the brutal rapes and trauma they were subjected to by the rebels, as well as the difficult conditions in the bush.

Forced Abortion by West Side Boys

Human Rights Watch has documented one case of forced abortion by the West Side Boys, the splinter group of the AFRC that took power in the 1997 coup. Twenty-year-old M.K. was abducted from Magbele village in Port Loko district in July 2000, when she was four months pregnant. She was raped by four West Side Boys and was made the wife of a rebel who forced her to abort:

> I was abducted with two other civilians, including my brother-in-law, by the West Side Boys. They were all wearing uniforms; some uniforms were new, and others wore old ones. We were taken to their base in Magbele Junction where there were many other abductees. At nighttime one of the rebels called Umaro Kamara came to me and said he wanted to have sex with me. He spoke nicely with me and said that he wanted to take me to Makeni and make me his wife. He raped me that day. The rebels saw that I was pregnant and said to Umaro, "We are not going to work along with any pregnant woman, we should kill her." Umaro said that he wanted to take me as his wife and that I should be given an injection instead. Umaro called me and tried to convince me to get rid of the baby. He said, "They will kill you if you do not agree so you better have the injection." I was taken to the doctor who gave me an injection and some pills. Two days later I started bleeding. I felt weak and had pain all over my body. Then I lost the baby.
>
> When Umaro was on patrol, three other rebels raped me. When we moved out to go to another base, I saw the body of my brother-in-law. After one day I started bleeding again so Umaro took me to the doctor who gave me another injection. When we reached Lunsar, Umaro wanted to make me his wife. Even while I was bleeding, Umaro used me. He told me to wash myself before raping me.[144]

Rape by Female Combatant

Human Rights Watch has documented a case of a female rebel manually raping female abductees. The virginity checks performed by female rebels on abductees prior to their "virgination" by male rebels, noted above, also constitute rape given that penetration occurred without the consent of the victim. More of such abuses may have been committed but not reported due to shame, as expressed in the testimony below. The rebels captured sixteen-year-old F.P. on January 7, 1999 when—as she was fleeing the fighting in central Freetown with two other girls—she ran into a patrol of five heavily armed rebels, including one female rebel. They knew the female rebel from before as Aminata; she had lived in their neighborhood before the 1997 AFRC coup. She had joined the rebels at that time and had not been seen since the AFRC was driven out of Freetown in February 1998. F.P. remembered having had an argument with her several years ago. The rebels called her "C.O. Sally." F.P. was taken with her sister and another girl whom she did not know to a rebel base. Her friend was raped by five men, which she was made to watch. F.P.was also "virginated" by male rebels and sexually molested by "C.O. Sally," along with another girl, also called Sally:

> C.O. Sally came into the room where we were kept and said, "Why are you hollering? These are my boys, why are you refusing them?" Since we knew C.O. Sally, we asked her to help us get away, so finally on January 10 she took us at gunpoint to another house. She made us cook and wash for her. Once she told us to go into a room and take off our clothes. She had an RPG [rocket propelled grenade] on the ground as well as a gun. We took off our clothes and then she took two long sticks and tied our hands to them straight out from our shoulders. She stood us in front of her and asked if we remembered her to which I answered, "No." Then she said that she remembered

[143] Human Rights Watch interview, Freetown, October 21, 1999.
[144] Human Rights Watch interview, Port Loko IDP camp, July 13, 2000.

> me and that we had fought last time we had met each other. She made me put one leg up on a drum and then she fingered me with two fingers. I was so embarrassed and ashamed. I asked her why she was doing this but she screamed at me to shut up. She did not touch herself or say anything, but kept on fingering me. Then she called Sally and did the same thing to her. When she was finished, she left us standing there with our arms tied. A little later she fingered us again. It did not seem sexual to me and I do not know why she did it. An hour later a young rebel came and said he thought he was hearing gunshots from ECOMOG. C.O. Sally ordered the boy to untie us as "I have punished these people already."[145]

Rape and Other Sexual Violence against Boys and Men by Male and Female Rebels

According to FAWE Sierra Leone, boys and men were also raped by male rebels. FAWE Sierra Leone treated fourteen boys aged between nine and fifteen years old who had been raped, but suspects that there are more cases. Due to the stigma attached to homosexuality in Sierra Leone, male victims of rape feared they would be perceived as homosexuals and therefore few boys were willing to report it. Human Rights Watch has not documented any of these crimes of sexual violence, which were apparently committed on a much smaller scale than sexual violence committed against women and girls. FAWE Sierra Leone did not want Human Rights Watch to interview the boys they had treated as they feared that interviewing them would re-traumatize them.[146]

Human Rights Watch documented two cases in which female rebels forced men to have sexual intercourse at gunpoint. One case involved a female rebel forcing a male civilian to have sex during the January 1999 invasion of Freetown, and the second involved a RUF female training commander and male conscripts in Kono. Cases of these crimes of sexual violence were also reported by FAWE Sierra Leone. It is impossible to determine the prevalence of this type of sexual violence, but—given the general level of violence within the rebel forces and the power that female combatants had over civilians—Human Rights Watch believes that such incidents did happen more often than has been reported, albeit again on a much reduced scale compared to male combatants raping female civilians.

Abduction, Sexual Slavery, Forced Labor, and Conscription

Abduction

The rebel forces used abduction as their primary method for recruitment. During an attack on a town or village, rebels typically rounded up civilians as they tried to flee or were found hiding. Men were abducted to carry the looted items as well as being forcibly conscripted. The abducted children were also given military training and forcibly conscripted.

In thousands of cases, women and girls were abducted after being subjected to sexual violence. The rebels often killed family members who tried to protect their women and girls. Abducted women and girls described being "given" to a combatant who then took them as their "wives" (see also "Sexual slavery" section, below).[147] Abduction of civilians continued for the duration of the armed conflict. In the early years of the conflict, the RUF went on hit-and-run raids, returning to their base camps with looted items and abducted civilians. As the RUF took over more territory, an increasing number of civilians were abducted. As their ranks increased with more men and boys being forcibly conscripted, so did their abduction of women and girls. The AFRC and West Side Boys used the same tactics. Some women had the extreme misfortune of escaping from one rebel faction, or unit, only to be abducted by another. One such victim, thirteen-year-old M.F. (see above, p. 34), who was first

[145] Human Rights Watch interview, Freetown, May 18, 1999.

[146] Human Rights Watch interview with Christiana Thorpe (founding Chairperson of FAWE Sierra Leone Chapter), Freetown, March 22, 2002.

[147] The PHR report found that 9 percent of women reporting having themselves experienced sexual violence had been forced to "marry" their rebel "husband." PHR report, p. 2. These types of marriage are similar to marriages by capture, which were common at the turn of the nineteenth to twentieth centuries. In tribal wars, the conquerors would kill the male inhabitants of the vanquished village and capture the women who subsequently became the wives of the conquerors. The "marriage" was validated by the captor's public declaration of his intention to cohabit with his captive. Such a wife was regarded as a slave and her children could not inherit from their father. Joko Smart, *Sierra Leone Customary Family Law*, p. 29.

abducted from Koinadugu by the RUF/AFRC and gang raped, was driven out of Makeni in October 1999 when it came under attack by the RUF. She was subsequently abducted by the West Side Boys and raped by two child combatants.[148]

Sexual Slavery and Forced Labor

Women and girls were primarily abducted to be the sex slaves of the rebels and to perform slave labor. The survey conducted by Physicians for Human Rights found that 33 percent of the interviewees reporting war-related sexual violence had been abducted and 15 percent had been subjected to sexual slavery. Consistent with fairly common practice among the Sierra Leonean male population at large, many rebels had polygynous "marriages," including with abducted women whom they had forced to "marry" them. Rebels also changed "wives" frequently when they tired of them or when their "wives" were too ill to perform their tasks (a consequence of the brutality that they were often subjected to). Victims interviewed by Human Rights Watch reported attaching themselves to one rebel to avoid gang rape and be given a degree of protection. The more highly ranked the commander, the more protection a woman had. Women and girls, however, remained vulnerable to sexual violence by other rebels. M.F., the thirteen-year-old who was gang raped by the RUF/AFRC in Koinadugu was raped by two other commanders when her "husband" Mohammed was out on patrol.

Women who were "married" to high-ranking rebels benefited not only from "protection" but also were able to exert power over others. The women and girls often benefited from the looted items that their rebel "husbands" gave them, and took part themselves in looting raids to steal clothes, shoes, and jewelry. Not all were abductees: some women and girls voluntarily joined the rebel forces and sought to benefit from their relationship with the rebels, i.e. from the looted goods or escaping from their parents (some girls would use a relationship with a rebel boyfriend to gain freedom from parental control, by threatening to involve the boyfriend in their dispute over parental restrictions). Such women consenting to marry a rebel were probably still vulnerable to sexual violence from other rebels.

Numerous victims described being subjected to abuse or forced to work by commanders' wives. FAWE Sierra Leone also reported that female combatants "married" to rebels killed new abductees if their "husbands" showed a preference for them. A.J., the fourteen-year-old student who was abducted in Pujehun and tortured by the RUF from February to May 1994 (see above, p. 31) is an example of how some "wives" were treated by other female abductees or combatants:

> I was put under the control of Commander Patrick, a Liberian. He was married to a woman called Neneh who was very jealous of me. Once, after the commanders had gone to the war front, Neneh told one of our guards to open up the cage where I was being held and take me out. She said, "My husband is interested in you. If you accept him to have sex with you, I'll kill you, so be forewarned." Neneh and Patrick have one child. She told me she'd joined the rebels voluntarily. She said, "You are just a captive. Do you think I was abducted? I was not abducted. I joined voluntarily. So you have no right to fall in love with my husband."[149]

A few victims also described how some of these women, usually the wives of commanders, used their power to try and protect, and at times facilitate the escape, of other abductees. For example, M.C., who was brutally raped by rebels in early 1999 in Mabang and suffered a prolapsed uterus (see above, p. 38) was helped to escape by a commander's wife who felt sorry for her.[150]

Abducted women were made to carry out forced labor during their captivity, including cooking, cleaning, washing clothes, and carrying heavy loads of ammunition and looted items. In many instances, women—intimidated by their captors and the situation they were in—felt powerless to escape their lives of sexual slavery, and were advised by other female captives to tolerate the abuses, "as it was war." The rebels often deliberately

[148] Human Rights Watch interview, Kabala, 7 March 2002.
[149] Human Rights Watch interview, Pujehun, February 12, 2000.
[150] Human Rights Watch interview, Freetown, September 5, 1999.

marked abducted civilians with the letters "RUF" or "AFRC" carved mainly onto their chests. This made escape more difficult because, were they to be caught by government forces, they would likely be suspected of being rebels and killed. Some women used traditional herbal remedies to remove their markings, and international organizations have also performed surgery on these victims to remove the scars.

Relationships between Rebels and Abductees

The relationships that developed between the abductees and rebels were very complex and varied. Most relationships were obviously very volatile, as described by I.S., the twenty-seven-year-old student who was abducted by the AFRC in the January 1999 invasion (see above, p. 40). She stayed with the AFRC/West Side Boys until August 1999 when she was able to escape:

> We stayed there for months and they were always going on attacks in the Port Loko area. Occasionally C.O. Blood was nice to me and I had to kiss him and play love with him. But I could never tell him what was really in my heart; that I missed my family and wanted to escape. Other days he would beat me for nothing. He did the same thing to his other "wife." Neither of us could complain.[151]

H.K. was assigned as the wife of "Jaja" and was so badly treated by him that even the other rebels sometimes tried to prevail on him to be less violent:

> Jaja was already "married" to another abductee, and when she saw what he had done to me, she escaped. He always beat both of us. He used to sex me twice every night. He made me take his penis in my mouth. I tried to refuse him but he always threatened to kill me. He was actually an SLA soldier but had joined the RUF. His C.O. was Colonel Stagger, who used to criticize him for how he treated us. Colonel Stagger used to say, "Look, when we take these kids, we should take care of them and now you beat her for nothing." Jaja used to say it was not Stagger's business. Stagger's own abductees were treated pretty well. He never beat them.[152]

Some women fled at the first opportunity. Other women, especially those who had children with the rebels, found it difficult to leave these abusive relationships. Many women and girls experienced their first sexual relationship with their rebel "husband" and may have developed aspects of the "Stockholm Syndrome," whereby the hostage identifies with the hostage-taker. They adjusted to the level of violence with the rebels, which over time became "normal," in order to survive.[153] Others feared that their "husband" might seek revenge if they escaped and returned to their family. The rebels instilled fear in their "wives" by telling them that their families would not accept them back. The abductees also feared to some extent that they would be blamed for what happened to them. For some women who had lost their families, the rebels became a surrogate family. As many rebels had themselves lost their families or could not return to their villages of origin, given that they had in some cases committed human rights abuses in their communities, they did not want to relinquish their surrogate families or their slave labor.

As the women and girls were never registered in the Disarmament, Demobilization and Reintegration (DDR) program and there was insufficient documentation of this large category of victims throughout the armed conflict, it is unclear how many girls and women were abducted. It is now impossible to establish how many remain under the control of their rebel "husband" or have returned to their village of origin.

The ones who have remained involuntarily will only re-examine their situation when alternatives become available. Women who wish to sever links with ex-combatants have few alternative economic or social options. They are a very vulnerable group that has little or no means of support. They are often not able to return to their

[151] Human Rights Watch interview, Freetown, September 17, 1999.
[152] Human Rights Watch interview, Freetown, October 12, 1999.
[153] A group of female ex-combatants and abducted women, for example, defined to Human Rights Watch domestic violence as "wounding or losing consciousness."

villages out of fear, lack of funds and social stigma, especially if they have given birth to children fathered by rebels. The women are therefore often forced to remain in situations in which they are vulnerable to continuing abuse. Numerous victims end up being commercial sex workers, selling their body for as little as U.S.50¢ Exploited girls and women can end up abandoned with several children to raise by themselves by the time they are in their early twenties.

Rebel Control over Abductees

Life with the rebels was very tough. Civilian abductees, in particular, were treated ruthlessly. The RUF established a military police system and courthouses to administer a form of justice to those who contravened RUF rules of behavior. Some of the RUF rules were written, but the rules, trial and punishment were to a large extent arbitrary, dependent on the particular commander. Interviewees reported that severe punishment was meted out for small incidents such as spilling water on a commander's shoes (one week in a cell with daily beatings) or not lodging complaints through the official channels (imprisonment in a dungeon). "Courthouses" were established to try both combatants and the civilians.[154] A rebel was expected to provide for his "wives" and children during their captivity even if he had taken on another "wife" or "wives." If a rebel reneged on his responsibility, then he could be put in a cell and beaten to death. Civilian women who were tried by the court were raped and beaten if they did not have a commander to stand up for them. According to K.M., who was abducted by the RUF from Kabala, Koinadugu, the three male rebels who presided over the courthouse in Burkina, a training camp in Kailahun, would arrange amongst themselves who could rape the women. She also said that one woman was raped to death by six rebels.[155]

Forced Conscription: Female Combatants

Women and girls were also forcibly conscripted into the rebel fighting forces. The RUF established military training camps for women. During active fighting, female combatants were sent into battle after the men and the Small Boys Units (SBUs). There were only very few high-ranking female commanders in the rebel forces and a much smaller number of female combatants than adult men or boys. Female combatants had more power than female civilians: combatants, including female combatants, who had received military training, had substantial power to do whatever they wanted to civilians. Within the rebel forces, however, women still held much lower status: female combatants were assigned "husbands."

Forcibly conscripted female combatants were in many ways as vulnerable as civilian abductees, and may have decided to stay with their rebel "husbands" for the same reasons as their civilian counterparts i.e. shame, lack of alternative options, and economic dependence on their "husbands."

RUF Officers' Responsibility for Sexual Violence

In addition to their individual criminal responsibility, rebel commanders can bear direct command responsibility for crimes of sexual violence and sexual slavery, for ordering the rape and abduction of women and girls (see below, p. 60, for a discussion of the principle of command responsibility in international law). C.O. Caca Scatter, for example, ordered the gang rape of S.J., the wealthy forty-five-year-old woman (see above, p. 37). A.J., the fourteen-year-old student, was tortured, caged and brutally raped by C.O. Patrick (see above, p. 43). S.G., the fifty-year-old widow was raped and had both arms amputated by Commander "Don't Blame God" (see above, p. 36).[156] Indeed, the organized way in which victims frequently describe being rounded up and taken, as well as the number of rebels involved in these abductions and the number of victims abducted, suggests an element of premeditation and planning on the part of the RUF, AFRC and West Side Boys command. Victims also frequently described being specifically selected to be given to a commander or being sexually abused in the presence of commanders, which again suggest that sexual violence was committed under the direction of and with the consent of members of the rebels' hierarchy. I.S., the twenty-seven-year-old student who was abducted and

[154] Abdullah and Muana, "The Revolutionary United Front of Sierra Leone," p. 189.

[155] Human Rights Watch interview, Kabala, March 7 and 9, 2002.

[156] Human Rights Watch interview, Freetown, May 3, 1999. Under Article 6 (1), persons are held individually responsible for the planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the statute.

gang raped by the West Side Boys from January to August 1999 explained how Commander "Blood" had initiated the "wife" selection process:

> One of the commanders said he was going to amputate all of us too. But another commander, C.O. Blood, said, "Don't kill them, let's chose them as wives." Then we were divided up. The one who seemed to be in charge, C.O. Blood, chose me. When he looked at me I was frightened. His pupils were huge—he was high on drugs. He took me to a house and told me to lie down on the ground. He said if I did not allow him to have sex, he would kill me. He took out a knife and said he would not even waste his ammunition on me. He would just chop me to pieces. I knew he meant what he said. He forced my clothes off and used me twice. He was rough and after the second time I begged him to leave me, but he said he did not care. My insides hurt so much. Then he used me from behind. Other women were being raped in the same room. They [the West Side Boys] did not care.[157]

According to the survey conducted by Physicians for Human Rights, thirty-four of the ninety-four survivors directly reporting sexual violence believed that their attackers' commander was aware of the attack.[158] While it is difficult to generalize from this figure, it does tend to confirm the findings of Human Rights Watch that sexual violence and slavery, which were committed on a widespread and systematic nature, were part of the rebel forces' military strategy to dominate, humiliate and punish the civilian population.

The RUF has made occasional efforts to declare rape a crime within certain areas under their control and disciplined ordinary soldiers accused of raping. The disciplinary measures included summary trials followed by execution. These efforts failed to prevent sexual violence in practice. One commander, for example, prevented at least temporarily the rape of an eight-year-old girl who was abducted by a ten-year-old child combatant by ordering the child combatant to only use the young girl "for cleaning and cooking for now."[159] A.B. witnessed the gang rape of an old woman, which the commander had originally tried to stop but then allowed to happen (see above, p. 37).

Senior male and female figures in the RUF interviewed by Human Rights Watch mainly denied that sexual violence had happened, explaining that the women joined the RUF movement voluntarily and fell in love with their rebel "husbands."[160] A key figure in the AFRC admitted that he had heard of cases of sexual violence and blamed it on the breakdown of law and order.[161] He also said that none of his men had expressed any remorse for the human rights abuses they committed. In the vast majority of the cases documented by Human Rights Watch, those who committed rape were not disciplined or punished in any way

Sexual Violence Committed by the CDF

As already noted, there are relatively few reported cases of rape committed by the CDF. The CDF were reasonably disciplined during the war, although their discipline deteriorated when they were deployed in chiefdoms outside their own native areas. Sexual intercourse is believed to act against the protection bestowed on the fighters during their initiation ceremonies. However, Human Rights Watch has documented several crimes of sexual violence by the Kamajors, the CDF based in the Southern Province.

In March 1998, a forty-five-year-old Temne man, M.B., witnessed the rape of a young Temne woman called Jeneba by the Kamajors in Kenema town. The Kamajors also mutilated and killed Jeneba. M.B. explained that during the ECOMOG intervention to restore the democratically elected government in 1998, Kamajors accused members of the Temne and Limba ethnic groups of being RUF/AFRC supporters and persecuted them. According to M.B., the Kamajors identified Temnes and Limbas as such by their last names and publicly beheaded or

[157] Human Rights Watch interview, Freetown, September 17, 1999.
[158] PHR report, p. 54.
[159] Human Rights Watch interview, Freetown, June 16, 1999.
[160] Human Rights Watch interviews, Freetown and Makeni, April 1999 to May 2002.
[161] Human Rights Watch interview, Freetown, April 26, 2002.

stabbed to death numerous alleged rebels. The Kamajors also ate some of their victims, believing that this would bestow additional powers to them. The accused had no means to defend themselves, as ECOMOG initially backed the Kamajors and did not realize until later that the killings were carried out along tribal lines. After receiving death threats, M.B. sought refuge in the house of a chief who was Temne and the father of Jeneba. A group of about eight Kamajors came to the house, looking for Jeneba, and accused her of having a sexual relationship with an AFRC fighter:

> I saw Jeneba being raped by one Kamajor, while the others were standing around watching. Then the Kamajors threatened to kill us if we did not stop looking at them, so we went into other houses to hide. From there we could not see what was going on but heard Jeneba screaming at the top of her voice, and when the Kamajors had gone we came outside and found Jeneba dead. She was naked and her hands and feet had been mutilated by a machete.[162]

On February 17, 1999, J.K., a thirty-one-year-old woman was raped by two Kamajors in a small village in Bonthe district. A group of Kamajors entered J.K.'s house looking for her brother, who had not been home for the past three years:

> One of the Kamajors called Kinie said that they had been told that my brother was in the village and was planning to attack them. I assured them no one knew where he was. During this argument, the other civilians in village became afraid and fled into the bush. As soon as the Kamajors forced their way into my bedroom, I followed them to check up on what they were doing. Kinie and another Kamajor whose name I did not know pushed me to the ground, tearing off my clothes. I screamed for help but no one came to my rescue. Even my father who was in the house was unable to help me. They both raped me while the others stood around laughing. When they left the village, they looted some goats and chickens. There was no one to report the incident to and I had no money to pay for a hospital visit. I decided to leave everything to the Almighty God.[163]

In another incident, at least three female civilians were raped, including by a Kamajor commander. In July 2000, M.S. and twenty-five other passengers were taken off a bus at Bauya in Moyamba district, beaten, and accused of being RUF rebels. All their possessions were taken off the bus and inspected by the Kamajors but they did not find any incriminating goods. Their possessions were stolen by the CDF. In the evening, M.S. was locked in the guardroom at the CDF office with nine other women and her young child:

> Twenty CDF came to the guardroom and told us, the women that we could choose between [being] raped or killed. I was raped by a young CDF on the ground of the guardroom. I told him that I was a suckling mother but he did not care. My baby was in the room when he raped me. He made me stoop like an animal. He said, "I am a government man so no one will ask me anything about this." My breast milk has gone bad now. I could hear another woman who initially refused to be raped being beaten with the torch. She was raped by two CDF called Mohammed and Ahmed.[164]

In the same incident, an older high-ranking CDF commander raped a thirty-five-year-old trader, R.K.:

> Mr. S. raped me all night. He raped me five times. I cried as I was not used to doing that even with my husband. He was rough and did it from behind like an animal in a bad way. He accused me of being a RUF commander's wife. I told him my husband is a Gbetti [part of the CDF].[165]

[162] Human Rights Watch interview, Kenema, August 12, 2002.
[163] Human Rights Watch interview, Bonthe district, July 8, 2002.
[164] Human Rights Watch interview, Freetown, August 21, 2000.
[165] Human Rights Watch interview, Freetown, August 21, 2000.

Human Rights Watch also interviewed B.R., a Kamajor fighter who reported witnessing the rape of two civilians that took place in 1997 and 1998. He also witnessed the killing of a captured RUF female combatant, who died after being raped with a stick. B.R. explained that the rape that took place in 1997 happened when a patrol of six Kamajors, including B.R., met a group of female civilians in the bush:

> Some of the women started talking bad things about the Kamajors and said that we were taking food off people. Then one Kamajors went for this woman. I saw him raping her. He had stripped her naked and she was screaming. I did not want to see it or be a witness but I had to rush there. At one point I thought he was killing her.[166]

The incident was reported to the high priest, one of the main Kamajor initiators who decided that the offender had to be punished. B.R. explained that the punishment was called "walking the highway," which entailed the offender being made to walk slowly through fifty Kamajors lined up on two sides, with the Kamajors flogging him with canes. B.R. said that the victim would have reported the rape to the Kamajor high priest, but that he and the others on patrol decided to report it first, otherwise it would have made them equally guilty of the crime. The rape committed in 1998 involved a young Kamajor raping a twenty-year-old woman. B.R. explained that the offender was given a trial, during which he admitted to having committed the crime. He was subsequently locked up in prison (probably a local prison).

In another instance, B.R. explained how a twenty-five-year-old female RUF combatant captured in Tongo in Kono district was brutally killed by the insertion of a long stick in her vagina after the Kamajors had cut off her ears and nose and gouged her eyes out with a machete. The Kamajor commander allegedly wanted to teach the woman a lesson and said that: "This stick is your husband and is screwing you. Are you enjoying it? Just say your last prayers, as you are going to die bit by bit."[167]

Sexual Violence Committed by International Peacekeeping Forces

Human Rights Watch has documented several cases of rape by the international peacekeeping forces. Human Rights Watch was informed of a rape committed by a Guinean peacekeeper, Sgt. Ballah, by two reliable sources, including the Sierra Leone Police (SLP), who had interviewed the twelve-year-old victim. The victim was raped on March 26, 2001 when she asked for Sgt. Ballah's assistance in securing a ride to Freetown at the checkpoint that he was manning. The rape was perpetrated in Bo, the area of deployment of the Guinean peacekeeping contingent. Sgt. Ballah was charged to court on the same day. Unfortunately, the SLP dropped the case and the offender was sent back to Guinea. Human Rights Watch was not able to locate the victim.

In February 2001, a Nigerian peacekeeper reportedly raped a sixteen-year-old girl in Freetown. When Human Rights Watch investigated the case, the SLP claimed they had not been able to trace the perpetrator for questioning. UNAMSIL claimed that the Nigerian contingent and UNAMSIL Civilian Police Section had investigated the matter and that the plaintiff had subsequently dropped the charge.

Human Rights Watch interviewed a witness to an alleged rape by two Ukrainian peacekeepers that took place on April 3, 2002 in the village of Joru in Kenema district. K.S., a fifty-five-year-old female farmer testified that she as well as others in her village had witnessed the gang rape:

> Late at night I came out of my house to ease myself [urinate]. Maybe I had been woken up by a big white truck that had stopped about fifty meters away from my house. I hid and watched what was happening; there were people inside. I noticed two white men and one black lady inside the truck. Clearly there was a struggle going on. I could hear her yelling at them to "leave me alone" in what sounded like a Liberian accent, but I can not be sure. The door was open and one of them was on top of her. The lady was really struggling. I saw that one of them was holding her down while the other was raping her. I was able to see because in the process the men had opened the

[166] Human Rights Watch interview, Freetown, July 31, 2000.
[167] Human Rights Watch interview, July 31, 2000. The CDF generally killed any RUF that they had captured.

door to the car and the light had come on. I am sure they were raping her and she was fighting with them to stop it. I stayed and watched this go on for several minutes. I later learned a few more people were also watching what was going on. In fact we talked about it the next morning.

Then, perhaps afraid of being watched, the two whites moved their truck further down the road ... past my house, further down the road going out of town. Maybe they thought that because there were no houses around, we would not see what they were up to. They stayed another thirty or so minutes in this second location. I saw both of them have their turn on her, but I did not see any guns. After they were finished, I saw one of them drag her out of the cabin and put her in the back of the big truck. I can not remember if one of them got in the back with her but I think so. Then they drove off.

The next morning when I went out to go to the mosque, we found one of her black shoes that she must have kicked off while struggling with those men. The shoe was near the first place they had stopped. We took it to the police but they never came to ask us any questions. We are all a bit frightened of those UNAMSIL people now. We tell our girls never to get in a truck with them or the same thing might happen to them.[168]

Neither the SLP in Joru or UNAMSIL in Kenema conducted a proper investigation into this alleged gang rape, both claiming that the absence of the victim prevented them from conducting their investigation. The UNAMSIL human rights section was not aware of this alleged gang rape until Human Rights Watch informed them, and to date has also not conducted a thorough investigation.

On June 22, 2002, a fourteen-year-old boy was allegedly raped by a Bangladeshi peacekeeper near the Jui transit camp for Sierra Leonean returnees located outside of Freetown in the Western Area. The rape occurred when the victim and his friends were fishing with several Bangladeshi peacekeepers near the camp. The offender was reported to have taken the boy away from the others in the group before raping him. The victim's friends reported that the boy looked disheveled after rejoining the group and immediately told them what had happened. The offender gave the victim the equivalent of U.S $0.25 to silence him. The boy reported the rape to the SLP on June 24 and a medical exam carried out on the same day confirmed penetration had taken place.

The SLP were involved in the case for ten days, until the UNAMSIL provost marshal took it over. The provost marshal concluded that there was no conclusive evidence to link the crime to the perpetrator. After reviewing the case, the UNAMSIL force commander concluded that while the evidence was inconclusive, the circumstantial evidence was strong enough to conclude that the peacekeeper had violated military discipline, and as such issued an order of repatriation. It is not clear to Human Rights Watch whether this violation will be recorded on the offender's file. According to a reliable source, the investigation by the police and UNAMSIL was conducted in an insensitive manner and members of the Bangladeshi contingent spoke with the victim while the UNAMSIL investigation was ongoing, even though they should not have had access to him. Nor did UNAMSIL follow up with the victim or his family to apologize, provide compensation, and explain the outcome of the investigation.[169]

UNAMSIL investigations into allegations of sexual violence by peacekeepers indicate a lack of appreciation for the seriousness of the problem of sexual violence. Human Rights Watch urges UNAMSIL to fully investigate any allegations of sexual violence committed by UNAMSIL military or civilian personnel. The human rights section should systematically monitor and report on sexual violence, including cases involving UNAMSIL personnel. UNAMSIL should establish a mechanism with the SLP whereby allegations of sexual violence by persons employed or affiliated with UNAMSIL reported to the police are immediately reported to the relevant UNAMSIL staff members, including the provost marshal and the gender specialist in the human rights section. UNAMSIL should reciprocate by reporting cases known to it to the SLP. UNAMSIL should ensure that states

[168] Human Rights Watch interview, Joru, May 28, 2002. Other villagers did not want to be interviewed.
[169] Human Rights Watch interview, Freetown, September 15, 2002

report within the prescribed six months on follow up to cases involving military personnel that have resulted in the alleged perpetrator being repatriated to his country of origin, in order to ensure that states prosecute the accused. This will serve to actually enforce a stated "zero tolerance" for sexual exploitation by UNAMSIL staff and persons affiliated with UNAMSIL, which to date has had no teeth and therefore no impact on changing behavior. Civilian staff who commit sexual violence should be fired and their misconduct properly recorded in their personnel file to ensure that they are not rehired in another U.N. mission.

The UNAMSIL human rights section should also provide in-depth gender sensitization training to military and civilian staff. The training should ensure that the peacekeepers understand the code of conduct and the consequences if they do not adhere to it. The U.N. Code of Conduct for peacekeepers and the Military Observer Handbook need to be revised to ensure that the zero tolerance policy for sexual exploitation by persons employed or affiliated with U.N. missions and the consequences of such acts are clearly stated in these guidelines. Similar guidelines for civilian staff need to be widely disseminated to all U.N. missions.

Both ECOMOG and UNAMSIL peacekeepers have sexually exploited women and solicited child prostitutes.

VI. EFFECTS OF SEXUAL VIOLENCE

Health

Sexual violence often continues to impact the physical and mental well-being of survivors long after the abuses were committed. In addition to the reluctance of some survivors to seek medical treatment, the lack of health facilities, especially in the provinces, as well as the survivors' lack of money for transport, medical treatment and drugs has meant that the health status of survivors is poor.[170] Survivors also were often only able to seek medical treatment months after the abuse had happened, for example when they managed to escape rebel captors and make their way to a health center.

The probability of transmission of HIV and certain other sexually transmitted diseases (STDs) is greatly increased in violent sex and any sex where a woman or girl is injured. Doctors and other health personnel interviewed by Human Rights Watch reported a high prevalence of STDs amongst victims, as the armed conflict in Sierra Leone, like other armed conflicts, served as a vector for sexually transmitted diseases.[171]

A World Health Organization (WHO) report found an alarmingly high prevalence rate of HIV/AIDS amongst Sierra Leone Army soldiers. According to the report, the SLA tested 176 soldiers and eighty-two civilians working for the army who had prolonged diarrhea, tuberculosis, weight loss or pneumonia, and found a HIV-positive rate of 41.9 percent (or 108 persons). Among the group tested were eighty female soldiers of whom thirty tested positive (37.5 percent). As many SLA soldiers defected to the rebel factions, it is likely that victims of sexual violence by them have been infected with the virus.[172] A U.N. report on the impact of conflict on children states that rates of sexually transmitted diseases among soldiers are two to five times higher than those of civilian populations, and that during armed conflict the rate of infection can be up to fifty times higher.[173] Commercial sexual exploitation of women by soldiers, including peacekeepers, also contributes to the spread of

[170] PHR report, p. 45.

[171] Human Rights Watch interviews with Dr. Olayinka Koso-Thomas, Freetown, February 25, 2002; Dr. Noah Conteh, Freetown, March 1, 2002 and Dr. Bernard Fraser, Freetown, March 3, 2002.

[172] World Health Organization, *HIV/AIDS in Sierra Leone: The Future at Stake—The Strategic and Organizational Context and Recommendations for Action* (Freetown, 2000), p. 3.

[173] *See* United Nations Security Council resolution 1308 on the responsibility of the Security Council in the maintenance of international peace and security: HIV/AIDS and international peacekeeping operations, July 17, 2000; and Graça Machel, "The Impact of Armed Conflict on Children: A critical review of progress made and obstacles encountered in increasing protection for war-affected children," report prepared for and presented at the International Conference on War-Affected Children, September 2000, Winnipeg, Canada, p. 12, at http://www.waraffectedchildren.gc.ca/machel-e.asp.

STDs, including HIV/AIDS.[174] In 1997, tests showed that 70.6 percent of commercial sex workers in Freetown were HIV positive compared to 26.7 percent in 1995.[175]

The 2002 report by the Joint United Nations Programme on HIV/AIDS (UNAIDS) on the global AIDS epidemic estimated that by the end of 2001 there were 170,000 persons aged between fifteen and forty-nine living with HIV/AIDS in Sierra Leone. UNAIDS estimates that more than 50 percent of this figure (90,000) are women and girls.[176] More accurate figures on HIV/AIDS prevalence in Sierra Leone, as opposed to estimates, should be known when the U.S. Centers for Disease Control and Prevention (CDC) publish their report based on a nationwide HIV/AIDS prevalence survey conducted in May 2002.[177] The government of Sierra Leone should ensure that future information campaigns on HIV/AIDS are designed both to impart basic information and to help reduce stigma, especially in light of the large number of survivors of sexual violence who may have been infected with HIV.

Other health problems are vasico-vaginal and vasico-rectal fistulas (VVFs and VRFs), as a result of the rape(s) especially of young girls but also of mature women; complications when giving birth; prolapsed uterus; trauma; and unwanted pregnancies. Health professionals have noted high rates of pregnancies amongst young girls with likely resultant illness, injury, and even death, due to pregnancy-related complications. These girls are likely to experience future complications including uterine problems and scarring, reducing their ability to have a normal sex life or to conceive or carry a child to full term in the future. The health of children born to abducted girls is also likely to suffer as the girls often have no one to teach them motherhood skills, contributing to high rates of infant mortality. The health risks are further exacerbated by various factors that impede safe sex, including lack of information about HIV/AIDS, as well as cultural practices and beliefs that undermine the use of reproductive health services and contraception.[178] The lack of attention paid until recently to conflict-related sexual violence has meant that the health needs of women and girls have not received as much attention or funding as required to adequately address the scale of the problem. In general the Sierra Leonean health services lack trained and motivated personnel, medical equipment and supplies, drugs, and blood for transfusion. The reproductive health infrastructure, which was poor before 1991, virtually collapsed during the war.[179] There are only six specialist obstetricians and gynecologists in Sierra Leone.[180] Treatment for sexually transmitted diseases is limited to the main towns and outreach by mobile clinics in some chiefdoms.

Mental health services for survivors of sexual violence are inadequate and as of 2002 there was only one qualified psychiatrist in the country. FAWE Sierra Leone, which has substantial expertise in treating survivors of

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[174] Human Rights Watch interview, UNAMSIL medical personnel, Freetown, April 30, 2002.

[175] Ministry of Health and Sanitation, *National AIDS/STD Control Programme Annual Report for 1998* (Freetown, Ministry of Health and Sanitation, 1998), p. 3.

[176] UNAIDS, *Report on the Global HIV/AIDS Epidemic 2002* at http://www.unaids.org/, p. 190. This figure is based on a total population of 4,587,000.

[177] Human Rights Watch interview with Dr. Joaquim Saweka (WHO Sierra Leone Representative), Freetown, May 3, 2002. The preliminary results of the CDC showed a prevalence rate of 4.9 percent.

[178] Only 297 of 4,923 women (or 6 percent) surveyed by the government in 2000 reported that they used contraceptives. This low prevalence of contraception use is due to lack of access to family planning services within the communities, inadequate health facilities, especially in the provinces, lack of disposable income to pay for these services, and the low education of women. Only 3 percent of women with no education used contraception compared to 8 percent of women with primary education and 14 percent of women with secondary or higher education. Another worrying factor is the unwillingness of partners to use condoms, which does not bode well given the high prevalence of HIV/AIDS and other STDs. *See* Government of Sierra Leone, *The Status of Women and Children in Sierra Leone*, pp. 55-58.

[179] UNDP, *Human Development Report 2001*, p. 198.

[180] WHO and the Ministry of Health and Sanitation, *Assessment of District Hospitals in Sierra Leone for the Delivery of Safe Motherhood and Reproductive Health Services* (Freetown: 2002), p. 10. The Assessment also found that physicians attended only 3 percent of births whereas traditional birth attendants assisted in 38 percent of births nationally. Ibid. pp. 56-57. Only 10 percent of 4,923 women surveyed by the government in 2000 reported that they received antenatal care from a physician. *See* Government of Sierra Leone, *The Status of Women and Children in Sierra Leone*, p. 10.

sexual violence, believes that counseling on a massive scale is needed to ensure that the women and girls can face the future.[181]

Stigmatization and Shame of Survivors

The rebels frequently committed crimes of sexual violence in public places. A.M., a twenty-year-old male, reported that when he was held in captivity in State House in Freetown from January 8, 1999 for three days, he saw from his cell window RUF/AFRC combatants raping about twenty to twenty-five girls each night on the grounds.[182] Given that rape has been committed on such a systematic and widespread scale and was witnessed by many people, it seems that rape survivors, particularly in urban centers, are generally not stigmatized by society. Survivors interviewed have expressed fear of rejection by their families and communities, but in practice it seems that their fears are unfounded. Most survivors are accepted back into their communities, with their families simply overjoyed to find that they are still alive.

Nevertheless, some women, like R.K. who was raped by the CDF (see above, p. 48), have been rejected by their husbands:

> I told my husband what happened. He cried and rejected me. He said he will find another wife. My family has begged him to accept me as it was not my fault. He does not love me anymore. I am annoyed because I was the senior wife and now he does not treat me well.[183]

Girls and women who voluntarily joined the rebel forces are less likely to be welcomed back.

The survey conducted by Physicians for Human Rights gives an indication of survival strategies employed by women who had been raped: of the ninety-four interviewees reporting having themselves experienced sexual violence, sixty-one (or 65 percent) told someone about their case(s) of sexual violence. The majority of these survivors (fifty women and girls or 53 percent) reported their experience to a health care provider in a hospital, health care center or to a traditional healer, albeit on average five months after the incident(s) occurred. Among those not reporting these incidents and who stated a reason (twenty-eight out of thirty-three), the reasons given were feelings of shame or social stigma (eighteen women and girls or 64 percent), fear of being stigmatized or rejected (eight women and girls or 28 percent) and not having trust in anyone (six women and girls or 21 percent). Eighteen women and girls (19 percent) reported that discussions with family members helped them to try to forget about the incident(s). Other survivors reported that what helped most was to try and forget about the incident (46 percent), support of family (35 percent), a health care provider (33 percent) and traditional medicine (32 percent).[184]

Human Rights Watch also found that many survivors feel intense personal shame that the rebels have defiled them, and therefore often do not report the crime or seek medical attention. S.G., the fifty-year-old widow who had both arms amputated after being raped (see above p. 36), described the shame and anger she felt after her ordeal:

> I didn't even tell my people about the rape. It's such a shameful act. Not just because of the rebel's age, but also because never in my life have I had sex with someone besides my husband. I was a good woman. Can you imagine how I felt when this young boy raped me, kicked me and then told me to get out of his sight after doing this to me? And without my arms, how can I as a woman even clean myself, let alone take care of my affairs. We're farmers and how am I to farm now? Both the rape and amputation are awful ... but later when thinking about what happened, I was even angrier about the rape than the amputation because for him to have done that to me was

[181] Human Rights Watch interview with Christiana Thorpe (founding chairperson of FAWE Sierra Leone Chapter), Freetown, March 22, 2002.
[182] Human Rights Watch interview, Freetown, April 12, 1999.
[183] Human Rights Watch interview, Freetown, August 21, 2000.
[184] PHR report, p. 51 and Table 6 on p. 54. Women could select more than one of the choices given.

> like killing me inside because of the shame. Sex is something you should enjoy together with your man. But to do it like that, to handle me like that, to torture me like that and then kick me and leave me like that ... it's too much. But I guess I was somehow lucky. There could have been ten people doing that to me.[185]

P.S. twenty-five, who was abducted and gang raped by the West Side Boys in January 2000, explained why she had not reported her rapes:

> I didn't want to tell anyone what happened. I was ashamed because it is bad enough being done like this, but having a rebel do it is even worse. I felt so bad because I wanted to save myself for someone special. I went to secret society and they instructed us not to be involved in sex until we were ready to marry. And now I'm afraid because of AIDS. When I think of them I feel so angry.[186]

VII. INTERNATIONAL LEGAL PROTECTIONS AGAINST GENDER-BASED VIOLENCE

Introduction[187]

Women and girls have, since time immemorial, been subjected to sexual and gender-based violence, including rape and sexual slavery, during armed conflict. Mass rape of women and girls was documented during the Second World War as well as in more recent conflicts in such diverse countries as the former Yugoslavia, Rwanda and the Democratic Republic of Congo.[188] Sexual violence has traditionally been considered as the inevitable by-product of armed conflict and has been mischaracterized by military and political leaders as a private crime or the unfortunate behavior of renegade soldiers. The use of rape as a weapon of war, however, means that rape is not a private or incidental crime. Rape as a weapon of war serves a strategic function and acts as an integral tool for achieving military objectives.

Conflict-related rape is an act of violence that targets sexuality, but it is also a military and political tool. It functions to subjugate and humiliate both the women and men within the targeted community. Furthermore, rape is generally not committed in isolation and victims are often subjected to multiple human rights abuses, which serve to further traumatize the survivor. In conflicts in which civilians are the principal targets, sexual violence has become an even more deliberate and insidious weapon of war. In the former Yugoslavia, for example, rape and other grave abuses committed by Serb forces were with the intent to drive the non-Serb population from their homes and communities.

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[185] Human Rights Watch interview, Bo, March 2, 2000.

[186] Human Rights Watch interview, Freetown, February 8, 2000.

[187] Some of the information in this section was published previously in Human Rights Watch Women's Rights Project, *The Global Report on Women's Human Rights* (New York: Human Rights Watch, 1995); and Dorothy Q. Thomas and Regan E. Ralph, "Rape in War: Challenging The Tradition of Impunity," *SAIS Review* (Washington D.C.: John Hopkins University Press, Winter-Spring 1994).

[188] *See* for example Human Rights Watch, *War Crimes in Bosnia-Hercegovina: U.N. Cease-Fire Won't Help Banja Luka* Volume 6, Issue 8, June 1994, http://www.hrw.org/reports/1994/bosnia2/; Human Rights Watch, *Bosnia-Hercegovina: The Fall of Srebrenica and the Failure of U.N. Peacekeeping,* Vol. 7, No. 13, October 1995, http://www.hrw.org/summaries/s.bosnia9510.html; Human Rights Watch, *Bosnia and Hercegovina, A Closed, Dark Place: Past and Present Human Rights Abuses in Foca*, Vol. 10, No. 6 (D), July 1998, http://www.hrw.org/reports98/foca/; Human Rights Watch/Africa, Human Rights Watch Women's Rights Project, Fédération Internationale des Ligues des Droits de l'Homme, Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, September 1996, http://www.hrw.org/reports/1996/Rwanda.htm; Human Rights Watch, *The War Within the War: Sexual Violence Against Women and Girls in Eastern Congo*, June 2002, http://www.hrw.org/reports/2002/drc/; Human Rights Watch, *Democratic Republic of Congo, War Crimes in Kisangani: The Response of Rwandan-backed Rebels to the May 2002 Mutiny*, Vol. 14, No 6 (A), August 2002, http://hrw.org/reports/2002/drc2/; United Nations, *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45*, E/CN.4/1995/42 (United Nations, 1994), p. 64.

The ten-year internal armed conflict in Sierra Leone has been characterized by egregious human rights abuses against the civilian population, including the use of sexual violence to achieve military aims.[189] From the testimonies in this report, it is clear that the rebels waged a war through attacking civilians. Sexual violence was therefore used as part of the rebels' military and political strategy, with victims often being used to bring messages to their enemies, including President Kabbah, ECOMOG, the SLA or the CDF. RUF rebels told an older woman whom they first raped and then subjected to amputation that: "There should be peace before the elections. Now you can go and vote. You have got to take a letter to Bo and those hands are the letters."[190] The testimonies also reveal how the rebels sought complete domination over girls and women by doing whatever they wanted to, including breaking numerous cultural taboos, such as raping lactating mothers or elderly women.

Despite being commonplace during armed conflict, rape "remains the least condemned war crime," according to the U.N. special rapporteur on violence against women.[191] It is only in recent years that it has been exposed and condemned alongside other human rights abuses and international humanitarian law violations. Sexual violence remains insufficiently reported, condemned, and prosecuted as war crimes or crimes against humanity. This differential treatment of sexual violence highlights the international community's willingness to tolerate sexual violence against women notwithstanding its obligations under international law.

International law has prohibited rape and other forms of sexual violence against women during armed conflict for over a century.[192] Perpetrators can be held accountable for rape and other forms of sexual violence as war crimes, crimes against humanity, and as acts of genocide.[193] International human rights law, which remains applicable in times of armed conflict, also prohibits sexual violence and sexual slavery.

International Humanitarian Law

International humanitarian law, also known as the laws of war, sets out protections for civilians, prisoners of war and other non-combatants during international and internal armed conflicts.[194] The four Geneva Conventions[195] and their two Additional Protocols[196] implicitly and explicitly condemn rape and other forms of

[189] United Nations, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49*, Addendum, Mission to Sierra Leone, E/CN.4/2002/83/Add.2 (United Nations, 2002).

[190] Human Rights Watch interview, Bo, March 2, 2000.

[191] United Nations, *Preliminary report submitted by the Special Rapporteur on violence against women*, E/CN.4/1995/42, p. 64.

[192] Some examples of how the law prohibiting war-related rape developed include the Italian lawyer Lucas de Penna advocating in the thirteenth century for the punishment of wartime rape just as severely as rape committed in peacetime, and Hugo Grotius stating in the sixteenth century that sexual violence committed in wartime was a punishable crime. Articles 44 and 47 of the 1863 Lieber Code, which served as the basis for subsequent war codes, also lists rape by a belligerent as a war crime punishable by death. *See* the Lieber Code of 1863, Correspondence, Orders, Reports, and Returns of the Union Authorities, From January 1 to December 31, 1863.--#7, O.R.--Series III—Volume III [S# 124], General Orders No. 100., War Dept., *Adjt. General's Office, Washington,* April 24, 1863. Article 4 of the Hague Convention (1907) provides a general prohibition of torture and abuses against combatants and non-combatants. Article 46 of the same convention prescribes that "[f]amily honour and rights...must be respected," which can be interpreted to cover rape. *See* Convention Respecting the Laws and Customs of War on Land, with annexed Regulations (Hague Convention IV) of October 18, 1907, 36 Stat. 2277, T.S. No. 539 (entered into force January 26, 1910). Kelly D. Askin and Dorean M. Koenig (eds.), *Women and International Human Rights Law* (Ardsley, NY: Transnational Publishers, Inc., 1999), Volume 1, p. 50. *See* also Kelly D. Askin, War *Crimes Against Women: Prosecution in International War Crimes Tribunals* (Dordrecht: Kluwer Law International, 1997), pp. 18-36.

[193] Although genocide did not occur in Sierra Leone, rape and other forms of sexual violence can be defined as constituent elements of genocide. Genocide is defined under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide as "acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group." Genocide has attained *jus cogens* status (a norm that preempts other norms) and is prohibited both in its own right and as a crime against humanity.

[194] *See* the four Geneva Conventions of 1949 and the two 1977 Protocols Additional to the Geneva Conventions. Other sources of international humanitarian law are the 1907 Hague Convention and Regulations, decisions of international tribunals and customary law.

[195] Sierra Leone became a party to the four Geneva Conventions on June 10, 1965.

sexual violence as serious violations of humanitarian law in both international and internal conflicts. In international armed conflicts, such crimes are grave breaches of the Geneva Conventions and are considered war crimes. Violations involving direct attacks on civilians during internal armed conflicts are increasingly recognized as war crimes.

Under international humanitarian law, the civil war in Sierra Leone was an internal armed conflict.[197] Common Article 3 to the Geneva Conventions applies to all parties in an internal armed conflict, including armed opposition groups. Through its prohibition of "outrages upon personal dignity, in particular humiliating and degrading treatment," Common Article 3 implicitly condemns sexual violence.

The Fourth Geneva Convention on the protection of civilians in international armed conflicts provides a basis for defining the protections provided under Common Article 3. Article 27 on the treatment of protected persons states that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[198] Article 147 specifies that "torture or inhuman treatment" and "willfully causing great suffering or serious injury to body or health" are grave breaches of the conventions.[199] According to the International Committee of the Red Cross (ICRC), rape and other forms of sexual violence are considered to be grave breaches and even a single act of sexual violence can constitute a war crime.[200]

Article 4 of Protocol II, which governs internal armed conflicts and applied to the conflict in Sierra Leone, expressly forbids "violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment, such as torture, mutilation or any form of corporal punishment" and "outrages upon personal dignity, in particular humiliating and degrading treatment, rape and enforced prostitution and any form of indecent assault" as well as "slavery and the slave trade in all their forms."[201] According to the ICRC Commentary, this provision "reaffirms and supplements Common Article 3 ... [because] it became clear that it was necessary to strengthen ... the protection of women ... who may also be the victims of rape, enforced prostitution or indecent assault."[202]

As the above language highlights, crimes of sexual violence under international humanitarian law have been mischaracterized as attacks against the honor of women or an outrage on personal dignity—as opposed to attacks on physical integrity. This mischaracterization diminishes the serious nature of the crime and contributes to the widespread misperception of rape as an attack on honor that is an "incidental" or "lesser" crime relative to crimes such as torture or enslavement.[203] Whilst it is true that rape is an assault on human dignity, rape should primarily be viewed as a violent assault on bodily integrity as well as one that dishonors the perpetrator and not the victim.

Sexual Violence as a Crime against Humanity

Acts of sexual violence committed as part of a widespread or systematic attack against civilians in Sierra Leone can be classified as crimes against humanity and prosecuted as such. There is no single international treaty that provides an authoritative definition of crimes against humanity, but such crimes are generally considered to

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[196] Sierra Leone ratified the Additional Protocols on October 21, 1986.

[197] The fighting in 1997-98 between West African ECOWAS forces and the RUF/AFRC government may have met the criteria for an international armed conflict.

[198] Geneva Convention IV, Article 27 (2). Article 76 of Protocol I extends this protection of protected persons to all women. Protocol I, Article 76.

[199] Geneva Convention IV, Article 147.

[200] Theodor Meron, "Rape as a Crime Under International Humanitarian Law," *American Journal of International Law* (Washington D.C.: American Society of International Law, 1993), vol. 87, p. 426, citing the International Committee of the Red Cross, Aide Mémoire, December 3, 1992.

[201] Protocol II, Article 4 (2) (a), (e) and (f).

[202] Yves Sandoz, Christophe Swinarski, Bruno Zimmerman (eds.), *ICRC Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff, 1987), p. 1375, para. 4539.

[203] *See* Catherine N. Niarchos, "Women, War and Rape: Challenges facing the International Criminal Tribunal for the former Yugoslavia," *Human Rights Quarterly* (Baltimore: The John Hopkins University Press, 1995), vol. 17, pp. 672, 674.

be serious and inhumane acts committed as part of a widespread or systematic attack against the civilian population, during peacetime or war, and that result from the persecution of a specific group.[204]

The charter establishing the Nuremberg tribunal after the Second World War did not specify rape under crimes against humanity or list gender as one of the grounds of persecution; the inclusion of rape could however be derived from the charter's general prohibition against "other inhumane acts."[205] Resolving this ambiguity, rape (as well as torture) was included in the specific list of crimes constituting crimes against humanity in the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY)[206] and the International Criminal Tribunal for Rwanda (ICTR).[207]

The statute of the International Criminal Court (ICC) expands on this by including gender as one of the grounds of persecution, as well as adding rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.[208] This definition of gender-based crimes against humanity, which appropriately makes no reference to the outdated notion of "crimes against honor," has been taken up in the Statute of the Special Court for Sierra Leone (see below for a discussion of the Special Court).

Under the evolving case law on crimes against humanity, formal proof of policy, plan or design is no longer an essential element for the prosecution of crimes against humanity. Both the ICTY and the ICTR have found that the existence of a plan or policy is sufficient: the policy need not be formalized and may be deduced from the way in which the acts occur.[209] The failure to take action to address widespread or systematic attacks against the civilian population can also be considered sufficient to determine the requisite element of policy, plan or design. Both state and non-state actors can be held accountable for crimes against humanity.

An individual case of serious sexual violence can be prosecuted as a crime against humanity if the prosecution can make the link between the single violation and other violations of basic human rights or international humanitarian law that have been committed as a widespread or systematic attack against the civilian population.[210] Each enumerated type of act, such as murder, torture, or rape, does not need to be committed on a

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[204] *See*, e.g. "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808," 32 I.L.M. at 1159 (1993), para. 48.

[205] The Nuremberg Charter, as amended by the Berlin Protocol, 59 Stat. 1546, 1547 (1945), E.A.S. NO. 472, 82 U.N.T.S. 284. Under article 6(c) of the Nuremberg Charter, crimes against humanity included, but were not limited to the following atrocities: "[m]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds."

[206] Article 5 of the Statute of the ICTY names rape as a crime against humanity. *See* Statute of the ICTY (adopted 25/5/93) at http://www.un.org/icty/basic/statut/statute-con.htm.

[207] Article 3 of the Statute of the ICTR names rape as a crime against humanity. *See* Statute of the ICTR (adopted 8/11/94) at http://www.ictr.org.

[208] Article 7 of the Statute of the ICC enumerates crimes against humanity as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Rome Statute of the International Criminal Court, opened for signature July 17, 1998, Article 7, reprinted in 37 I.L.M. 999 (1998). Sierra Leone signed and ratified the Rome Statute on October 17, 1998 and September 15, 2000 respectively.

[209] *Kunarac* Trial Chamber Judgement, para. 432.

[210] "It is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity." *Kunarac* Trial Chamber Judgement, para. 419.

widespread or systematic basis—it is the attack that must be widespread or systematic.[211]

Human Rights Law

Sierra Leone is party to international human rights instruments that provide safeguards for women and girls at all times, including during armed conflict. These include protection from rape as torture and other mistreatment; slavery and forced prostitution; and discrimination based on sex. Armed opposition groups, particularly those in control of territory, have increasingly been under an obligation to respect international human rights standards.[212]

The International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[213] prohibit torture and other cruel, inhuman or degrading treatment by officials or persons acting in an official capacity. The Convention on the Rights of the Child (CRC) provides for the right to freedom from torture, sexual exploitation and abuse as well as liberty and security of person.[214] The 1991 constitution of Sierra Leone also prohibits "any form of torture or any punishment or other treatment which is inhuman or degrading."[215]

The United Nations special rapporteur on torture has recognized that rape can constitute torture: "[R]ape is a traumatic form of torture for the victim."[216] The ICTY in the *Furundzija* case noted that "[i]n certain circumstances ... rape can amount to torture and has been found by international judicial bodies to constitute a violation of the norm prohibiting torture."[217] The ICTR in the *Akayesu* case stated that "Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[218]

Sexual violence generally violates women's rights to be free from discrimination based on sex as provided for under the ICCPR.[219] Under Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[220] the definition of discrimination is considered to include "gender-based violence precisely because gender-based violence has the effect or purpose of impairing or nullifying the enjoyment by women of human rights" on a basis of equality with men.[221] The CEDAW Committee enumerated a wide range of obligations for states related to ending sexual violence, including ensuring appropriate treatment for victims in the justice system, counseling and support services, and medical and psychological assistance to victims.[222] In a 1993

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[211] *Prosecutor v. Kupreškic*, Judgement, IT-95-16-T, 14 January 2000 (*Kupreškic* Trial Chamber Judgement), para. 550.

[212] Nigel S. Rodley, "Can Armed Opposition Groups Violate Human Rights?" in P. Mahoney and K. Mahoney (eds.) *Human Rights in the 21st Century: A Global Challenge* (Dordrecht: Martinus Nijhoff, 1993), pp. 297-318, and International Council on Human Rights Policy, "Hard Cases: Bringing Human Rights Violators to Justice Abroad—A Guide to Universal Jurisdiction," (Geneva: International Council on Human Rights Policy, 1999), p. 6.

[213] Sierra Leone ratified the CAT on March 1, 2001.

[214] Sierra Leone ratified the CRC on June 18, 1990. Article 34 protects the child from sexual exploitation and sexual abuse. Article 37 provides for the freedom from torture or other cruel, inhuman or degrading treatment or punishment as well as liberty and security of person.

[215] Constitution of Sierra Leone (1991), Chapter III – The Recognition and Protection of Fundamental Human Rights and Freedoms of the Individual, s. 20(1).

[216] United Nations, *Report of the U.N. Special Rapporteur on Torture, Mr. Nigel S. Rodley, submitted pursuant to the Commission on Human Rights Resolution 1992/32*, E/CN.4/1995/34, Paragraph 19, January 12, 1995.

[217] *Prosecutor v. Anto Furundžija*, Judgement, IT-95-17/1-T, December 10, 1998, para. 171.

[218] *Prosecutor v. Jean-Paul Akayesu*, Judgement, ICTR-96-4-T, September 2, 1998 (the *Akayesu* Trial Chamber Judgement), para. 687.

[219] *See* ICCPR, Articles 2 (1) and 26.

[220] Sierra Leone ratified this treaty on November 11, 1988.

[221] Women, Law and Development International, *Gender Violence: The Hidden War Crimes* (Washington D.C.: Women, Law and Development International, 1998), p. 37.

[222] Committee on the Elimination of All Forms of Discrimination Against Women, "Violence Against Women," General Recommendation no. 19 (eleventh session, 1992), U.N. Document CEDAW/C/1992/L.1/Add.15.

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HUMAN RIGHTS WATCH , RECONCILED TO VIOLENCE: STATE FAILURE TO STOP DOMESTIC AND ABDUCTION IN KYRGYZSTAN

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KYRGYZSTAN

Reconciled to Violence

State Failure to Stop Domestic Abuse and Abduction of Women in Kyrgyzstan

HUMAN RIGHTS WATCH

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Introduction to the Report

Summary

Domestic violence and abduction for forced marriage (bride-kidnapping) are pervasive forms of violence against women in Kyrgyzstan. Although statistics are not available, great numbers of women and girls in Kyrgyzstan have experienced these serious violations of their most fundamental human rights. The problems of domestic violence and abduction have long been neglected by government officials, and urgently need to be addressed.

Perpetrators of domestic violence variously beat, kick, strangle, stab, rape, and shoot their wives. Women are locked in their homes to isolate them from their natal families and to prevent them from seeking assistance; are denied food; and are beaten with bricks, pipes, and other heavy objects. They are humiliated and demeaned. Some women are hospitalized due to domestic abuse; some suffer permanent injury. Women are severely traumatized by the violence they experience, and some commit suicide as a result. Some are killed by their husbands.

Kyrgyzstan is not alone in having a serious domestic violence problem. Statistical data on domestic violence is inadequate worldwide, but available data shows disturbingly high levels of domestic violence in many countries. In 2005 the World Health Organization issued a report reflecting data collected from more than 24,000 women in 10 countries around the world that found that the proportion of women who had experienced intimate partner violence ranged from 15 to 71 percent, with most sites falling between 29 and 62 percent. Research shows that domestic violence occurs in all social, economic, religious, and cultural groups.

The domestic violence section of this report focuses primarily on how Kyrgyz police respond to domestic violence. This focus was chosen for several reasons: First, Kyrgyzstan has a progressive new law on domestic violence that specifically calls on law enforcement agencies to play a role in responding to and preventing domestic violence through a series of very specific obligations. Second, despite their legal

repeated assault by her ex-husband, which resulted in a concussion and other injuries, she eventually resorted to violence to defend herself in May 2004:

> He came one day to our house, he was very drunk. He broke down the door to get in. That time he attacked me and hit me with his fists and I suffered a concussion. I went to the police and asked them to take action. But they didn't do anything in time. He then came back at 2 a.m. He came with a metal pipe in his hand, he was drunk and high.... I feared for myself and my children and could only think that I had to defend them. He started to come into the house and I came out and met him. He tried to hit me. I knocked him down. The next thing I know I had the pipe in my hands and I had been hitting him. He had two broken legs. Then my [current] husband came out and pulled me off of my ex-husband. I was in shock.... The case against me was investigated for four months and then the court process went [on] for four months. They sent me to the psychological hospital to determine my sanity at the time of the attack. They determined that at the moment of the attack I was changed, that I was consumed by stress and fear and did not understand what I was doing. They gave me a one-year suspended sentence that expires in December. I have to go to the police once a month to check in.

The incident finally sparked police and judicial action to address her ex-husband's violent behavior; a former convict, he was sent to prison on an eight-year sentence for beating her.[199] But even after her husband was sent to prison, Jamila J. was skeptical that the police would protect her, "My ex-husband is in prison now, but I still fear him. I fear what he will do when he gets out. The police clearly can't protect me."[200]

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[199] Human Rights Watch interview with Jamila J., November 2005.
[200] Ibid.

the suicide and illegal possession of firearms. Aitbaeva said, "We thought at first that the police were working [on it].... [A year later] the investigator... told me, 'My personal conviction is that there was no murder here.' I became convinced he was hiding something, that he wasn't doing his job." Aitbaeva began to push for further action on the case. "We went to court and asked for an additional investigation. I didn't believe that the procuracy was doing a proper job because he [Aldoiarova's husband] worked for the police." She succeeded in getting the case transferred to the military procuracy.[203] As a result of this investigation, Aldoiarova's husband was charged with murder and the case went to court. Aitbaeva said, "We demanded a lot of expert analyses: ballistics, forensics, etc. The civilian procuracy's expert had determined 'She had possibly shot herself,' when this is not at all what had happened. He appeared in court drunk. We believe that he must have been paid by her husband's family." By contrast, she said, the military investigator was very professional, "He checked everything and determined that she had been shot and murdered 24 hours earlier [before the family had found the body]. He found a lot of shortcomings and mistakes in the civilian prosecutor's work." Nonetheless, the first military court acquitted Aldoiarova's husband. "The judge was drunk. We were shocked," Aitbaeva recalled.[204]

The family appealed the case to the Supreme Court, which convicted Nurbek Estebesov of murder, assault, and illegal possession of weapons and sentenced him to 14 years in prison on June 17, 2004.[205]

Aitbaeva speculated that not only did police "solidarity" inhibit a genuine police investigation and accountability, but that bribery also played a significant role in the extraordinarily shoddy police work and ill-founded first court decision regarding the shooting death of her daughter. She conjectured about the officials responsible for the early stages of the case, "I think his family paid them. Paid all of them. Of course I don't have any evidence. But why else would the expert and the judge appear in

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[203] In cases such as the case related to the death of Iskra Aldoiarova, when there are grounds to believe that the procuracy cannot be objective, the plaintiff has the right to request transfer of the case to the military procuracy, as Aitbaeva did.

[204] Human Rights Watch interview with Uliana Aitbaeva, Tiup, November 18, 2005.

[205] Ibid., Aitbaeva said that the investigative work of the military procuracy was crucial to getting a conviction in the case: "They determined... that if she had shot herself there would have been blood and matter spray on the wall, but there wasn't. They also analyzed the trajectory of the shot and determined that she could not have shot herself. [The defense] experts tried to say that she had shot herself using her foot."

- Law enforcement and judicial authorities failed to hold anyone accountable for the alleged rape and murder of a woman in the town of Dolon, in Tiup district, in 2004. In that case the woman died of exposure after allegedly being beaten and raped by her husband and his friends and then left outside in the cold. The men were acquitted and no one was punished for her death.[212] Tiup district police said that forensic analysis found that the woman had been drunk and that is why she had died of exposure on the street. The charges of rape were also not confirmed by police.[213]

Police perceived as perpetrators of domestic violence

An expert from the Presidential Council on Women, Family, and Gender Development asserted the prevalence of domestic violence in police homes. She said, "The majority of domestic violence cases are in homes of police officers. We don't have exact data on this, but the wealth of anecdotal evidence points to this."[214] Leading women's rights groups throughout Kyrgyzstan told Human Rights Watch that domestic violence by police officers against their wives is common and widespread.[215] An OSCE law enforcement expert said that police "tend towards violence at home" as well as at work.[216] Police officers' own culpability in acts of violence against their wives may contribute to their unwillingness and failure to act to protect women victims and hold male abusers accountable for their crimes. Several women victims of violence by husbands who are police officers told Human Rights Watch of particular challenges they faced to obtaining justice and protection from law enforcement agencies. They are also more likely to feel constrained from escaping from a violent home.

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[212] Human Rights Watch interview with Uliana Aitbaeva, Tiup, November 18, 2005.

[213] Email communication from Human Rights Watch consultant, Sardar Bagishbekov, based on his telephone interview with Anna Makarova, Accent, Tiup, April 26, 2006.

[214] Human Rights Watch interview with Taalaygul Isakunova, expert, the Presidential Council on Women, Family, and Gender Development, Bishkek, October 31, 2005.

[215] Human Rights Watch interviews with Zhanna Saralaeva, Association of Women Leaders of Jalal Abad and Kaniet Crisis Center, Jalal Abad, November 10; Nargiza Eshtaeva, Ailzat, Osh, November 8; Maya Kaparova, Diamond, Bishkek, October 31; Jamila Kaparova, affiliated with Diamond, Osh, November 8, 2005; Aleksandra Eliferenko, Chance, Bishkek, October 28; Olga Klimentieva, lawyer, Chance, Bishkek, October 29; and Bubusara Ryskulova, Sezim, Bishkek, November 1, 2005.

[216] Human Rights Watch interview with Police Colonel Salishybek Mamyrov, OSCE national professional employee (Ministry of Internal Affairs liaison), Bishkek, November 17, 2005.

your husband for doing such hard work. How could he not beat you after [going through] that?'"[221]

Women whose abusive husbands are police officers are often constrained from leaving abusive marriages and are afraid to go to the police for help. Asel A. said, "I never went to the police because he himself is an officer and his brother is too, so I couldn't go to the police."[222] According to Nargiza Eshtaeva of the NGO Ailzat in Osh, Elena E., who was beaten by her husband, said that because he was a police officer and many of his relatives were also on the police force, she could not leave him. Eshtaeva said that when Elena E. came to Ailzat for counseling she was afraid even to speak to the group's lawyer because she feared the lawyer might also know her husband and would tell him what she said.[223] NGO activists say women's perceptions that their options are constrained by the fact that their abusive husbands are police officers are well-founded, and that police regard themselves as above the law. Leading women's rights advocate Bubusara Ryskulova asserted that when a woman's abusive husband is a police officer, "she can't do anything, because he says, 'I am the police, you can't go anywhere.'"[224] "Policemen with contacts can do what they want," said another activist.[225]

Wives of abusive police officers also may not have access to police protection orders. Activist Nargiza Eshtaeva told Human Rights Watch, "A woman came to us and she was covered in bruises. She didn't know how to get a restraining order. Her husband was a police colonel."[226] In that case, although the woman had been hospitalized several times due to injuries caused by beatings by her husband and she had her doctors' documentation of the injuries, the presence of her husband and all of his brothers on the police force convinced her that she could not turn to the police herself.[227]

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[221] Human Rights Watch interview with Zhanna Saralaeva, Association of Women Leaders of Jalal Abad and Kaniet Crisis Center, Jalal Abad, November 10, 2005.

[222] Human Rights Watch interview with Asel A., November 2005.

[223] Human Rights Watch interview with Nargiza Eshtaeva, Ailzat, Osh, November 8, 2005.

[224] Human Rights Watch interview with Bubusara Ryskulova, Sezim, Bishkek, November 1, 2005.

[225] Human Rights Watch interview with Nargiza Eshtaeva, Ailzat, Osh, November 8, 2005.

[226] Ibid.

[227] According to Nargiza Eshtaeva, the woman's husband had managed, through his connections with local authorities, to obtain a divorce from her without her consent and this contributed to her belief that law enforcement authorities would not help her.

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HUMAN RIGHTS WATCH, BHUTAN/ NEPAL: TRAPPED BY INEQUALITY:BHUTANESE REFUGEES WOMEN IN NEPAL

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NEPAL/BHUTAN

Trapped by Inequality

Bhutanese Refugee Women in Nepal

HUMAN RIGHTS WATCH

Women's Status in Nepal

Over the past twelve years, Bhutanese refugee women have been under the protection and jurisdiction of the government of Nepal. Despite progress made by the Nepalese women's movement in recent decades, women and girls still suffer inferior social, economic, legal, and political status compared to men. Girls experience discriminatory treatment from birth, and strict gender roles prevent women from cultivating economic independence and social autonomy. Girls are considered burdens to the family and less valuable than sons, who are expected to care for parents in their old age.

Low education levels among girls and women, paternalistic laws, and pervasive gender-based violence prevent women from enjoying their human rights. Rampant poverty, lack of awareness about deceptive and coercive methods employed by human traffickers, and an open border between Nepal and India contribute to thousands of Nepalese women and girls being trafficked for sex work and forced labor in India each year.[38] Discrimination against women includes legalized polygyny and a law that prevents women from retaining custody of their children if they remarry.[39] Shortcomings in the law that inhibit successful prosecutions for gender-based violence cases are discussed in later sections.

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society ... is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality"; and in article 27, that: "Everyone has the right freely to participate in the cultural life of the community...." The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) recognizes the "right to equal participation in cultural activities." CERD, 660 U.N.T.S. 195, entered into force Jan. 4, 1969, art. 5(e)(6). Bhutan signed the CERD in 1973. Under article 18 of the Vienna Convention on the Law of Treaties, a state that has signed but not yet ratified a treaty is obliged to refrain from acts that would defeat the object and purpose of a treaty. See also, International Covenant on Economic, Social, and Cultural Rights (ICESCR), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (no. 16), U.N. Doc. A/6316, entered into force January 3, 1976, art.15 and International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 27.

[38] Human Rights Watch, *Rape for Profit: Trafficking of Nepali Girls and Women for India's Brothels*, (New York: Human Rights Watch, 1995); United States Department of State, "2002 Country Reports on Human Rights Practices: Nepal," March 31, 2003 [online], http://www.state.gov/g/drl/rls/hrrpt/2002/18313pf.htm(retrieved on May 30, 2003). No reliable data exists on the magnitude of trafficking in Nepal, but local NGOs estimate 5,000 to 12,000 girls and women are trafficked each year, primarily to India for sex work.

[39] Polygyny refers to men having more than one wife and polyandry refers to women having more than one husband. Polygamy encompasses both. The Country Code states, "No male shall, except in the following circumstances, marry another female or keep a woman as an additional wife during the lifetime of his wife or where the conjugal relation with his first wife has not been dissolved under the law: [i] If his wife has any contagious venereal disease and has become incurable: [ii] If his wife has become incurably insane; [iii] If no child has been born or remained alive within ten years of the marriage; [iv] If his wife has become lame and unable to walk; [v] If his wife has become blind of both eyes; [vi] If his wife has lived separately after obtaining her partition share under No. 10 or No. 10A of the Chapter on Partition." Muluki Ain 2020 [Country Code 1963], chapter on Marriage, no. 9. The Country Code also stipulates a woman may only have custody of her children older than five years if she has not "eloped" (remarried). Muluki Ain 2020 [Country Code 1963], chapter on Husband and Wife, no. 3(2).

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IV. DISCRIMINATION IN REGISTRATION PROCEDURES AND ACCESS TO AID

Gender discrimination in camp registration policies and in Nepalese law has deprived many Bhutanese women and children from enjoying equal and full access to humanitarian aid and has also prevented some women from passing their Bhutanese nationality to their children. UNHCR and the government of Nepal have implemented a registration system based on household cards listed under the name of the male household head. They have failed to ensure that all refugee women have independent access to their full entitlement of aid, which is especially critical for women leaving polygynous or abusive households.[42]

Discrimination against Women and Children in Refugee Registration

The government of Nepal does not register children who have a refugee mother but a non-refugee father. This discriminatory policy denies children rations of food, clothes, and other goods, and makes them ineligible for repatriation to Bhutan. These registration procedures violate children's right to be free from discrimination based on the sex of their parent or legal guardian.[43] Moreover, the practice of allowing refugee men to register children born of non-refugee women, but not allowing the same for refugee women with children fathered by non-refugee men, discriminates on the basis of sex. In the refugee camps, this policy may also violate children's right to acquire a nationality and render them stateless.[44]

One twenty-seven-year-old rape survivor said she was unable to register her child conceived as a result of the rape because she could not name the father. Crying, she told Human Rights Watch:

> I was raped. The problem is that the child is not registered in the camps because she doesn't have a father. She doesn't get clothes. I have submitted a number of applications to the camp management committee. I

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[42] This report does not discuss the plight of non-registered women. In some cases, refugee women failed the refugee status determination interview at the screening post at Kakarbhitta on the India-Nepal border, possibly because of their unfamiliarity with and fear about the screening procedures. In other cases, they arrived after the screening post closed in January 2001 (screening resumed in September 2003). Some women from the local Nepalese community have also married into the camps. None of these women or their children are able to access aid packages, and it is unclear whether they will have a chance to accompany their families to Bhutan. Human Rights Watch interviewed several Nepalese women who had married into the camps, and who experienced psychological and physical abuse from their husband's families because they were seen as burdens on the household's resources.

[43] CRC, art. 2(1).

[44] CRC, art. 7. UNHCR guidelines on the protection of refugee children outline its responsibilities to prevent statelessness among refugee children and to protect stateless persons, in part by ensuring that the births of all refugee children are registered. UNHCR, *Refugee Children: Guidelines for Protection and Care* (Geneva: UNHCR, 1995), p. 104. ExCom Conclusion No. 47 (1987) urges States to "take appropriate measures to register the births of refugee children born in countries of asylum," and ExCom Conclusion No. 85 (1998) affirms this guideline, drawing particular attention to "children of refugees and asylum-seekers born in asylum countries who could be stateless unless appropriate legislation and registration procedures are in place and are followed."

Another administrator confirmed this policy: "If an outside [Nepalese] woman is brought into the camps, the children will be registered, but there is no rule like that for outside men. This is the rule of Nepal under an understanding with UNHCR: inheritance is only through the father, not the mother."[51]

Camp administrators base registration procedures on Nepalese law, which discriminates against women by denying them the ability to transfer citizenship to their children. Section 9 of the constitution of Nepal states that a child "whose father is a citizen of Nepal at the birth of the child shall be a citizen of Nepal by descent" and that "[e]very child who is found within the Kingdom of Nepal and the whereabouts of whose parents are not known shall, until the father of the child is traced, be deemed to be a citizen of Nepal by descent."[52] Any child with a Nepalese father and a non-Nepalese mother automatically acquires Nepalese citizenship, but this is not the case for a child with a Nepalese mother and non-Nepalese father. Correspondingly, any child with a registered Bhutanese refugee father may be registered in the camps, but camp policy denies registration to children with a registered Bhutanese refugee mother and Nepalese father.

Non-Registration of Ration Cards in Women's Names

Under the current registration and ration card system, Bhutanese refugee women are often unable to obtain ration cards in their own names. Although there are isolated cases of household cards being issued to women, married women are generally listed under their husband's household card. Adult women who are single, divorced, or widowed are often "absorbed" into their father or brother's household card. This practice denies women independent and equal access to their full aid entitlements and if they are in abusive relationships, may jeopardize their safety. Human Rights Watch interviewed one twenty-one-year-old woman, Tara D., who was beaten repeatedly by her husband to the point where she was hospitalized twice. She eventually tried to commit suicide. She said:

> Now I am living separately. But my ration is still with my parents-in-law. They say bad things [insults] but I do it my way. I get my [food] rations, but not other benefits, like clothes. I have talked about it in the office, but no one replied. I asked again, I was called, and I asked for a separation. They said this is new for us, we need to discuss it more. That was three months ago. The subsector head supports me. He gives my husband's share to me when my husband is away. The subsector head found a place for me to build a new hut. I had a goat and I sold it to buy materials for a new hut. I have not been given anything. I borrowed money from others and have not been able to pay it back yet. When it rains, the whole place gets drenched.

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[51] Human Rights Watch interview with camp-level RCU administrator, Bhutanese refugee camps, Nepal, April 1, 2003. In an e-mail message to Human Rights Watch, a protection officer with the UNHCR Sub-Office in Damak said that UNHCR does not agree with the current policy. E-mail message from Douglass Cubie, UNV associate protection officer, UNHCR Sub-Office, Damak, Nepal to Human Rights Watch, September 1, 2003.

[52] Nepal Const. arts. 9(1) and 9(2).

> Equal access to and control of material resources and assistance benefits and women's equal participation in decision-making processes should be reflected in all programmes, whether explicitly targeting sexual and gender-based violence or responding to the emergency, recovery or development needs of the population.[58]

The guidelines emphasize that an important method for ensuring equal access to aid and protection is to "[p]rovide registration cards to all adult refugees (male and female)."[59] However, an informal review conducted by UNHCR and the World Food Programme (WFP) in early 2003 concluded that the cost of redesigning the registration system in Nepal would not justify the benefits.[60]

The current registration policies fail women by preventing them from obtaining an independent ration card even if they separate from an abusive husband. Upon the request of Tara D., whose situation is described above, a researcher from Human Rights Watch raised her case with a camp-level RCU administrator. He replied, "I think this case is quite satisfactorily settled. She's receiving special protection from the subsector head. If she has complaints, then she doesn't know who to go to. She should go to LWF [The Lutheran World Federation] for additional housing materials." The administrator ignored the fact that Tara D. could not request additional materials without a separate ration card and that she faced difficulties with other types of rations as well. He further explained, "A ration card cannot be separated. [If a woman wants to live separately] [t]hey can set up a partition in the hut. Only if the woman takes another husband can the ration card be changed. The RCU changes it, UNHCR has to give a separate hut, and LWF gives separate materials."[61]

Even when the camp management committee and the RCU forwarded cases to UNHCR, most women we interviewed were still not able to obtain a separate ration card because of the camp registration policies. Geeta M. reported:

> I was in class eight when we got married. I had a child, and my husband started mistreating me. He had an affair with another girl. I was beaten several times. Sometimes I was beaten so badly I bled. I told the sector head. My husband took a second wife. I didn't agree, but I had lots of pressure from the neighbors so I agreed. He said, "if you don't allow me to take a second wife, then the ration card is in my name, and I'll take everything." There was a fight involving my brothers, and I was taken to the police. The case couldn't be decided by the camp secretary and the

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[58] UNHCR, *Sexual and Gender-Based Violence*, p. 25.

[59] UNHCR, *Sexual and Gender-Based Violence*, p. 51. ExCom Conclusion No. 64 (1990) calls upon States to "[i]ssue individual identification and/or registration documents to all refugee women; [and] provide all refugee women and girls with effective and equitable access to basic services...."

[60] Human Rights Watch interview with Courtney Mitchell, programme officer, World Food Programme, Kathmandu, Nepal, March 18, 2003.

[61] Human Rights Watch interview with camp-level RCU administrator, Bhutanese refugee camps, Nepal, April 1, 2003.

mother. Typically, these children, along with their mothers, access their food rations through ad hoc arrangements with the subsector head, but have less access to other types of household goods.

Children living with their fathers may also face difficulties obtaining their share of aid. Youth advocates from the Children's Forum highlight abuse from fathers and stepmothers as one of the most pressing children's problems in the camps. At times, the abuse takes the form of depriving children their full food rations. One refugee mother, Maya N., said she works as an agricultural laborer outside of the camps in order to earn extra money to buy food for her children, who live with their father and stepmother. She told Human Rights Watch:

> My first husband took a Tamang girl as a second wife. Now he beats my four children. My children are treated badly by the second wife and are not given their share of food. My son says he doesn't get food. I want him to shift to my new husband's ration card. I cut rice in the village from 7 a.m. to 4 p.m. I get Rs. 50 [U.S. $0.64].[65] I have to work all day long in the heat, for the benefit of the children.[66]

Maya N. remarried and is now on the ration card of her second husband. He refuses to apply for Maya N.'s children to switch to their ration card. Because of the current camp registration policies, she is unable to obtain her own ration card and to ensure independently that her children receive their aid entitlements.

[65] Throughout this report, the exchange rate used is 78 Nepalese Rupees to the U.S. dollar, the rate on July 31, 2003.

[66] Human Rights Watch interview with Maya N., Bhutanese refugee camps, Nepal, March 26, 2003.

Guidelines for Preventing and Responding to Gender-Based Violence

The West Africa "sexual exploitation" scandal provided impetus for a re-evaluation of United Nations and NGO employee codes of conduct as well as methodologies for addressing gender-based violence in humanitarian crises. The Inter-Agency Standing Committee (IASC), a body of U.N. agencies and NGO invitees, established a Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises (IASC Task Force) in March 2002.[71] The IASC Task Force's mandate was "to make recommendations to eliminate sexual exploitation and abuse by humanitarian personnel and the misuse of humanitarian assistance for sexual purposes."[72] The IASC Task Force identified core principles for a code of conduct for all humanitarian workers in its Plan of Action.[73]

UNHCR has independently developed a number of guidelines and manuals to ensure the protection of refugees, internally displaced people, and returnees.[74] Among the most important guidelines for the protection of refugee women are the 1991 *Guidelines for the Protection of Refugee Women* and the 2003 *Sexual and Gender-Based Violence Against Refugees, Returnees, and Internally-Displaced Persons: Guidelines for Prevention and Response.*[75] UNHCR also integrated the core principles delineated by the IASC Task Force into its own code of conduct.[76]

UNHCR and its implementing partners use the following definition for gender-based violence:

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[71] The IASC includes several United Nations agencies and voluntary organizations that provide humanitarian assistance. A full list of members and standing invitees can be found at http://www.humanitarianinfo.org/iasc/membership.asp.

[72] IASC, "Report of the Task Force," p. 1.

[73] IASC Task Force, "Plan of Action," June 13, 2002, p. 1 [online] http://www.humanitarianinfo.org/iasc/poasexualexploitation.doc (retrieved March 18, 2003). The six core principles are (1) sexual exploitation and abuse are grounds for termination of employment; (2) sexual activity with children is prohibited regardless of age of majority or local age of consent; (3) exchange of money, services or other goods for sex is prohibited; (4) sexual relationships between humanitarian workers and beneficiaries are strongly discouraged as they are based on unequal power dynamics and undermine the integrity of humanitarian aid work; (5) aid workers must report concerns regarding sexual abuse by a fellow worker via established agency mechanisms; and (6) humanitarian workers and agencies are obliged to create and maintain an environment that prevents sexual exploitation and abuse and promotes the code of conduct.

[74] In 2002, UNHCR and states adopted a joint "Agenda for Protection" after the Global Consultations on International Protection, eighteen months of discussion among governments, NGOs, refugee experts, and UNHCR. The Agenda for Protection is a program of action for improving the protection of refugees and asylum-seekers around the world. Two of its six goals address finding durable solutions for refugees and meeting the protection needs of refugee women and children. Although it is not a legally binding document, the Agenda for Protection carries political weight and reflects a broad consensus on actions that can and should be taken to achieve agreed goals in refugee protection. UNHCR, *Agenda for Protection* (Geneva: UNHCR, 2003).

[75] There are several other UNHCR manuals which address gender-based protection issues, including UNHCR, *Handbook for Emergencies* (Geneva: UNHCR, 2000); UNHCR, *Refugee Children: Guidelines on Protection and Care* (Geneva: UNHCR, 1994); and UNHCR, *Reproductive Health in Refugee Situations: Interagency Field Manual* (Geneva: UNHCR, 1999).

[76] The UNHCR Code of Conduct may be found in the 2003 Guidelines.

of refugee women and children.[80] The perpetrators were two Nepalese government officials whose salaries were paid by UNHCR and fifteen refugee men (mostly school teachers) working for NGO implementing partners.[81] Refugee girls comprised the vast majority of victims in these cases. In addition to sexual exploitation by refugee aid workers and officials, the team discovered many other cases of gender-based violence within the refugee community, including rape, attempted rape, sexual assault, child marriage, forced marriage, and domestic violence.[82]

A humanitarian aid worker told Human Rights Watch that the two government officials involved in the sexual exploitation cases were a police officer stationed in one of the camps and an RCU official not stationed in the camps. The police officer encouraged a local man to rape a refugee woman in early 2002, and allegedly received a bribe to rape her himself. He did not rape the woman, but beat her at her home and then again at the police station, where he threatened to charge her with prostitution. The aid worker told Human Rights Watch:

> The official, who was in a managerial position, was sexually harassing refugee women in his office.... There was a case of a [repeated] rape of a disabled girl, this was by an aid worker.... There were many cases of teachers being involved with their students. They would impregnate the girls, who were then kicked out of school. Nothing would happen to the teachers, they would continue to teach and went out with other girls.[83]

A young refugee woman emphasized the impact of the school-based sexual exploitation cases: "In one case a twenty-five-year-old teacher made a fourteen-year-old student pregnant. The community does not like it because then they will feel afraid to send girls to school."[84] In some cases, the camp management committees or the parents of the student and teacher would "settle" the case by encouraging their marriage.

Attention to the sexual exploitation cases illuminated the broader and more pervasive problem of gender-based violence in the camps. The UNHCR investigation team also found that refugee women and girls suffered sexual assault and domestic violence perpetrated by other refugees, local Nepalese residents, and intimate partners. In such cases, refugee women and girls were doubly victimized—first by their assailants, and then by the minimal response by the government of Nepal and UNHCR. They received inadequate and even harmful settlements meted out by the refugee camp management committees. Whether perpetrators were refugee aid workers, other refugees, or members of the local Nepalese community, the victims of gender-based

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[80] Binaj Gurubacharya, "U.N. investigates reports of sexual abuse by aid workers in Bhutanese refugee camps in Nepal," The Associated Press, November 19, 2002.

[81] Ibid. UNHCR, "Information Note," December 6, 2002.

[82] UNHCR, "Information Note," December 6, 2002. UNHCR, "Information Note," December 24, 2002. Human Rights Watch interview with a humanitarian aid worker who wished to remain anonymous, August 2003.

[83] Human Rights Watch interview with a humanitarian aid worker who wished to remain anonymous, June 2003.

[84] Human Rights Watch interview with Sabitra B., Bhutanese refugee camps, Nepal, March 31, 2003.

crowds and to receive little redress. The hearings and final judgments often humiliated and further traumatized victims. The UNHCR investigation team discovered cases where rape victims, including children as young as five years old, were given public apologies and a token compensation of only ten rupees (U.S. $0.13). One aid worker told Human Rights Watch that there were "many cases where young girls were raped and these cases were settled by turning them into early marriages. Parents often felt they had no other option. It was regularized into a social situation. [There were] more than thirty cases where rape victims were forced to marry their assailant."[88]

Survivors of gender-based violence were often unable to obtain appropriate medical assistance, legal aid, or counseling services. Staff at the Asian Medical Doctors Association (AMDA) hospital issued a medical certificate citing "internal damage" to a five-year-old girl raped by a seventeen-year-old boy instead of sending her to a government hospital where she could get a legally admissible medical report.[89] Refugees and aid workers with inadequate training were often responsible for providing therapy and counseling for victims. In one camp, an aid worker relied upon tranquilizers for treating patients. In other cases, the counseling provided to victims exposed them to danger, as in one woman who was advised to stay with her husband despite severe and repeated physical and sexual violence.[90]

The Government of Nepal and UNHCR: A Case of Negligence

The government of Nepal and UNHCR did not have adequate complaint mechanisms for reporting gender-based violence, and often failed to provide protection when refugees brought cases to their attention. UNHCR did not implement programs for effective prevention and response despite several indications about the problems confronting women and girls in the camps.

UNHCR had an insufficient presence in the refugee camps and visited them irregularly, contributing to the denial of justice and protection for those who suffered gender-based violence. As one observer noted, UNHCR and implementing partners felt that since "refugees were electing their leaders, they were legitimate leaders to whom responsibility for camp protection and administration of justice could fully be delegated."[91] Refugee camp management committee members did not have appropriate

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[88] Human Rights Watch interview with a humanitarian aid worker who wished to remain anonymous, June 2003. UNHCR stated that as of June 30, 2003, there were four reported cases of gender-based violence survivors who had married their assailant. However, they note this does not include cases of child marriage. E-mail message from UNHCR Branch Office, Kathmandu, Nepal to Human Rights Watch, July 22, 2003.

[89] Human Rights Watch interview with a humanitarian aid worker who wished to remain anonymous, August 2003.

[90] Ibid. The woman's husband once fractured her wrist and inserted a bamboo stick into her vagina. UNHCR Nepal staff failed to meet with the victim soon after the occurrence of that round of violence. According to UNHCR, field and protection staff have since met with the woman and are assisting her with splitting her ration card from that of her husband. E-mail message from Giulia Ricciarelli-Ranawat, protection officer, UNHCR Branch Office, Kathmandu, Nepal, to Human Rights Watch, September 10, 2003.

[91] Human Rights Watch interview with a humanitarian aid worker who wished to remain anonymous, August 2003.

child marriage. The refugees highlighted alcoholism and its links with quarrels between married couples and the sale of rations, polygamy-related problems, and the widespread occurrence of domestic violence coupled with social sanctions against reporting such cases. They also perceived a rising incidence of rape cases.[97] UNHCR also documented individual cases of gender-based violence as early as October 2001 and during the summer of 2002.[98]

UNHCR did not refer any cases of gender-based violence for legal prosecution, instead relying upon the settlements meted out by the counseling boards. Senior international staff in Nepal were aware that the counseling boards "resolved" some gender-based violence cases by ordering apologies and token compensation but still failed to take action.[99] As one source told Human Rights Watch, "Cases came before UNHCR—brought by refugees—all sorts of SGBV [sexual and gender-based violence] cases, [including] rape of children. The response was not totally absent, but it was inadequate. There was no follow-up with perpetrators, or with victims in terms of psycho-social care, legal help. In many cases, UNHCR did not meet with victims directly. The CMC structures were failing [refugees], for example there were rapists who were repeat offenders."[100]

Citing the terms of its agreement with Nepal, UNHCR decided to end or reduce funding in September 2002 for "informal" refugee organizations operating in the camps.[101] Three of these organizations had been vocal about gender-based violence and child abuse in the camps. As grassroots networks, the Bhutanese Refugee Women's Forum (BRWF) and the Children's Forum often identified and supported women and children survivors of violence. The Children's Forum monitored the camps for child abuse and forwarded cases to The Lutheran World Federation. If cases reached UNHCR, the staff had no system to forward them to the Bhadrapur office and failed to respond to many cases.[102] The third organization, Bhutanese Refugees Aiding Victims of Violence (BRAVVE), provided training in weaving and other income-generating activities to economically and socially marginalized groups like widows, women heads of households, and people with disabilities.

Eliminating funding for these groups would have likely meant that many incidents of violence would remain unreported, limiting survivors' access to support services and gravely undermining efforts to improve women and children's status in the camps. In the context of instituting reforms in the camps in late 2002, UNHCR addressed the problem by incorporating BRWF, the Children's Forum, BRAVVE, and other refugee

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[97] Human Rights Watch interview with a humanitarian aid worker who wished to remain anonymous, August 2003.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] E-mail message from Giulia Ricciarelli-Ranawat, protection officer, UNHCR Branch Office, Kathmandu, Nepal, to Human Rights Watch, September 10, 2003. UNHCR's agreement with the Nepalese government stipulates that UNHCR cannot financially support any organization not registered in Nepal.
[102] Human Rights Watch interview with a humanitarian aid worker who wished to remain anonymous, August 2003.

VI. EVALUATING REFORM: STRENGTHS AND GAPS IN THE RESPONSE TO GENDER-BASED VIOLENCE

After the Inspector General's Office completed its investigation in November 2002, UNHCR initiated a comprehensive program to prevent and respond to the overall problem of gender-based violence in Nepal's refugee camps. These included streamlining reporting and referral procedures; increasing security and a regular UNHCR presence in the camps; establishing mass information campaigns to raise community awareness about gender discrimination and gender-based violence; improving medical protocols and other victims' services; signing a subagreement with the Nepal Bar Association to provide legal counseling and representation to gender-based violence survivors and actively pursuing prosecutions; and ensuring the retention of women and children's organizations in the camps. To address gender-based violence by humanitarian workers, UNHCR amended their subagreements with implementing partners to include a code of conduct for all employees (see Appendix A).

In late 2002, UNHCR also removed three international staff members from their posts in Nepal on grounds of gross negligence. UNHCR has not provided any public information on follow-up procedures or disciplinary measures taken regarding these three staff. Sharing information in a transparent manner on internal protocols for disciplinary action and the outcome of such proceedings is essential for setting a rigorous standard of accountability for UNHCR's employees, its partners, and the staff of other United Nations agencies.

As of July 25, 2003, UNHCR had documented eighty-four cases of gender-based violence.[103] Thirty-eight victims were children, and one victim was male. These include thirty-six cases of rape, thirteen cases of domestic violence, thirteen sexual and physical assault cases, and seven cases of child marriage.[104] UNHCR also reported that thirty-five additional refugee women and girls are missing from the camps.[105] Many of these girls and women may be trafficking victims.

Human Rights Watch interviews with refugees suggest the actual numbers of gender-based violence are higher. Fears of retaliation and social stigma still prevent survivors from coming forward,[106] and Human Rights Watch talked to domestic violence victims in particular who felt that existing mechanisms could not address their problems.

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[103] E-mail message from Giulia Ricciarelli-Ranawat, protection officer, UNHCR Branch Office, Kathmandu, Nepal to Human Rights Watch, August 18, 2003.

[104] Ibid. The thirty-six rape cases include rape, gang rape, attempted rape, statutory rape, and marital rape. UNHCR also documented three sexual harassment cases, two trafficking cases, two "inappropriate behavior" cases, two attempted sexual abuse cases, one molestation case, three cases of spouse abandonment, and two cases of alleged prostitution.

[105] E-mail message from Giulia Ricciarelli-Ranawat, protection officer, UNHCR Branch Office, Kathmandu, Nepal, to Human Rights Watch, September 10, 2003.

[106] Ibid. In some cases, refugee families have refused to disclose the identity of child victims to UNHCR because of the social stigma associated with gender-based violence and with talking to UNHCR, who are seen as mainly working on gender-based violence cases.

The design of the camps facilitates safety in some respects and hampers it in others. Every two huts share a latrine, saving refugees from risky trips to distant or poorly-lit parts of the camp at night. The Lutheran World Federation has helped create a water and sanitation system that ensures consistent and year-round access to water inside the camps. Refugees also receive kerosene and stoves as part of their assistance packages. However, the location of the camps presents difficulties. Timai and Goldhap camps are located close to the Nepal-India border and, along with other camps, have experienced cases of trafficking in refugee women and girls. The proximity of several camps to the town of Damak or to major thoroughfares has allowed refugees to participate in life outside of the camps, but has also meant that members of the local Nepalese community sometimes enter the camps and harass the refugees.

Women, men, and children all report problems with local Nepalese coming into the camps, often inebriated, and harassing them.[111] A forty-five-year-old male subsector head said, "[d]runk local people come in the camp. They tease women, they beat people. There have been some serious cases."[112] Kalpana K., a seventeen-year-old girl, said, "I don't like it when they tease me. It happens more right outside of the camp. There are gangs of people outside of the camp. They have the wrong intention. They talk in such a manner, pretending they're going to marry you immediately. Some women...fall prey to these men."[113]

Women and girls interviewed by Human Rights Watch said they fear sexual violence. Sapana S., who is twenty-three, reported that, "being a refugee, especially women, we feel insecure in the camp. [Our concern is] mainly the sex cases, if we have to work at night, we should take guard, otherwise the situation could get very difficult."[114] A girl in tenth grade said:

> The locals threaten us, they come inside the camp and drink. They come near my home, everyday they come, I can't count how many, ages sixteen to twenty-five. Boys from the camp learn from them and imitate them. They speak filthy words. They can do illegal acts to us. Even to small girls. In my sector there was a case involving a three or four-year-old girl baby. This organization [UNHCR] should be strict. The government of Nepal should also make strict rules.[115]

Guidelines for Humanitarian Aid Staff

Human Rights Watch found that UNHCR and its implementing partners had made significant progress in encouraging compliance with a code of conduct for employees. The government of Nepal is amending the camp rules with input from

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[111] The RCU issued instructions to enforce the no-alcohol policy in the camps in August 2003. E-mail message from Douglass Cubie, UNV associate protection officer, UNHCR Sub-Office, Damak, Nepal to Human Rights Watch, September 1, 2003. Human Rights Watch lacks sufficient information to assess the impact of this directive.

[112] Human Rights Watch interview with Dilli T., Bhutanese refugee camps, Nepal, April 3, 2003.

[113] Human Rights Watch interview with Kalpana K., Bhutanese refugee camps, Nepal, March 28, 2003.

[114] Human Rights Watch interview with Sapana S., Bhutanese refugee camps, Nepal, March 28, 2003.

[115] Human Rights Watch interview with Shanti D., Bhutanese refugee camps, Nepal, March 28, 2003.

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UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, CONTEMPORARY FORMS OF SLAVERY

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CONTEMPORARY FORMS OF SLAVERY

Systematic rape, sexual slavery and slavery-like practices during armed conflict

Update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur

CONTENTS

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CONTENTS (continued)

Introduction

1. At its forty-ninth session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in its decision 1997/114, decided to entrust Ms. Gay J. McDougall with the task of completing the study on systematic rape, sexual slavery and slavery-like practices during periods of armed conflict, including internal armed conflict. The final report (E/CN.4/Sub.2/1998/13) (hereinafter "final report") was submitted to the Sub-Commission at its fiftieth session.

2. The final report concludes that systematic rape, sexual slavery and slavery-like practices during armed conflict constitute violations of human rights, humanitarian and international criminal law, and as such must be properly documented, the perpetrators brought to justice, and the victims provided with full criminal and civil redress, including compensation where appropriate. The final report also concludes that even in the absence of armed conflict, sexual slavery and other forms of sexual violence, including rape, may be prosecuted under existing legal norms as slavery, crimes against humanity, genocide or torture.

3. The Sub-Commission, in its resolution 1998/18, welcoming with great interest the final report of the Special Rapporteur, endorsed "the accepted view that regardless of whether sexual violence in armed conflict occurs on an apparently sporadic basis or as part of a comprehensive plan to attack and terrorize a targeted population, all acts of sexual violence, in particular during armed conflicts and including all acts of rape and sexual slavery, must be condemned and prosecuted" (para. 2). The Sub-Commission also strongly endorsed "the Special Rapporteur s call for national and international responses to the increasing occurrence during armed conflicts, including internal armed conflicts, of acts of sexual violence and sexual slavery" (para. 4).

4. At its fifty-fifth session, the Commission on Human Rights, in its decision 1999/105, approved the request of the Sub-Commission to extend the mandate of the Special Rapporteur for a further year, "in order to enable her to submit an update on developments with respect to her mandate at the fifty-first session of the Sub-Commission." As Special Rapporteur for systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict, the Special Rapporteur understands her mandate to encompass various forms of sexual violence committed in a range of conflict situations.

5. The importance of continuing the Special Rapporteur's mandate and the focus on the use of sexual violence as a weapon of war is abundantly clear, as evidenced by atrocities which have been and continue to be committed in conflicts around the world. Such abuses include the detention and rape of women and girls in their homes, in rape camps or in other facilities, and the abduction of women and girls for the purpose of forced labour and forced sexual activity. These and other practices involving the treatment of women and girls as chattel, which often includes sexual access, are forms of slavery and must be prosecuted as such. Although the Special Rapporteur places special emphasis on abuses committed against women and girls, there is no doubt that prohibitions of the crimes discussed in this report must be applied to men and boys, who also are victims of sexual violence.

6. This update to the final report[1] considers a number of developments and actions at the international and national levels to end the cycle of impunity for sexual violence committed

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during armed conflict. These developments include the historic adoption of the Rome Statute of the International Criminal Court, the continuing progress of the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, and efforts at the national level to end impunity for violations of international law, including sexual violence committed during armed conflict.

I. PURPOSE OF THE REPORT

7. Both the Special Rapporteur s final report and this update share the same purposes: first, to reiterate the call for an effective response to sexual violence committed during armed conflict; second, to emphasize that rape and other forms of sexual abuse are crimes of violence which, under certain circumstances, may constitute slavery, crimes against humanity, genocide, grave breaches of the Geneva Conventions, war crimes and torture; third, to reinforce the legal framework which already exists for the prosecution of these crimes, with a view to achieving a more consistent and gender-responsive application of human rights and humanitarian and international criminal law.

8. Many cases of sexual violence during armed conflict, including many of the factual scenarios presented in this report, are most appropriately characterized and prosecuted as slavery. Slavery should be understood as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,[2] including sexual access through rape or other forms of sexual abuse. Critical elements in the definition of slavery are limitations on autonomy and on the power to decide matters relating to one s sexual activity and bodily integrity. A claim of slavery does not require that a person be bought, sold or traded; physically abducted, held in detention, physically restrained or confined for any set or particular length of time; subjected to forced labour or forced sexual activity; or subjected to any physical or sexual violence although these are indicia of slavery.[3] Further, a claim of slavery does not require any State action or nexus to armed conflict. And the mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery does not in and of itself nullify a claim of slavery.

9. The term "sexual" is used in this report as an adjective to describe a form of slavery. In all respects and in all circumstances, sexual slavery is slavery and its prohibition is a jus cogens norm. The legal effect of jus cogens is that slavery, as well as crimes against humanity, genocide and torture, are prohibited at all times and in all places. The violation of a jus cogens norm is subject to universal jurisdiction and can be prosecuted by any State. In fact, States have an obligation to ensure that persons who commit violations of jus cogens norms are brought to justice.[4]

II. SEXUAL VIOLENCE DURING CONTEMPORARY ARMED CONFLICTS

10. Sexual violence continues to be used as a weapon of war, as evidenced in armed conflicts around the world during the period covered by this report. For example, there are reports of sexual slavery and other forms of sexual violence, including rape, being used by all sides to the conflicts in Afghanistan,[5] Burundi,[6] Colombia,[7] the Democratic Republic of the Congo,[8] Liberia,[9] and Myanmar.[10]

11. The Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, has investigated the issue of sexual violence in Indonesia and reports the following:

> Before May 1998, rape was used as an instrument of torture and intimidation by certain elements of the Indonesian army in Aceh, Irian Jaya and East Timor. Since May 1998, the policy appears to be different. The Army Commander of East Timor assured us that rape by soldiers will not be tolerated and that perpetrators will be prosecuted. Nevertheless, the rapes continue.[11]

12. Also in Indonesia, during the 1998 riots which followed student protests and clashes with security forces in Jakarta, there were reports of widespread and systematic rapes of ethnic Chinese women and girls.[12] While there was some controversy over the number of rapes and the level of systematic planning involved in their commission,[13] the fact-finding team eventually established by the Government of Indonesia verified that there were at least 66 rapes.[14]

13. In Uganda, the Lord s Resistance Army (LRA) and the Allied Democratic Forces continued their practice of abducting children and using them as forced labourers, child soldiers and sexual slaves. It is estimated that the LRA, supported by and operating out of the Sudan, has abducted up to 10,000 children, with girls as young as 12 given to commanders as "wives". "Each soldier may have several such wives, and many of the children have become pregnant and have contracted sexual diseases."[15] The repeated rape and sexual abuse of women and girls under the guise of "marriage" constitutes slavery, as the victims do not have the freedom to leave, to refuse the sham "marriage" or to decide whether and on what terms to engage in sexual activity.[16]

14. There are widespread reports that Serb soldiers committed rapes and other acts of sexual violence against ethnic Albanian women and girls during the armed conflict in Kosovo. The allegations of sexual violence on the part of the Serbs include gang rape, rape in front of family and community members, and rape of women and girls detained in army camps, hotels and other locations.[17] The detention or confinement of women and girls in their homes or in other locations for the purpose of rape or other sexual abuse constitutes slavery and should be prosecuted as such.

15. The reports from Kosovo highlight the devastating psychological and social consequences, in addition to the physical trauma, that women survivors of sexual violence must endure. Many ethnic Albanian women who have been victims of sexual violence dare not speak about their experience, for fear of being ostracized in their families and communities due to the social stigma associated with rape. The cultural milieu for many women in Kosovo, and elsewhere, is one in which a husband will divorce his wife upon learning or even suspecting that she has been raped, and an unmarried woman who has been raped has few if any opportunities for marriage.[18] Women also are ostracized by other victims of sexual violence simply for reporting the crime.[19] Consequently, many women will admit to being threatened with or witnessing rape or other sexual abuse, but not to being victims themselves.

16. In June 1999, the Special Rapporteur participated in a two-day mission to Sierra Leone at the invitation of the United Nations High Commissioner for Human Rights. During the mission,

a number of teenage girls were interviewed, several of whom had been subjected to sexual violence and one of whom had been abducted and held by rebel soldiers for nearly three months, during which time she was repeatedly raped and sexually abused. These and numerous other testimonies reveal that sexual slavery and other forms of sexual violence, including gang rapes, public rapes and sexual mutilations, were systematic and widespread during the armed conflict, with rebel soldiers committing the vast majority of the reported abuses.[20]

17. In one well-documented incident in January 1999, a local rebel commander ordered all virgin girls to report for a physical examination. The girls were checked by a female companion of the commander and those who were "verified" as virgins, most of whom were between the ages of 12 and 15, were ordered to report each night for sexual abuse by the rebel fighters. Some of the girls were subsequently abducted when the rebels retreated. The acts committed in this incident constitute slavery, as the victims did not have the freedom to leave or to refuse to comply with the orders, and as repeated sexual access to the victims was gained through the use and threat of force, the control of the physical environment and abduction.

18. While a peace accord between the Government of Sierra Leone and the rebel forces was signed on 7 July 1999, the peace process suffered a grave setback in May 2000, demonstrating that it will require considerable time and effort for the people of Sierra Leone to surmount the devastating effects of the atrocities that were committed during the eight-year war. These atrocities include summary executions, murder, amputations of limbs and extremities, the use of child soldiers, and sexual violence.[21]

19. It also should be noted that while the peace accord offers amnesty to those persons who committed abuses during the war, such amnesty would pertain only to criminal prosecutions within the domestic jurisdiction of Sierra Leone, and only to acts preceding the effective date of the amnesty. Thus, crimes of sexual violence must be investigated and documented for possible criminal prosecution in the domestic courts of other States which may have jurisdiction, and for possible civil action in Sierra Leone. Once constituted, the Truth and Reconciliation Commission of Sierra Leone also should devote careful attention to documenting crimes of sexual violence committed during the conflict and should propose remedial actions to be taken by the Government of Sierra Leone, with support from the international community.

20. There are any number of often interconnecting reasons why sexual slavery and other forms of sexual violence, including rape, continue to be so prevalent in armed conflict situations. Some of the more obvious reasons include:

- The use of sexual violence is seen as an effective way to terrorize and demoralize members of the opposition, thereby forcing them to flee;

- Access to women's bodies and sexuality often is seen as the "spoils of war" or part of the "services" that are made available to combatants;

- Military or combat indoctrination often desensitizes combatants and dehumanizes the opposition, thereby facilitating the commission of atrocities during armed conflict, including sexual violence;

- In situations of armed conflict, where aggressive behaviour is particularly rewarded, individual combatants may be allowed or even encouraged to express their own pathology, brutality or personal animus through acts of sexual violence;

- Individual conscience and personal objections to sexual violence often are subordinated to mob rule or to superior orders in armed conflict situations;

- The generally violent and lawless climate created by armed conflict allows such crimes to be committed with impunity;

- Acts of sexual violence are not consistently viewed or codified as criminal acts, and those who commit them often are not punished under the law;

- Women and girls are devalued in society in general, making them vulnerable to sexual violence, particularly in times of armed conflict;

- Racism, xenophobia or ethnic hatred often is directed against women and girls who are members of targeted groups, and who then are subjected to sexual violence because of their gender and other factors of their identity;

- Sexual violence is used as a form of "ethnic cleansing" through forced impregnation, the prevention or termination of births, or the infliction of severe physical or mental suffering.

21. While these and other motives certainly merit consideration, with particular attention given to the ways in which they might be countered, the most immediate and effective deterrent to the use of sexual violence during armed conflict is to hold the perpetrators responsible for their crimes. As stated by the Commission on Human Rights, "the expectation of impunity for violations of international human rights or humanitarian law encourages such violations." The Commission further "urged States to give necessary attention to the question of impunity for violations of international human rights and humanitarian law, including those perpetrated against women, and to take appropriate measures to address this important issue."[22]

22. Out of all of the factual patterns described thus far in this report, only the egregious acts of sexual violence that have occurred in Kosovo are within the jurisdiction of an existing international criminal tribunal, the International Criminal Tribunal for the Former Yugoslavia. The permanent International Criminal Court will have jurisdiction only over those crimes which are committed after the Court is established. Thus, in the vast majority of cases of sexual violence occurring in contemporary armed conflicts, national judicial systems must be relied on to investigate, prosecute and punish the perpetrators.[23]

III. THE INTERNATIONAL CRIMINAL COURT

23. The adoption of the Rome Statute of the International Criminal Court[24] on 17 July 1998 was a critically important event in international law. The International Criminal Court (hereinafter "ICC"), will significantly supplement the international legal framework for prosecuting international crimes, including those involving sexual violence. In addition, a permanent international criminal court offers obvious advantages over ad hoc international tribunals in which jurisdiction is limited to offences occurring within a certain geographical area or within a prescribed period of time.

24. As at April 2000, 96 States had signed the Statute of the ICC and eight States had ratified it.[25] The statute requires 60 ratifications before it enters into force. The crimes over which the International Criminal Court will have jurisdiction are genocide, crimes against humanity, war crimes and the crime of aggression. Only crimes occurring after the Court is established will be subject to its jurisdiction.[26]

25. In the preamble to the Statute of the ICC, the United Nations Diplomatic Conference:

> [Affirmed] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation;
>
> [Determined] to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes; [and]
>
> [Recalled] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

26. In furtherance of this commitment to end impunity for international crimes, including sexual slavery and other forms of sexual violence, the Statute of the ICC explicitly includes gender concerns, gender-based crimes and sexual violence in many of its provisions. The term "gender" is defined in the Statute as "the two sexes, male and female, within the context of society."[27] The Special Rapporteur interprets this definition to be consistent with other, more clearly stated formulations, in which the term gender "refers to the socially constructed roles of women and men in public and private life."[28]

27. This report considers several aspects of the Statute of the ICC that represent the progressive development of international criminal law, particularly with respect to addressing gender-based crimes and sexual violence. However, in the diplomatic negotiations to delineate the elements of the crimes within the Court's jurisdiction, some States have attempted to limit the scope of the Court's protections. The Preparatory Commission for the ICC will hold its fifth session from 12 to 30 June 2000 at United Nations Headquarters. The elements of the crimes, as well as the rules of procedure and evidence for the Court, are to be finalized at that session. It is critical that the Statute of the ICC reinforces the highest possible human rights, humanitarian and international criminal law standards to ensure that international crimes involving gender-based or sexual violence are within the jurisdiction of the Court.

28. One example of the inclusion of gender-based crimes and sexual violence in the Statute of the ICC is with respect to crimes against humanity. Article 7 (1) (g) provides that constituent acts of crimes against humanity include "[r]ape, sexual slavery, enforced prostitution, forced pregnancy,[29] enforced sterilization or any other form of sexual violence of comparable gravity." Additionally, Article 7 (2) (c) of the Statute provides that enslavement, as a constituent act of crimes against humanity, includes "trafficking in persons, in particular women and children."

29. As of the writing of this report, the diplomatic negotiations over the elements of sexual slavery has resulted in the following proposed text: "...(3) the accused exercised a power attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such person or persons, or by imposing on them a similar deprivation of liberty; (4) the accused caused such person or persons to engage in one or more acts of a sexual nature."[30] It is unnecessary and inappropriate to require any element of commercial transaction for the crime of sexual slavery. Most contemporary forms of slavery, including sexual slavery, do not involve payment or exchange; and as stated in section I of this report, a claim of slavery does not require that a person be bought, sold or traded, or subjected to a similar deprivation of liberty.

30. Another negotiation proposal which threatens to diminish the scope and effectiveness of the prohibition on crimes against humanity in the Statute of the ICC was prompted by the efforts of some States to exclude crimes which are committed within the family. As of the writing of this report, the proposal would require proving that a State or organization actively promoted or encouraged the criminal conduct in question in order for it to constitute a crime against humanity. This would exclude from the jurisdiction of the Court those crimes which involve a State's failure to act, even in the face of widespread violations, such as widespread crimes committed against women.

31. It is particularly noteworthy that article 7 (1) (h), in stating that "[p]ersecution against any identifiable group or collectivity" may constitute a crime against humanity, includes gender among the grounds for persecution "that are universally recognized as impermissible under international law." This recognition of gender as an individual and collective identity which, like race, ethnicity and religion, is capable of being targeted for persecution, and thus merits specific protection under international law, is an explicit articulation of what has been an obvious omission in earlier codifications and formal definitions of crimes against humanity.

32. Another positive example of the inclusion of gender-based crimes and sexual violence in the Statute of the ICC is with respect to war crimes. Article 8 (2) (b) (xxii) provides that war crimes in international armed conflict include "[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilizations, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions." Article 8(2)(e)(vi) provides that war crimes in non-international armed conflict include "[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilizations, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions."[31]

33. The provision in the Statute of the ICC regarding genocide also is pertinent to gender-based violations, even though it does not explicitly refer to sexual violence. Article 6 (d),

which is reproduced from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, provides that constituent acts of genocide include imposing measures intended to prevent births within a group.[32]

34. Sexual violence also is implicated in several other provisions of the Statute of the ICC, including: (i) torture as a crime against humanity[33] and a grave breach of the Geneva Conventions;[34] (ii) inhumane acts which cause serious injury as a crime against humanity[35] and a grave breach of the Geneva Conventions;[36] (iii) "outrages upon personal dignity, in particular humiliating and degrading treatment" as a serious violation of the laws and customs of war[37] and a serious violation of common article 3;[38] and (iv) violence to life and person, mutilation, cruel treatment and torture as serious violations of common article 3.[39].

35. In addition to its provisions regarding genocide, crimes against humanity and war crimes, the Statute of the ICC contains various other provisions which explicitly incorporate gender concerns. For instance, while falling short of requiring gender equality on the Court, article 36 (8) (a) (iii) provides for a "fair representation of female and male judges." The Statute also requires a consideration of the need for legal expertise on gender violence in the Court, the Office of the Prosecutor and the Victims and Witnesses Unit.[40]

36. Importantly, the Statute of the ICC also provides for the protection and rehabilitation of victims and witnesses, including "where the crime involves sexual or gender violence or violence against children."[41] This protection requires consideration of such matters as safety, physical and psychological well-being, dignity and privacy.[42] The Statute also provides for in camera proceedings and non-public hearings, particularly in cases involving sexual violence.[43]

37. The Statute of the ICC explicitly provides for the participation of non-governmental organizations, which are particularly useful sources for documenting and disseminating information on violence against women committed during armed conflict. Article 15 (2) provides that the Prosecutor may initiate an investigation on the basis of information from non-governmental organizations or other reliable sources, provided the Pre-Trial Chamber so authorizes. Article 44 (4) states that the Court and the Office of the Prosecutor may employ the expertise offered by non-governmental organizations.

38. Further, the Statute of the ICC provides for the reparation of victims and for the non-applicability of statutes of limitations. Article 75 states: "The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[44] Article 29 of the Statute of the ICC states: "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."[45] Both of these provisions are critical to ensuring full redress to victims of sexual violence committed during armed conflict.

39. In addition, the Statute of the ICC identifies several categories of individuals who may be held responsible for international crimes.[46] Article 25 provides for individual criminal responsibility for those persons who commit, attempt to commit, order, solicit, induce, aid, abet, assist or intentionally contribute to the commission of a crime within the Court's jurisdiction,[47] and for persons who incite others to commit genocide.[48] Article 27 stipulates that the statute applies to all persons without distinction, including on the basis of official capacity such as head

of State, member of Government or elected representative. And article 28 provides for the responsibility of military commanders and other superior authorities for crimes committed by subordinates under their control.

40. Modifying the principle applied in the Nürnberg Tribunal and in the ad hoc international criminal tribunals, that the defence of "superior orders" cannot be raised and may only be considered in mitigation of punishment, article 33 (1) of the Statute of the ICC provides that superior orders shall not relieve a person of criminal responsibility unless the subordinate was under a legal obligation to obey the order and did not know that the order was unlawful, and the order was not manifestly unlawful. Article 33 (2) does provide, however, that "orders to commit genocide or crimes against humanity are manifestly unlawful."

41. As for issues of admissibility, article 17 (1) of the Statute of the ICC provides that a case which has been or is being investigated or prosecuted by a State with jurisdiction is inadmissible, unless the State is unwilling or unable genuinely to conduct the proceedings. Under the Statute of the ICC, one indication of a State's "unwillingness" is lack of independence or impartiality in the national proceedings, which presumably would include gender bias.[49] The high threshold provided under the Statute for determining a State's "inability" to carry out proceedings is a "total or substantial collapse or unavailability of its national judicial system."[50]

42. It is the understanding of the Special Rapporteur that a crucial concern in evaluating the competence of national judicial systems to adjudicate international crimes is the extent to which the national system in question adequately protects the rights of women. In particular, the existence of gender biases in municipal laws or procedures must be taken into account when assessing the general competence of domestic courts to adjudicate the types of violations of human rights and humanitarian law addressed in this report that are directed against women.[51]

43. The provisions for the Court's jurisdiction are more limited than many at the Rome diplomatic conference had hoped they would be. Under the Statute of the ICC, the Court has jurisdiction in cases initiated by a State party or the Prosecutor only if the crime occurs on the territory of a State party (or a State which has accepted the Court's jurisdiction on an ad hoc basis) or if the accused is a national of a State party (or a State which has accepted the Court's jurisdiction on an ad hoc basis).[52] The Court also has jurisdiction in cases referred to it by the Security Council.[53] If none of the above provisions apply, the Statute excludes from the Court's jurisdiction those cases in which the victim is a national of a State party, as well as those cases in which the suspect is in the custody of a State party. Thus, for example, in an internal armed conflict where the State in which the crime occurs and of which the suspect is a national are the same, the Court could have jurisdiction only if that State is a party to the Statute, or has accepted the Court's jurisdiction on an ad hoc basis, or if the case is referred to the Court by the Security Council.

IV. THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS

44. In addition to the promising role that the International Criminal Court will play in the future, there have been several important developments in the ad hoc international criminal tribunals. Efforts continue in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) to address violations committed

during the armed conflicts in those regions, including the investigation and prosecution of crimes involving sexual slavery and other forms of sexual violence. In addition to handling cases related to the conflict in Bosnia, the Office of the Prosecutor for the ICTY is investigating allegations of sexual violence committed during the conflict in Kosovo.

45. With the conclusion of several precedent-setting cases in both tribunals, jurisprudence is increasingly confirming that sexual slavery and other forms of sexual violence, including rape, committed during armed conflict are violations of international law. In the ICTY and the ICTR, acts of sexual violence, committed against women and men, have been charged and successfully prosecuted as crimes against humanity, genocide, grave breaches of the Geneva Conventions and other war crimes, including torture and outrages upon personal dignity. In addition to rape and sexual slavery, various other forms of sexual violence have been the basis of prosecution, including sexual mutilation, forced public nudity, and forcing victims to perform sexual acts on each other.

46. The definitions of rape used in the ICTY and the ICTR are consistent in recognizing that: (i) rape is a serious crime of violence; (ii) rape is not limited to forcible sexual intercourse; (iii) both women and men can be victims and perpetrators of rape; and (iv) coercion, as an element of rape, has a broad meaning which is not limited to physical force.[54]

47. The International Tribunal for Rwanda "considers sexual violence, which includes rape, as any act of a sexual nature which is committed upon a person under circumstances which are coercive."[55] The Special Rapporteur reiterates the definition of slavery as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence. Slavery, when combined with sexual violence, constitutes sexual slavery.

48. In the Kunarac, Kovac and Vukovic case pending before the International Criminal Tribunal for the Former Yugoslavia,[56] the Prosecutor alleges that one victim, who at the time was seven months pregnant, was detained for at least a week in Kunarac's headquarters.

> "During the entire period of her detention at this house, [the witness] was subjected to repeated rapes. In addition to being repeatedly raped, the witness was beaten. She also had to clean the house and obey each order given to her by the accused and his subordinates. [The witness] was treated as the personal property of Dragoljub Kunarac and his unit."[57]

49. Based on these allegations, Kunarac is charged with enslavement, rape and torture as crimes against humanity and with rape, torture and outrages upon personal dignity as war crimes. Kunarac also is charged with the aforementioned crimes for similar abuses committed against three other victims.[58] These allegations, if established at trial, constitute sexual slavery in the view of the Special Rapporteur. The treatment of the women as chattel or as personal property, which is the gravamen of slavery, is evidenced not only by the forced domestic work but also by the forced sexual activity. Indeed, the forced labour is a separate crime from the sexual slavery.

50. The Special Rapporteur understands that based on customary law interpretations of the crime of slavery, and thus sexual slavery, there are no requirements of any payment or exchange;

of any physical restraint, detention or confinement for any set or particular length of time; nor is there a requirement of legal disenfranchisement. Nonetheless, these and other factors may be taken into account in determining whether a "status or condition" of slavery exists. While the most commonly recognized form of slavery involves the coerced performance of physical labour or service of some kind, again, this is merely a factor to be considered in determining whether a "status or condition" exists which transforms an act, such as rape, into sexual slavery. It is the status or condition of being enslaved which differentiates sexual slavery from other crimes of sexual violence, such as rape. One respect in which slavery differs from imprisonment or arbitrary detention is that the limitations on autonomy can be solely psychological or situational, with no physical restraints.

51. Sexual slavery, as a form of slavery, is an international crime and a violation of jus cogens norms in the exact same manner as slavery.[59] Clearly, there can be no distinction which implies that slavery for the purpose of physical labour is a jus cogens crime, whereas slavery for the purpose of rape and sexual abuse is not.[60] As a jus cogens norm, the prohibition of slavery, including sexual slavery, cannot be the subject of derogation, amendment or any legal modification, except by a subsequent peremptory norm having the same character. As a jus cogens crime, neither a State nor its agents, including government and military officials, can consent to the enslavement of any person under any circumstances. Likewise, a person cannot, under any circumstances, consent to be enslaved or subjected to slavery. Thus, it follows that a person accused of slavery cannot raise consent of the victim as a defence.[61]

A. International Criminal Tribunal for the Former Yugoslavia

52. As at April 2000, the ICTY had issued public indictments against 94 individuals, of whom 39 were in custody.[62] A major impetus for the establishment of the ICTY was sexual violence committed against women in the conflict in Bosnia, and this continues to be reflected in the cases brought before the Tribunal and in the indictments, at least half of which include allegations of sexual violence.[63] Three of the four cases completed by trial in the ICTY have involved allegations of sexual violence: the Tadić, Celebići and Furundžija cases.[64]

53. In the Furundžija case, the defendant, a Bosnian Croat paramilitary commander, was found guilty and sentenced to 10 years' imprisonment on two counts of war crimes - torture, and aiding and abetting in outrages upon personal dignity, including rape. The defendant was accused of conducting an interrogation of a Muslim woman prisoner while she was sexually assaulted by another soldier.[65] Although Furundžija did not commit the physical acts of sexual violence, his interrogation of the prisoner during the assaults made him criminally responsible as a co-perpetrator of torture. For his presence and his acts or omissions during the assault, Furundžija also was found liable for aiding and abetting in the rape of the prisoner. The prisoner was subsequently locked in a house where she was raped repeatedly by soldiers for two months. This crime, while not attributed to Furundžija, constitutes sexual slavery for which the perpetrators should be held liable.

54. The Trial Chamber entered its judgement in the "Celebići" case on 16 November 1998, finding three of the defendants guilty of grave breaches and war crimes, and acquitting another defendant of all charges. Zdravko Mucić, a Bosnian Croat commander of the Celebići detention camp where acts of rape and other sexual violence were committed, was convicted on 11 counts

of grave breaches and war crimes. He was sentenced to seven years' imprisonment. Hazim Delić, a Bosnian Muslim deputy commander of the Celebići camp, was convicted on 13 counts of grave breaches and war crimes, including for multiple acts of rape as torture. He was sentenced to 20 years' imprisonment. Esad Landžo, a Bosnian Muslim guard at the camp, testified at trial to committing various acts of sexual violence, including forcing two brothers to perform oral sex on each other and placing a burning fuse around their genitals. He was convicted on 17 counts of grave breaches and war crimes and sentenced to 15 years' imprisonment.

55. In its analysis of rape as torture, the Trial Chamber in the "Celebići" case cited the Special Rapporteur's final report on systematic rape, sexual slavery and slavery-like practices during armed conflict.

> "Finally, in a recent report, the United Nations Special Rapporteur on Contemporary Forms of Slavery, Systematic Rape and Slavery-like Practices during Armed Conflict, has considered the issue of rape as torture with particular regard to the prohibited purpose of discrimination. The United Nations Special Rapporteur referred to the fact that the Convention on the Elimination of All Forms of Discrimination Against Women has recognized that violence directed against a woman because she is a woman, including acts that inflict physical, mental or sexual harm or suffering, represent a form of discrimination that seriously inhibits the ability of women to enjoy human rights and freedoms. Upon this basis, the United Nations Special Rapporteur opined that, 'in many cases the discrimination prong of the definition of torture in the Torture Convention provides an additional basis for prosecuting rape and sexual violence as torture'."[66]

56. Several defendants in the ICTY have been indicted and prosecuted on the basis of superior responsibility, or as it is alternatively referred to, superior authority or command responsibility.[67] In convicting both the commander and the deputy commander of the Celebići detention camp, the Trial Chamber stated: "Thus, a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates."[68] The Trial Chamber further noted that "the applicability of the principle of superior responsibility ... extends not only to military commanders but also to individuals in non-military positions of superior authority."[69]

57. In this regard, it is an important development that the President of the Federal Republic of Yugoslavia (FRY), Slobodan Milosević, is under indictment for suspected crimes committed in Kosovo.[70] Milosević has been charged with crimes against humanity and war crimes on the basis of both individual and superior responsibility.[71] In a separate indictment, another civilian leader, Radovan Karadžić, has been charged on the basis of superior authority with crimes allegedly committed in Bosnia, including rape and sexual abuse.[72]

58. It is crucial that those persons in positions of authority, military commanders and civilian leaders alike, who order subordinates to commit acts of sexual violence, or who otherwise knew or should have known that such acts were likely to be committed and failed to take steps to

prevent them, are held fully responsible for the commission of the international crimes which these acts may constitute, including war crimes, slavery, crimes against humanity, genocide and torture. Where rape and other acts of sexual violence occur in a widespread or systematic manner, superior authorities should be presumed to have knowledge of the acts. Of course, a superior authority who participates in or is present during the commission of acts of sexual violence is directly liable under individual responsibility as a co-perpetrator or for aiding and abetting in the crime.

B. International Tribunal for Rwanda

59. As at April 2000, the ICTR had issued public indictments against 50 individuals, of whom 44 were in custody.[73] Several ICTR indictments include charges of sexual violence. In one indictment, Arsène Shalom Ntahobali is charged jointly with his mother, Pauline Nyiramasuhuko, the former Minister of Women's Development and Family Welfare, with genocide, crimes against humanity and serious violations of common article 3 and Additional Protocol II to the Geneva Conventions. The two indictees allegedly controlled a roadblock near their home where members of the Tutsi ethnic group were kidnapped, abused and killed. Ntahobali is charged with kidnapping and raping Tutsi women, and both he and his mother are charged with outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and indecent assault.[74]

60. The amended indictment of Laurent Semanza also contains charges of sexual violence,[75] as does the amended indictment of Alfred Musema.[76] In another ICTR indictment, Omar Serushago, a Hutu militia leader, initially was charged with five counts of genocide and crimes against humanity, including one count of rape as a crime against humanity, which was later withdrawn by the Prosecutor.[77] Also noteworthy is the case of Georges Ruggiu, who was prosecuted for using propaganda to perpetuate ethnic and gender stereotypes in a manner calculated to bring about violence against a targeted group.[78]

61. The concluded trial of Jean-Paul Akayesu in the ICTR is historic and important for several reasons.[79] The original indictment against Akayesu, the Hutu bourgmestre (mayor) of Taba, contained no charges relating to sexual violence. The indictment, however, was amended to include allegations of sexual violence against Tutsi women, including rape and forced nudity.[80] Akayesu was found guilty of genocide; incitement to commit genocide (through public speeches); and crimes against humanity for extermination, murder, torture, rape, and other inhumane acts, including forced nudity.[81] The defendant was not accused of physically committing the acts of sexual violence, but of being present during the acts, thereby encouraging them, and of knowing such acts were being committed by his subordinates and failing to stop them.[82]

62. The definitions of rape and sexual violence used in the Akayesu decision are as follows:

> "The Trial Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a

> person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[83]

63. The Trial Chamber found that, in the facts of this case, acts of sexual violence, including rape, were constituent acts of crimes against humanity and torture. In determining that rape constituted torture, the Trial Chamber stated:

> "Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[84]

64. In addition to crimes against humanity and torture, the Trial Chamber determined that rape and other forms of sexual violence also constitute genocide when committed with specific intent to destroy, in whole or in part, a targeted group. After finding that sexual violence was committed solely against Tutsi women and clearly was an integral part of the physical and psychological destruction of Tutsi women, their families and communities, the Trial Chamber convicted Akayesu of genocide.[85]

65. Akayesu is one of a host of high-level political and government leaders to be indicted and prosecuted in the ICTR,[86] from bourgmestres and prefects to Cabinet Ministers, and even the former Prime Minister of Rwanda, Jean Kambanda.[87] Reinforcing the accepted view that it is not only civilian leaders who must be held responsible for their international crimes committed during armed conflict, the ICTR also has indicted a number of "ordinary" citizens, and the ICTR detainees include a doctor, a pastor, journalists and business owners.

66. Arsène Shalom Ntahobali, indicted on charges including rape and forced nudity, was a store manager.[88] Alfred Musema, convicted of crimes involving sexual violence, was the director of a tea factory.[89] Obed Ruzindana, a former commercial trader, was convicted of genocide and sentenced to 25 years' imprisonment.[90] Although the indictment against Ruzindana did not contain allegations of sexual violence, the Trial Chamber did take sexual violence into consideration. "In particular, the Trial Chamber included testimony of rape and sexual mutilation, and determined that sexual violence had occurred within the context of genocide."[91]

67. A broad range of actors perpetrate international crimes during armed conflict, including crimes involving sexual violence, for which they must be investigated, prosecuted and punished. These persons include not only combatants and military commanders, but also government leaders, politicians, bureaucrats and others from every trade, profession and socio-economic group. Civilians must be held responsible not only when they personally commit acts which constitute slavery, crimes against humanity, genocide, torture or war crimes,[92] but also when they contribute, through their complicitous acts, to the commission of such international crimes.

V. THE RIGHT TO REPARATION

68. The right of victims to reparation for gross violations of international law is a critical issue with respect to sexual slavery and other forms of sexual violence, including rape, committed during armed conflict. The right of reparation, as defined in international law, includes compensation of victims, punishment of perpetrators, apology or atonement, assurances of non-repetition, and other forms of satisfaction proportionate to the gravity of the violations.[93]

69. The right of victims to reparation has been elaborated further in a revised set of basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law.[94] The initial report on the revised guidelines maintains the following:

> "In seeking to clarify both the terms and the concepts of the right to reparation, the expert believes it necessary to adopt the victim of the violations as the point of departure for the development of coherent guidelines governing this right. Extraneous considerations concerning sources of law, or the particular interests of one or other Government, should not obscure the fundamental imperative of ensuring that victims of violations receive reparation."[95]

70. The revised guidelines bring much-needed clarity and consistency to the issue of the right of victims to reparation, including for sexual violence committed during armed conflict. It is important that the application of these guidelines fully take into consideration the particular needs and circumstances of women and girls who are victims of violations and who require reparation. These considerations include the implications of gender on the actual nature of the violations; the gender-specific consequences of those violations; and the gender-related obstacles that women and girls face in seeking redress.[96]

VI. DEVELOPMENTS CONCERNING JAPAN'S SYSTEM OF MILITARY SEXUAL SLAVERY DURING THE SECOND WORLD WAR

71. One of the most egregious documented cases of sexual slavery was the system of rape camps associated with the Japanese Imperial Army during the Second World War. A significant impetus for the creation of the mandate of the Special Rapporteur was the increasing international recognition of the true scope and character of the harms perpetrated against the more than 200,000 women and girls enslaved in so-called "comfort stations" throughout Asia. The Special Rapporteur, in an appendix to the final report, included a case study on the continuing legal liability of the Government of Japan for the "comfort women" system, which in its totality constitutes crimes against humanity.

72. The atrocities committed against the so-called "comfort women"[97] remain largely unremedied. There has been no reparation to the victims: no official compensation, no official acknowledgement of legal liability, and no prosecutions. While the Government of Japan has taken some steps to apologize for its system of military sexual slavery during the

Second World War, it has not admitted or accepted legal liability and has failed to pay legal compensation to the victims. Thus, the Government of Japan has not discharged fully its obligations under international law.

73. The Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization has observed that Japan's system of military sexual slavery was in contravention of the ILO Forced Labour Convention, 1930 (No. 29). The Committee repeatedly has requested the Government of Japan to take steps expeditiously to compensate the victims. In June 1999, the ILO Committee stated the following:

> "The Government of Japan should take the initiative of holding meetings with the trade unions concerned, the representative organizations of the women who had been the victims of these acts and the governments of the various countries concerned, in order to find an effective solution responding to the expectations of the majority of the victims."[98]

74. In the absence of a comprehensive resolution of the issue of liability for military sexual slavery during the Second World War, some survivors are seeking reparation through the Japanese national courts. There are approximately 50 lawsuits in Japan claiming compensation for war-related injuries, of which several are on behalf of survivors of sexual slavery. For example, following similar lawsuits filed by women from China, the Netherlands, the Philippines and the Republic of Korea, nine former "comfort women" from Taiwan filed suit in the Tokyo District Court on 14 July 1999 seeking compensation and an apology from the Government of Japan.[99]

75. The Japanese national courts have issued decisions in three cases involving military sexual slavery. On 27 April 1998, the Shimonoseki Branch of the Yamaguchi District Court awarded 300,000 yen (US$ 2,300) to three former "comfort women" from Korea.[100] After establishing as fact that the "comfort women" were confined and forced to have sex with Japanese soldiers, the court in the Shimonoseki decision found that, given the purpose and day-to-day realities of the "comfort stations", the women essentially were held in sexual slavery for which the Government of Japan is responsible. The court held that the basic human rights of the "comfort women" had been infringed upon, and that the failure of the Japanese Diet to legislate a law to compensate the women constituted a violation of Japanese constitutional and statutory law. The Government of Japan is appealing the decision to the Hiroshima High Court.

76. In contrast to the Shimonoseki decision, the Tokyo District Court, on 9 October 1998, denied the claims of 46 former "comfort women" from the Philippines after a five-year trial, during which time 7 of the plaintiffs died.[101] The plaintiffs are appealing the case to the Tokyo High Court. The Tokyo District Court also denied the claims of a former Dutch "comfort woman" on 30 November 1998.[102] Several other former "comfort women" have cases pending in Japanese national courts.[103]

77. Legislation has been proposed in Japan calling for the establishment of a fact-finding bureau to investigate Japan's system of military sexual slavery and other issues, including compensation for war-related injuries and violations.[104] Legislation also has been introduced in

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CONTEMPORARY FORMS OF SLAVERY

Systematic rape, sexual slavery and slavery-like practices during armed conflict

Update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur

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Introduction

1. At its forty-ninth session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in its decision 1997/114, decided to entrust Ms. Gay J. McDougall with the task of completing the study on systematic rape, sexual slavery and slavery-like practices during periods of armed conflict, including internal armed conflict. The final report (E/CN.4/Sub.2/1998/13) (hereinafter "final report") was submitted to the Sub-Commission at its fiftieth session.

2. The final report concludes that systematic rape, sexual slavery and slavery-like practices during armed conflict constitute violations of human rights, humanitarian and international criminal law, and as such must be properly documented, the perpetrators brought to justice, and the victims provided with full criminal and civil redress, including compensation where appropriate. The final report also concludes that even in the absence of armed conflict, sexual slavery and other forms of sexual violence, including rape, may be prosecuted under existing legal norms as slavery, crimes against humanity, genocide or torture.

3. The Sub-Commission, in its resolution 1998/18, welcoming with great interest the final report of the Special Rapporteur, endorsed "the accepted view that regardless of whether sexual violence in armed conflict occurs on an apparently sporadic basis or as part of a comprehensive plan to attack and terrorize a targeted population, all acts of sexual violence, in particular during armed conflicts and including all acts of rape and sexual slavery, must be condemned and prosecuted" (para. 2). The Sub-Commission also strongly endorsed "the Special Rapporteur s call for national and international responses to the increasing occurrence during armed conflicts, including internal armed conflicts, of acts of sexual violence and sexual slavery" (para. 4).

4. At its fifty-fifth session, the Commission on Human Rights, in its decision 1999/105, approved the request of the Sub-Commission to extend the mandate of the Special Rapporteur for a further year, "in order to enable her to submit an update on developments with respect to her mandate at the fifty-first session of the Sub-Commission." As Special Rapporteur for systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict, the Special Rapporteur understands her mandate to encompass various forms of sexual violence committed in a range of conflict situations.

5. The importance of continuing the Special Rapporteur's mandate and the focus on the use of sexual violence as a weapon of war is abundantly clear, as evidenced by atrocities which have been and continue to be committed in conflicts around the world. Such abuses include the detention and rape of women and girls in their homes, in rape camps or in other facilities, and the abduction of women and girls for the purpose of forced labour and forced sexual activity. These and other practices involving the treatment of women and girls as chattel, which often includes sexual access, are forms of slavery and must be prosecuted as such. Although the Special Rapporteur places special emphasis on abuses committed against women and girls, there is no doubt that prohibitions of the crimes discussed in this report must be applied to men and boys, who also are victims of sexual violence.

6. This update to the final report[1] considers a number of developments and actions at the international and national levels to end the cycle of impunity for sexual violence committed

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during armed conflict. These developments include the historic adoption of the Rome Statute of the International Criminal Court, the continuing progress of the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, and efforts at the national level to end impunity for violations of international law, including sexual violence committed during armed conflict.

I. PURPOSE OF THE REPORT

7. Both the Special Rapporteur s final report and this update share the same purposes: first, to reiterate the call for an effective response to sexual violence committed during armed conflict; second, to emphasize that rape and other forms of sexual abuse are crimes of violence which, under certain circumstances, may constitute slavery, crimes against humanity, genocide, grave breaches of the Geneva Conventions, war crimes and torture; third, to reinforce the legal framework which already exists for the prosecution of these crimes, with a view to achieving a more consistent and gender-responsive application of human rights and humanitarian and international criminal law.

8. Many cases of sexual violence during armed conflict, including many of the factual scenarios presented in this report, are most appropriately characterized and prosecuted as slavery. Slavery should be understood as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,[2] including sexual access through rape or other forms of sexual abuse. Critical elements in the definition of slavery are limitations on autonomy and on the power to decide matters relating to one s sexual activity and bodily integrity. A claim of slavery does not require that a person be bought, sold or traded; physically abducted, held in detention, physically restrained or confined for any set or particular length of time; subjected to forced labour or forced sexual activity; or subjected to any physical or sexual violence although these are indicia of slavery.[3] Further, a claim of slavery does not require any State action or nexus to armed conflict. And the mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery does not in and of itself nullify a claim of slavery.

9. The term "sexual" is used in this report as an adjective to describe a form of slavery. In all respects and in all circumstances, sexual slavery is slavery and its prohibition is a jus cogens norm. The legal effect of jus cogens is that slavery, as well as crimes against humanity, genocide and torture, are prohibited at all times and in all places. The violation of a jus cogens norm is subject to universal jurisdiction and can be prosecuted by any State. In fact, States have an obligation to ensure that persons who commit violations of jus cogens norms are brought to justice.[4]

II. SEXUAL VIOLENCE DURING CONTEMPORARY ARMED CONFLICTS

10. Sexual violence continues to be used as a weapon of war, as evidenced in armed conflicts around the world during the period covered by this report. For example, there are reports of sexual slavery and other forms of sexual violence, including rape, being used by all sides to the conflicts in Afghanistan,[5] Burundi,[6] Colombia,[7] the Democratic Republic of the Congo,[8] Liberia,[9] and Myanmar.[10]

11. The Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, has investigated the issue of sexual violence in Indonesia and reports the following:

> Before May 1998, rape was used as an instrument of torture and intimidation by certain elements of the Indonesian army in Aceh, Irian Jaya and East Timor. Since May 1998, the policy appears to be different. The Army Commander of East Timor assured us that rape by soldiers will not be tolerated and that perpetrators will be prosecuted. Nevertheless, the rapes continue.[11]

12. Also in Indonesia, during the 1998 riots which followed student protests and clashes with security forces in Jakarta, there were reports of widespread and systematic rapes of ethnic Chinese women and girls.[12] While there was some controversy over the number of rapes and the level of systematic planning involved in their commission,[13] the fact-finding team eventually established by the Government of Indonesia verified that there were at least 66 rapes.[14]

13. In Uganda, the Lord s Resistance Army (LRA) and the Allied Democratic Forces continued their practice of abducting children and using them as forced labourers, child soldiers and sexual slaves. It is estimated that the LRA, supported by and operating out of the Sudan, has abducted up to 10,000 children, with girls as young as 12 given to commanders as "wives". "Each soldier may have several such wives, and many of the children have become pregnant and have contracted sexual diseases."[15] The repeated rape and sexual abuse of women and girls under the guise of "marriage" constitutes slavery, as the victims do not have the freedom to leave, to refuse the sham "marriage" or to decide whether and on what terms to engage in sexual activity.[16]

14. There are widespread reports that Serb soldiers committed rapes and other acts of sexual violence against ethnic Albanian women and girls during the armed conflict in Kosovo. The allegations of sexual violence on the part of the Serbs include gang rape, rape in front of family and community members, and rape of women and girls detained in army camps, hotels and other locations.[17] The detention or confinement of women and girls in their homes or in other locations for the purpose of rape or other sexual abuse constitutes slavery and should be prosecuted as such.

15. The reports from Kosovo highlight the devastating psychological and social consequences, in addition to the physical trauma, that women survivors of sexual violence must endure. Many ethnic Albanian women who have been victims of sexual violence dare not speak about their experience, for fear of being ostracized in their families and communities due to the social stigma associated with rape. The cultural milieu for many women in Kosovo, and elsewhere, is one in which a husband will divorce his wife upon learning or even suspecting that she has been raped, and an unmarried woman who has been raped has few if any opportunities for marriage.[18] Women also are ostracized by other victims of sexual violence simply for reporting the crime.[19] Consequently, many women will admit to being threatened with or witnessing rape or other sexual abuse, but not to being victims themselves.

16. In June 1999, the Special Rapporteur participated in a two-day mission to Sierra Leone at the invitation of the United Nations High Commissioner for Human Rights. During the mission,

a number of teenage girls were interviewed, several of whom had been subjected to sexual violence and one of whom had been abducted and held by rebel soldiers for nearly three months, during which time she was repeatedly raped and sexually abused. These and numerous other testimonies reveal that sexual slavery and other forms of sexual violence, including gang rapes, public rapes and sexual mutilations, were systematic and widespread during the armed conflict, with rebel soldiers committing the vast majority of the reported abuses.[20]

17. In one well-documented incident in January 1999, a local rebel commander ordered all virgin girls to report for a physical examination. The girls were checked by a female companion of the commander and those who were "verified" as virgins, most of whom were between the ages of 12 and 15, were ordered to report each night for sexual abuse by the rebel fighters. Some of the girls were subsequently abducted when the rebels retreated. The acts committed in this incident constitute slavery, as the victims did not have the freedom to leave or to refuse to comply with the orders, and as repeated sexual access to the victims was gained through the use and threat of force, the control of the physical environment and abduction.

18. While a peace accord between the Government of Sierra Leone and the rebel forces was signed on 7 July 1999, the peace process suffered a grave setback in May 2000, demonstrating that it will require considerable time and effort for the people of Sierra Leone to surmount the devastating effects of the atrocities that were committed during the eight-year war. These atrocities include summary executions, murder, amputations of limbs and extremities, the use of child soldiers, and sexual violence.[21]

19. It also should be noted that while the peace accord offers amnesty to those persons who committed abuses during the war, such amnesty would pertain only to criminal prosecutions within the domestic jurisdiction of Sierra Leone, and only to acts preceding the effective date of the amnesty. Thus, crimes of sexual violence must be investigated and documented for possible criminal prosecution in the domestic courts of other States which may have jurisdiction, and for possible civil action in Sierra Leone. Once constituted, the Truth and Reconciliation Commission of Sierra Leone also should devote careful attention to documenting crimes of sexual violence committed during the conflict and should propose remedial actions to be taken by the Government of Sierra Leone, with support from the international community.

20. There are any number of often interconnecting reasons why sexual slavery and other forms of sexual violence, including rape, continue to be so prevalent in armed conflict situations. Some of the more obvious reasons include:

- The use of sexual violence is seen as an effective way to terrorize and demoralize members of the opposition, thereby forcing them to flee;

- Access to women's bodies and sexuality often is seen as the "spoils of war" or part of the "services" that are made available to combatants;

- Military or combat indoctrination often desensitizes combatants and dehumanizes the opposition, thereby facilitating the commission of atrocities during armed conflict, including sexual violence;

- In situations of armed conflict, where aggressive behaviour is particularly rewarded, individual combatants may be allowed or even encouraged to express their own pathology, brutality or personal animus through acts of sexual violence;

- Individual conscience and personal objections to sexual violence often are subordinated to mob rule or to superior orders in armed conflict situations;

- The generally violent and lawless climate created by armed conflict allows such crimes to be committed with impunity;

- Acts of sexual violence are not consistently viewed or codified as criminal acts, and those who commit them often are not punished under the law;

- Women and girls are devalued in society in general, making them vulnerable to sexual violence, particularly in times of armed conflict;

- Racism, xenophobia or ethnic hatred often is directed against women and girls who are members of targeted groups, and who then are subjected to sexual violence because of their gender and other factors of their identity;

- Sexual violence is used as a form of "ethnic cleansing" through forced impregnation, the prevention or termination of births, or the infliction of severe physical or mental suffering.

21. While these and other motives certainly merit consideration, with particular attention given to the ways in which they might be countered, the most immediate and effective deterrent to the use of sexual violence during armed conflict is to hold the perpetrators responsible for their crimes. As stated by the Commission on Human Rights, "the expectation of impunity for violations of international human rights or humanitarian law encourages such violations." The Commission further "urged States to give necessary attention to the question of impunity for violations of international human rights and humanitarian law, including those perpetrated against women, and to take appropriate measures to address this important issue."[22]

22. Out of all of the factual patterns described thus far in this report, only the egregious acts of sexual violence that have occurred in Kosovo are within the jurisdiction of an existing international criminal tribunal, the International Criminal Tribunal for the Former Yugoslavia. The permanent International Criminal Court will have jurisdiction only over those crimes which are committed after the Court is established. Thus, in the vast majority of cases of sexual violence occurring in contemporary armed conflicts, national judicial systems must be relied on to investigate, prosecute and punish the perpetrators.[23]

III. THE INTERNATIONAL CRIMINAL COURT

23. The adoption of the Rome Statute of the International Criminal Court[24] on 17 July 1998 was a critically important event in international law. The International Criminal Court (hereinafter "ICC"), will significantly supplement the international legal framework for prosecuting international crimes, including those involving sexual violence. In addition, a permanent international criminal court offers obvious advantages over ad hoc international tribunals in which jurisdiction is limited to offences occurring within a certain geographical area or within a prescribed period of time.

24. As at April 2000, 96 States had signed the Statute of the ICC and eight States had ratified it.[25] The statute requires 60 ratifications before it enters into force. The crimes over which the International Criminal Court will have jurisdiction are genocide, crimes against humanity, war crimes and the crime of aggression. Only crimes occurring after the Court is established will be subject to its jurisdiction.[26]

25. In the preamble to the Statute of the ICC, the United Nations Diplomatic Conference:

> [Affirmed] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation;
>
> [Determined] to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes; [and]
>
> [Recalled] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

26. In furtherance of this commitment to end impunity for international crimes, including sexual slavery and other forms of sexual violence, the Statute of the ICC explicitly includes gender concerns, gender-based crimes and sexual violence in many of its provisions. The term "gender" is defined in the Statute as "the two sexes, male and female, within the context of society."[27] The Special Rapporteur interprets this definition to be consistent with other, more clearly stated formulations, in which the term gender "refers to the socially constructed roles of women and men in public and private life."[28]

27. This report considers several aspects of the Statute of the ICC that represent the progressive development of international criminal law, particularly with respect to addressing gender-based crimes and sexual violence. However, in the diplomatic negotiations to delineate the elements of the crimes within the Court's jurisdiction, some States have attempted to limit the scope of the Court's protections. The Preparatory Commission for the ICC will hold its fifth session from 12 to 30 June 2000 at United Nations Headquarters. The elements of the crimes, as well as the rules of procedure and evidence for the Court, are to be finalized at that session. It is critical that the Statute of the ICC reinforces the highest possible human rights, humanitarian and international criminal law standards to ensure that international crimes involving gender-based or sexual violence are within the jurisdiction of the Court.

28. One example of the inclusion of gender-based crimes and sexual violence in the Statute of the ICC is with respect to crimes against humanity. Article 7 (1) (g) provides that constituent acts of crimes against humanity include "[r]ape, sexual slavery, enforced prostitution, forced pregnancy,[29] enforced sterilization or any other form of sexual violence of comparable gravity." Additionally, Article 7 (2) (c) of the Statute provides that enslavement, as a constituent act of crimes against humanity, includes "trafficking in persons, in particular women and children."

29. As of the writing of this report, the diplomatic negotiations over the elements of sexual slavery has resulted in the following proposed text: "...(3) the accused exercised a power attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such person or persons, or by imposing on them a similar deprivation of liberty; (4) the accused caused such person or persons to engage in one or more acts of a sexual nature."[30] It is unnecessary and inappropriate to require any element of commercial transaction for the crime of sexual slavery. Most contemporary forms of slavery, including sexual slavery, do not involve payment or exchange; and as stated in section I of this report, a claim of slavery does not require that a person be bought, sold or traded, or subjected to a similar deprivation of liberty.

30. Another negotiation proposal which threatens to diminish the scope and effectiveness of the prohibition on crimes against humanity in the Statute of the ICC was prompted by the efforts of some States to exclude crimes which are committed within the family. As of the writing of this report, the proposal would require proving that a State or organization actively promoted or encouraged the criminal conduct in question in order for it to constitute a crime against humanity. This would exclude from the jurisdiction of the Court those crimes which involve a State's failure to act, even in the face of widespread violations, such as widespread crimes committed against women.

31. It is particularly noteworthy that article 7 (1) (h), in stating that "[p]ersecution against any identifiable group or collectivity" may constitute a crime against humanity, includes gender among the grounds for persecution "that are universally recognized as impermissible under international law." This recognition of gender as an individual and collective identity which, like race, ethnicity and religion, is capable of being targeted for persecution, and thus merits specific protection under international law, is an explicit articulation of what has been an obvious omission in earlier codifications and formal definitions of crimes against humanity.

32. Another positive example of the inclusion of gender-based crimes and sexual violence in the Statute of the ICC is with respect to war crimes. Article 8 (2) (b) (xxii) provides that war crimes in international armed conflict include "[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilizations, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions." Article 8(2)(e)(vi) provides that war crimes in non-international armed conflict include "[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilizations, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions."[31]

33. The provision in the Statute of the ICC regarding genocide also is pertinent to gender-based violations, even though it does not explicitly refer to sexual violence. Article 6 (d),

which is reproduced from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, provides that constituent acts of genocide include imposing measures intended to prevent births within a group.[32]

34. Sexual violence also is implicated in several other provisions of the Statute of the ICC, including: (i) torture as a crime against humanity[33] and a grave breach of the Geneva Conventions;[34] (ii) inhumane acts which cause serious injury as a crime against humanity[35] and a grave breach of the Geneva Conventions;[36] (iii) "outrages upon personal dignity, in particular humiliating and degrading treatment" as a serious violation of the laws and customs of war[37] and a serious violation of common article 3;[38] and (iv) violence to life and person, mutilation, cruel treatment and torture as serious violations of common article 3.[39].

35. In addition to its provisions regarding genocide, crimes against humanity and war crimes, the Statute of the ICC contains various other provisions which explicitly incorporate gender concerns. For instance, while falling short of requiring gender equality on the Court, article 36 (8) (a) (iii) provides for a "fair representation of female and male judges." The Statute also requires a consideration of the need for legal expertise on gender violence in the Court, the Office of the Prosecutor and the Victims and Witnesses Unit.[40]

36. Importantly, the Statute of the ICC also provides for the protection and rehabilitation of victims and witnesses, including "where the crime involves sexual or gender violence or violence against children."[41] This protection requires consideration of such matters as safety, physical and psychological well-being, dignity and privacy.[42] The Statute also provides for in camera proceedings and non-public hearings, particularly in cases involving sexual violence.[43]

37. The Statute of the ICC explicitly provides for the participation of non-governmental organizations, which are particularly useful sources for documenting and disseminating information on violence against women committed during armed conflict. Article 15 (2) provides that the Prosecutor may initiate an investigation on the basis of information from non-governmental organizations or other reliable sources, provided the Pre-Trial Chamber so authorizes. Article 44 (4) states that the Court and the Office of the Prosecutor may employ the expertise offered by non-governmental organizations.

38. Further, the Statute of the ICC provides for the reparation of victims and for the non-applicability of statutes of limitations. Article 75 states: "The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[44] Article 29 of the Statute of the ICC states: "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."[45] Both of these provisions are critical to ensuring full redress to victims of sexual violence committed during armed conflict.

39. In addition, the Statute of the ICC identifies several categories of individuals who may be held responsible for international crimes.[46] Article 25 provides for individual criminal responsibility for those persons who commit, attempt to commit, order, solicit, induce, aid, abet, assist or intentionally contribute to the commission of a crime within the Court's jurisdiction,[47] and for persons who incite others to commit genocide.[48] Article 27 stipulates that the statute applies to all persons without distinction, including on the basis of official capacity such as head

of State, member of Government or elected representative. And article 28 provides for the responsibility of military commanders and other superior authorities for crimes committed by subordinates under their control.

40. Modifying the principle applied in the Nürnberg Tribunal and in the ad hoc international criminal tribunals, that the defence of "superior orders" cannot be raised and may only be considered in mitigation of punishment, article 33 (1) of the Statute of the ICC provides that superior orders shall not relieve a person of criminal responsibility unless the subordinate was under a legal obligation to obey the order and did not know that the order was unlawful, and the order was not manifestly unlawful. Article 33 (2) does provide, however, that "orders to commit genocide or crimes against humanity are manifestly unlawful."

41. As for issues of admissibility, article 17 (1) of the Statute of the ICC provides that a case which has been or is being investigated or prosecuted by a State with jurisdiction is inadmissible, unless the State is unwilling or unable genuinely to conduct the proceedings. Under the Statute of the ICC, one indication of a State's "unwillingness" is lack of independence or impartiality in the national proceedings, which presumably would include gender bias.[49] The high threshold provided under the Statute for determining a State's "inability" to carry out proceedings is a "total or substantial collapse or unavailability of its national judicial system."[50]

42. It is the understanding of the Special Rapporteur that a crucial concern in evaluating the competence of national judicial systems to adjudicate international crimes is the extent to which the national system in question adequately protects the rights of women. In particular, the existence of gender biases in municipal laws or procedures must be taken into account when assessing the general competence of domestic courts to adjudicate the types of violations of human rights and humanitarian law addressed in this report that are directed against women.[51]

43. The provisions for the Court's jurisdiction are more limited than many at the Rome diplomatic conference had hoped they would be. Under the Statute of the ICC, the Court has jurisdiction in cases initiated by a State party or the Prosecutor only if the crime occurs on the territory of a State party (or a State which has accepted the Court's jurisdiction on an ad hoc basis) or if the accused is a national of a State party (or a State which has accepted the Court's jurisdiction on an ad hoc basis).[52] The Court also has jurisdiction in cases referred to it by the Security Council.[53] If none of the above provisions apply, the Statute excludes from the Court's jurisdiction those cases in which the victim is a national of a State party, as well as those cases in which the suspect is in the custody of a State party. Thus, for example, in an internal armed conflict where the State in which the crime occurs and of which the suspect is a national are the same, the Court could have jurisdiction only if that State is a party to the Statute, or has accepted the Court's jurisdiction on an ad hoc basis, or if the case is referred to the Court by the Security Council.

IV. THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS

44. In addition to the promising role that the International Criminal Court will play in the future, there have been several important developments in the ad hoc international criminal tribunals. Efforts continue in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) to address violations committed

during the armed conflicts in those regions, including the investigation and prosecution of crimes involving sexual slavery and other forms of sexual violence. In addition to handling cases related to the conflict in Bosnia, the Office of the Prosecutor for the ICTY is investigating allegations of sexual violence committed during the conflict in Kosovo.

45. With the conclusion of several precedent-setting cases in both tribunals, jurisprudence is increasingly confirming that sexual slavery and other forms of sexual violence, including rape, committed during armed conflict are violations of international law. In the ICTY and the ICTR, acts of sexual violence, committed against women and men, have been charged and successfully prosecuted as crimes against humanity, genocide, grave breaches of the Geneva Conventions and other war crimes, including torture and outrages upon personal dignity. In addition to rape and sexual slavery, various other forms of sexual violence have been the basis of prosecution, including sexual mutilation, forced public nudity, and forcing victims to perform sexual acts on each other.

46. The definitions of rape used in the ICTY and the ICTR are consistent in recognizing that: (i) rape is a serious crime of violence; (ii) rape is not limited to forcible sexual intercourse; (iii) both women and men can be victims and perpetrators of rape; and (iv) coercion, as an element of rape, has a broad meaning which is not limited to physical force.[54]

47. The International Tribunal for Rwanda "considers sexual violence, which includes rape, as any act of a sexual nature which is committed upon a person under circumstances which are coercive."[55] The Special Rapporteur reiterates the definition of slavery as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence. Slavery, when combined with sexual violence, constitutes sexual slavery.

48. In the Kunarac, Kovac and Vukovic case pending before the International Criminal Tribunal for the Former Yugoslavia,[56] the Prosecutor alleges that one victim, who at the time was seven months pregnant, was detained for at least a week in Kunarac's headquarters.

> "During the entire period of her detention at this house, [the witness] was subjected to repeated rapes. In addition to being repeatedly raped, the witness was beaten. She also had to clean the house and obey each order given to her by the accused and his subordinates. [The witness] was treated as the personal property of Dragoljub Kunarac and his unit."[57]

49. Based on these allegations, Kunarac is charged with enslavement, rape and torture as crimes against humanity and with rape, torture and outrages upon personal dignity as war crimes. Kunarac also is charged with the aforementioned crimes for similar abuses committed against three other victims.[58] These allegations, if established at trial, constitute sexual slavery in the view of the Special Rapporteur. The treatment of the women as chattel or as personal property, which is the gravamen of slavery, is evidenced not only by the forced domestic work but also by the forced sexual activity. Indeed, the forced labour is a separate crime from the sexual slavery.

50. The Special Rapporteur understands that based on customary law interpretations of the crime of slavery, and thus sexual slavery, there are no requirements of any payment or exchange;

of any physical restraint, detention or confinement for any set or particular length of time; nor is there a requirement of legal disenfranchisement. Nonetheless, these and other factors may be taken into account in determining whether a "status or condition" of slavery exists. While the most commonly recognized form of slavery involves the coerced performance of physical labour or service of some kind, again, this is merely a factor to be considered in determining whether a "status or condition" exists which transforms an act, such as rape, into sexual slavery. It is the status or condition of being enslaved which differentiates sexual slavery from other crimes of sexual violence, such as rape. One respect in which slavery differs from imprisonment or arbitrary detention is that the limitations on autonomy can be solely psychological or situational, with no physical restraints.

51. Sexual slavery, as a form of slavery, is an international crime and a violation of jus cogens norms in the exact same manner as slavery.[59] Clearly, there can be no distinction which implies that slavery for the purpose of physical labour is a jus cogens crime, whereas slavery for the purpose of rape and sexual abuse is not.[60] As a jus cogens norm, the prohibition of slavery, including sexual slavery, cannot be the subject of derogation, amendment or any legal modification, except by a subsequent peremptory norm having the same character. As a jus cogens crime, neither a State nor its agents, including government and military officials, can consent to the enslavement of any person under any circumstances. Likewise, a person cannot, under any circumstances, consent to be enslaved or subjected to slavery. Thus, it follows that a person accused of slavery cannot raise consent of the victim as a defence.[61]

A. International Criminal Tribunal for the Former Yugoslavia

52. As at April 2000, the ICTY had issued public indictments against 94 individuals, of whom 39 were in custody.[62] A major impetus for the establishment of the ICTY was sexual violence committed against women in the conflict in Bosnia, and this continues to be reflected in the cases brought before the Tribunal and in the indictments, at least half of which include allegations of sexual violence.[63] Three of the four cases completed by trial in the ICTY have involved allegations of sexual violence: the Tadić, Celebići and Furundžija cases.[64]

53. In the Furundžija case, the defendant, a Bosnian Croat paramilitary commander, was found guilty and sentenced to 10 years' imprisonment on two counts of war crimes - torture, and aiding and abetting in outrages upon personal dignity, including rape. The defendant was accused of conducting an interrogation of a Muslim woman prisoner while she was sexually assaulted by another soldier.[65] Although Furundžija did not commit the physical acts of sexual violence, his interrogation of the prisoner during the assaults made him criminally responsible as a co-perpetrator of torture. For his presence and his acts or omissions during the assault, Furundžija also was found liable for aiding and abetting in the rape of the prisoner. The prisoner was subsequently locked in a house where she was raped repeatedly by soldiers for two months. This crime, while not attributed to Furundžija, constitutes sexual slavery for which the perpetrators should be held liable.

54. The Trial Chamber entered its judgement in the "Celebići" case on 16 November 1998, finding three of the defendants guilty of grave breaches and war crimes, and acquitting another defendant of all charges. Zdravko Mucić, a Bosnian Croat commander of the Celebići detention camp where acts of rape and other sexual violence were committed, was convicted on 11 counts

of grave breaches and war crimes. He was sentenced to seven years' imprisonment. Hazim Delić, a Bosnian Muslim deputy commander of the Celebići camp, was convicted on 13 counts of grave breaches and war crimes, including for multiple acts of rape as torture. He was sentenced to 20 years' imprisonment. Esad Landžo, a Bosnian Muslim guard at the camp, testified at trial to committing various acts of sexual violence, including forcing two brothers to perform oral sex on each other and placing a burning fuse around their genitals. He was convicted on 17 counts of grave breaches and war crimes and sentenced to 15 years' imprisonment.

55. In its analysis of rape as torture, the Trial Chamber in the "Celebići" case cited the Special Rapporteur's final report on systematic rape, sexual slavery and slavery-like practices during armed conflict.

> "Finally, in a recent report, the United Nations Special Rapporteur on Contemporary Forms of Slavery, Systematic Rape and Slavery-like Practices during Armed Conflict, has considered the issue of rape as torture with particular regard to the prohibited purpose of discrimination. The United Nations Special Rapporteur referred to the fact that the Convention on the Elimination of All Forms of Discrimination Against Women has recognized that violence directed against a woman because she is a woman, including acts that inflict physical, mental or sexual harm or suffering, represent a form of discrimination that seriously inhibits the ability of women to enjoy human rights and freedoms. Upon this basis, the United Nations Special Rapporteur opined that, 'in many cases the discrimination prong of the definition of torture in the Torture Convention provides an additional basis for prosecuting rape and sexual violence as torture'."[66]

56. Several defendants in the ICTY have been indicted and prosecuted on the basis of superior responsibility, or as it is alternatively referred to, superior authority or command responsibility.[67] In convicting both the commander and the deputy commander of the Celebići detention camp, the Trial Chamber stated: "Thus, a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates."[68] The Trial Chamber further noted that "the applicability of the principle of superior responsibility ... extends not only to military commanders but also to individuals in non-military positions of superior authority."[69]

57. In this regard, it is an important development that the President of the Federal Republic of Yugoslavia (FRY), Slobodan Milosević, is under indictment for suspected crimes committed in Kosovo.[70] Milosević has been charged with crimes against humanity and war crimes on the basis of both individual and superior responsibility.[71] In a separate indictment, another civilian leader, Radovan Karadžić, has been charged on the basis of superior authority with crimes allegedly committed in Bosnia, including rape and sexual abuse.[72]

58. It is crucial that those persons in positions of authority, military commanders and civilian leaders alike, who order subordinates to commit acts of sexual violence, or who otherwise knew or should have known that such acts were likely to be committed and failed to take steps to

prevent them, are held fully responsible for the commission of the international crimes which these acts may constitute, including war crimes, slavery, crimes against humanity, genocide and torture. Where rape and other acts of sexual violence occur in a widespread or systematic manner, superior authorities should be presumed to have knowledge of the acts. Of course, a superior authority who participates in or is present during the commission of acts of sexual violence is directly liable under individual responsibility as a co-perpetrator or for aiding and abetting in the crime.

B. International Tribunal for Rwanda

59. As at April 2000, the ICTR had issued public indictments against 50 individuals, of whom 44 were in custody.[73] Several ICTR indictments include charges of sexual violence. In one indictment, Arsène Shalom Ntahobali is charged jointly with his mother, Pauline Nyiramasuhuko, the former Minister of Women's Development and Family Welfare, with genocide, crimes against humanity and serious violations of common article 3 and Additional Protocol II to the Geneva Conventions. The two indictees allegedly controlled a roadblock near their home where members of the Tutsi ethnic group were kidnapped, abused and killed. Ntahobali is charged with kidnapping and raping Tutsi women, and both he and his mother are charged with outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and indecent assault.[74]

60. The amended indictment of Laurent Semanza also contains charges of sexual violence,[75] as does the amended indictment of Alfred Musema.[76] In another ICTR indictment, Omar Serushago, a Hutu militia leader, initially was charged with five counts of genocide and crimes against humanity, including one count of rape as a crime against humanity, which was later withdrawn by the Prosecutor.[77] Also noteworthy is the case of Georges Ruggiu, who was prosecuted for using propaganda to perpetuate ethnic and gender stereotypes in a manner calculated to bring about violence against a targeted group.[78]

61. The concluded trial of Jean-Paul Akayesu in the ICTR is historic and important for several reasons.[79] The original indictment against Akayesu, the Hutu bourgmestre (mayor) of Taba, contained no charges relating to sexual violence. The indictment, however, was amended to include allegations of sexual violence against Tutsi women, including rape and forced nudity.[80] Akayesu was found guilty of genocide; incitement to commit genocide (through public speeches); and crimes against humanity for extermination, murder, torture, rape, and other inhumane acts, including forced nudity.[81] The defendant was not accused of physically committing the acts of sexual violence, but of being present during the acts, thereby encouraging them, and of knowing such acts were being committed by his subordinates and failing to stop them.[82]

62. The definitions of rape and sexual violence used in the Akayesu decision are as follows:

> "The Trial Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a

> person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[83]

63. The Trial Chamber found that, in the facts of this case, acts of sexual violence, including rape, were constituent acts of crimes against humanity and torture. In determining that rape constituted torture, the Trial Chamber stated:

> "Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[84]

64. In addition to crimes against humanity and torture, the Trial Chamber determined that rape and other forms of sexual violence also constitute genocide when committed with specific intent to destroy, in whole or in part, a targeted group. After finding that sexual violence was committed solely against Tutsi women and clearly was an integral part of the physical and psychological destruction of Tutsi women, their families and communities, the Trial Chamber convicted Akayesu of genocide.[85]

65. Akayesu is one of a host of high-level political and government leaders to be indicted and prosecuted in the ICTR,[86] from bourgmestres and prefects to Cabinet Ministers, and even the former Prime Minister of Rwanda, Jean Kambanda.[87] Reinforcing the accepted view that it is not only civilian leaders who must be held responsible for their international crimes committed during armed conflict, the ICTR also has indicted a number of "ordinary" citizens, and the ICTR detainees include a doctor, a pastor, journalists and business owners.

66. Arsène Shalom Ntahobali, indicted on charges including rape and forced nudity, was a store manager.[88] Alfred Musema, convicted of crimes involving sexual violence, was the director of a tea factory.[89] Obed Ruzindana, a former commercial trader, was convicted of genocide and sentenced to 25 years' imprisonment.[90] Although the indictment against Ruzindana did not contain allegations of sexual violence, the Trial Chamber did take sexual violence into consideration. "In particular, the Trial Chamber included testimony of rape and sexual mutilation, and determined that sexual violence had occurred within the context of genocide."[91]

67. A broad range of actors perpetrate international crimes during armed conflict, including crimes involving sexual violence, for which they must be investigated, prosecuted and punished. These persons include not only combatants and military commanders, but also government leaders, politicians, bureaucrats and others from every trade, profession and socio-economic group. Civilians must be held responsible not only when they personally commit acts which constitute slavery, crimes against humanity, genocide, torture or war crimes,[92] but also when they contribute, through their complicitous acts, to the commission of such international crimes.

V. THE RIGHT TO REPARATION

68. The right of victims to reparation for gross violations of international law is a critical issue with respect to sexual slavery and other forms of sexual violence, including rape, committed during armed conflict. The right of reparation, as defined in international law, includes compensation of victims, punishment of perpetrators, apology or atonement, assurances of non-repetition, and other forms of satisfaction proportionate to the gravity of the violations.[93]

69. The right of victims to reparation has been elaborated further in a revised set of basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law.[94] The initial report on the revised guidelines maintains the following:

> "In seeking to clarify both the terms and the concepts of the right to reparation, the expert believes it necessary to adopt the victim of the violations as the point of departure for the development of coherent guidelines governing this right. Extraneous considerations concerning sources of law, or the particular interests of one or other Government, should not obscure the fundamental imperative of ensuring that victims of violations receive reparation."[95]

70. The revised guidelines bring much-needed clarity and consistency to the issue of the right of victims to reparation, including for sexual violence committed during armed conflict. It is important that the application of these guidelines fully take into consideration the particular needs and circumstances of women and girls who are victims of violations and who require reparation. These considerations include the implications of gender on the actual nature of the violations; the gender-specific consequences of those violations; and the gender-related obstacles that women and girls face in seeking redress.[96]

VI. DEVELOPMENTS CONCERNING JAPAN'S SYSTEM OF MILITARY SEXUAL SLAVERY DURING THE SECOND WORLD WAR

71. One of the most egregious documented cases of sexual slavery was the system of rape camps associated with the Japanese Imperial Army during the Second World War. A significant impetus for the creation of the mandate of the Special Rapporteur was the increasing international recognition of the true scope and character of the harms perpetrated against the more than 200,000 women and girls enslaved in so-called "comfort stations" throughout Asia. The Special Rapporteur, in an appendix to the final report, included a case study on the continuing legal liability of the Government of Japan for the "comfort women" system, which in its totality constitutes crimes against humanity.

72. The atrocities committed against the so-called "comfort women"[97] remain largely unremedied. There has been no reparation to the victims: no official compensation, no official acknowledgement of legal liability, and no prosecutions. While the Government of Japan has taken some steps to apologize for its system of military sexual slavery during the

Second World War, it has not admitted or accepted legal liability and has failed to pay legal compensation to the victims. Thus, the Government of Japan has not discharged fully its obligations under international law.

73. The Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization has observed that Japan's system of military sexual slavery was in contravention of the ILO Forced Labour Convention, 1930 (No. 29). The Committee repeatedly has requested the Government of Japan to take steps expeditiously to compensate the victims. In June 1999, the ILO Committee stated the following:

> "The Government of Japan should take the initiative of holding meetings with the trade unions concerned, the representative organizations of the women who had been the victims of these acts and the governments of the various countries concerned, in order to find an effective solution responding to the expectations of the majority of the victims."[98]

74. In the absence of a comprehensive resolution of the issue of liability for military sexual slavery during the Second World War, some survivors are seeking reparation through the Japanese national courts. There are approximately 50 lawsuits in Japan claiming compensation for war-related injuries, of which several are on behalf of survivors of sexual slavery. For example, following similar lawsuits filed by women from China, the Netherlands, the Philippines and the Republic of Korea, nine former "comfort women" from Taiwan filed suit in the Tokyo District Court on 14 July 1999 seeking compensation and an apology from the Government of Japan.[99]

75. The Japanese national courts have issued decisions in three cases involving military sexual slavery. On 27 April 1998, the Shimonoseki Branch of the Yamaguchi District Court awarded 300,000 yen (US$ 2,300) to three former "comfort women" from Korea.[100] After establishing as fact that the "comfort women" were confined and forced to have sex with Japanese soldiers, the court in the Shimonoseki decision found that, given the purpose and day-to-day realities of the "comfort stations", the women essentially were held in sexual slavery for which the Government of Japan is responsible. The court held that the basic human rights of the "comfort women" had been infringed upon, and that the failure of the Japanese Diet to legislate a law to compensate the women constituted a violation of Japanese constitutional and statutory law. The Government of Japan is appealing the decision to the Hiroshima High Court.

76. In contrast to the Shimonoseki decision, the Tokyo District Court, on 9 October 1998, denied the claims of 46 former "comfort women" from the Philippines after a five-year trial, during which time 7 of the plaintiffs died.[101] The plaintiffs are appealing the case to the Tokyo High Court. The Tokyo District Court also denied the claims of a former Dutch "comfort woman" on 30 November 1998.[102] Several other former "comfort women" have cases pending in Japanese national courts.[103]

77. Legislation has been proposed in Japan calling for the establishment of a fact-finding bureau to investigate Japan's system of military sexual slavery and other issues, including compensation for war-related injuries and violations.[104] Legislation also has been introduced in

the Philippines urging the Japanese Diet to accept the recommendations of the Special Rapporteur's final report "and enact a post-war compensation law that would fulfil the demands of justice for the women victims of sexual slavery or 'comfort women'."[105]

78. The Special Rapporteur notes that there have been encouraging efforts to redress abuses that took place in the European theatre during the Second World War. These efforts include trials of Nazi war criminals;[106] agreements to compensate Holocaust victims whose assets were confiscated by the Nazis;[107] and agreements to compensate victims of wartime forced labour.[108] For example, the Government of Germany has agreed to compensate approximately 235 United States' citizens who were imprisoned in Nazi concentration camps.[109] The Special Rapporteur reiterates that in order to end impunity for gross violations of international law committed during armed conflict, the legal liability of all responsible parties, including Governments, must be acknowledged, and the victims must be provided with full redress, including legal compensation and prosecution of the perpetrators.

VII. RECOMMENDATIONS

79. While efforts are being made to address sexual violence during armed conflict, the fact that such atrocities still occur evinces the necessity of more concerted action by the international community in general, and particularly the United Nations, Governments, and non-governmental actors. The recommendations put forward in the Special Rapporteur's final report[110] are as salient now as ever, and further steps should be taken to implement them.

80. **Legislation at the national level.** States should enact special legislation incorporating human rights, humanitarian and international criminal law into their municipal legal systems, including legislation providing universal jurisdiction for violations of jus cogens norms such as slavery, crimes against humanity, genocide, torture and other international crimes.[111] Domestic law codifications of international criminal law should specifically criminalize slavery and sexual violence, including rape, as grave breaches of the Geneva Conventions, war crimes, torture and constituent acts of crimes against humanity and genocide, irrespective of the territorial location of the crime. With respect to grave breaches of the Geneva Conventions, the Commission on Human Rights has reiterated that States have an "obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and to bring such persons, regardless of their nationality, before their own courts."[112]

81. The regulations and training materials of military and security forces must explicitly address the prohibition of sexual violence during armed conflict. Appropriate disciplinary mechanisms must be in place to ensure that unlawful conduct on the part of the military or security forces is investigated and punished at the administrative level, in addition to any other national or international proceedings that may be brought. The Special Rapporteur was encouraged to learn during her June 1999 mission to Sierra Leone that the High Command of the Ceasefire Monitoring Group of the Economic Community of West African States (ECOMOG) had initiated a Civil/Military Relations Committee to investigate allegations of human rights and humanitarian law violations committed by ECOMOG forces and members of the Civilian Defense Force and to recommend appropriate action to higher authorities.[113] States should also provide for specific training on human rights, humanitarian and international criminal law to members of the judiciary and legislature.

82. The Sub-Commission, in consultation with other relevant United Nations bodies, should facilitate public reporting by the Secretary-General on steps that have been taken to incorporate humanitarian law into municipal legal systems of member States and the extent to which domestic laws provide jurisdiction for the prosecution of persons who commit humanitarian law violations. Further, the Security Council has requested the Secretary-General to "identify contributions the Council could make toward effective implementation of existing humanitarian law" and to "examine whether there are any significant gaps in existing legal norms."[114] The Special Rapporteur recommends that emphasis be placed on the need to address sexual violence during armed conflict. The Secretary-General also should stress to the Security Council that the effective protection of civilians during armed conflict requires special consideration of the needs and circumstances of women and girls.

83. **Removal of gender bias in municipal law and procedure.** States must ensure that their legal systems at all levels conform to internationally accepted norms. They must be capable of adjudicating international crimes and administering justice without gender bias.[115] Domestic courts, laws and practices must not discriminate against women in substantive legal definitions or in matters of evidence or procedure. States should review and revise their laws and practices to ensure that they promote equal access to justice for women and men, and provide equally effective remedies and forms of redress for violations of international law. The Sub-Commission, in consultation with other relevant United Nations bodies, should facilitate public reporting of information on substantive, evidentiary and procedural barriers in domestic legal systems to prosecuting violence against women, including sexual violence.

84. **Adequate protection for victims and witnesses.** In prosecutions of international crimes at the international or national levels, including those involving sexual violence, victims and witnesses must be protected from intimidation, retaliation and reprisals at all stages of the proceedings and thereafter.[116] Such protection may require witness relocation programmes or confidentiality of witnesses' identities, and is particularly necessary in cases where the assailants remain at large in the community. There must be adequate and appropriate resources, structures and personnel for the protection of victims and witnesses, including female translators and investigators. States should review and revise where necessary their asylum and refugee determination procedures to ensure their capacity to grant asylum or refugee status to those persons with a well-founded fear of persecution through sexual or gender-based violence.

85. **Appropriate support services for victims.** In addition to having their cases investigated and prosecuted, victims of sexual violence must be afforded appropriate support services, including psycho-social counselling,[117] legal assistance, emergency medical care and reproductive health services that are responsive to the devastating effects of sexual violence, including unwanted pregnancies, sexually transmitted disease, mutilation and other physical damage. At the same time, in the context of armed conflict, it is crucial not to overlook the fact that many victims of sexual violence also will have suffered violence of a non-sexual nature. Women who have been raped, for instance, should not be characterized solely as "the rape victims", as this ignores the totality of the violations they may have endured.

86. **The International Criminal Court.** The United Nations High Commissioner for Human Rights should facilitate an ongoing dialogue between the relevant bodies of the United Nations, including the Office of the Prosecutor for the International Criminal Tribunal for

the Former Yugoslavia and for the International Tribunal for Rwanda, the Commission on Human Rights and the Sub-Commission, with regard to the International Criminal Court. To further this dialogue, the High Commissioner should convene a meeting to develop principles and recommendations to ensure that investigations and prosecutions proceed in the International Criminal Court with due regard for the need to integrate fully a gender perspective and analysis into the work of the Court, and to incorporate considerations of gender into the recruitment and training of Court personnel, as provided for in the Statute of the ICC.

87. **Documentation with a view toward eventual prosecution.** The Office of the United Nations High Commissioner for Human Rights, operating through field missions and other services, should take the lead in documenting or facilitating the documentation of sexual violence in conflict situations, with a view toward eventual prosecution. This will require that efforts be made to recruit, train and employ female translators and investigators, and that all translators and investigators be given specific training on appropriate documentation techniques. Efforts also should be made to coordinate with investigators from governmental institutions and non-governmental organizations, humanitarian and relief agencies, health care providers, journalists and others, in order to reduce the trauma of victims and witnesses in recounting their stories. Steps should be taken by all relevant actors, including local women's groups, to understand fully and address appropriately the reluctance of many victims of sexual violence to report the crimes due to fear of ostracism and discrimination in their families and communities. These steps may include public education, outreach and media campaigns designed to dispel harmful and demeaning stereotypes about women and men, and to remove the religious, cultural and social stigma often associated with sexual violence.

88. **Action at the cessation of hostilities.** It is increasingly the practice for concerned parties to include "human rights chapters" in peace treaties obliging the parties to ratify and observe international human rights instruments and principles. The prosecution of perpetrators and compensation of victims of international crimes committed during armed conflict generally are not contemplated in the peace negotiations and agreements. In fact, amnesty often is granted by the Government involved to those persons who have committed crimes such as slavery, crimes against humanity, genocide, war crimes and torture. Demands for amnesty should be denied. Nevertheless, even if amnesty is offered at the national level, perpetrators still may be subject to prosecution by international tribunals, as well as in the domestic courts of other States which may have jurisdiction. Peace agreements concluded at the cessation of hostilities should contain provisions designed to break the cycle of impunity and to ensure the effective investigation and redress of sexual slavery and sexual violence, including rape, committed during the armed conflict. In addition, peace treaties must not seek to extinguish the rights of victims to reparation and other forms of legal redress. It is further recommended that States develop and implement appropriate responses to sexual and other forms of violence against women which often escalate after the cessation of hostilities, in particular, domestic violence and trafficking of women and girls.

89. The international community, including the United Nations, must give maximum support to rebuilding effective, accessible and non-discriminatory municipal legal systems following the cessation of hostilities and ensure adequate prosecutions of international crimes committed during the conflict, including those involving sexual violence. The involvement of women in the

peace-building process is crucial to maintaining lasting peace, achieving reconciliation and rebuilding war-torn societies. At the Fourth World Conference on Women, the Governments of the world agreed to the following objective:

> "[States must strengthen] the role of women and ensure equal representation of women at all decision-making levels in national and international institutions which may make or influence policy with regard to matters related to peace-keeping, preventive diplomacy and related activities and in all stages of peace mediation and negotiations."[118]

VIII. CONCLUSION

90. There is a need for an understanding of the gender implications of sexual violence not only in the context of armed conflict but also in the everyday lives of women and girls everywhere. Women and girls are subordinated, devalued and discriminated against in all societies, although to varying degrees. This gender inequality is compounded further by racial, ethnic, religious or other forms of discrimination that women members of minority groups often face - which not only increases the vulnerability of these women and girls to sexual violence, but also creates additional significant obstacles to asserting their rights and seeking redress and healing for violations committed against them.[119]

91. One aspect of gender inequality is that rape and other acts of sexual violence, to a large extent, still are linked to gender-based concepts of a family's "honour". Often the shame, ostracism and dishonour that should be imputed to the perpetrator of sexual violence attaches instead to the survivor. The veil of silence which surrounds crimes of sexual violence can seem more like an iron curtain. However, this silence is being lifted as women and girls courageously are reporting their experiences and demanding justice. The world must ensure that their pain in coming forward will not be in vain.

92. It is indeed unfortunate that by the time reports of sexual slavery and sexual violence in conflict situations reach those outside of the conflict, in some respects, it is already too late. The international community must continue its efforts to identify and avert impending conflicts, monitor the conduct of all parties to a conflict, and develop more timely and effective responses to reported atrocities, whether through diplomacy; economic, political or public pressure; humanitarian or development aid; or other methods. The international community has taken important steps to document and respond to abuses and to provide relief to civilians caught in the conflict in Kosovo. A similar strong response is necessary in Sierra Leone and elsewhere.

93. Although the international community heralds the establishment of a permanent International Criminal Court, and the continuing work of the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, these international mechanisms will be available to address only a small fraction of the violations that are being committed in contemporary armed conflicts around the world. Thus, it remains imperative that prosecutions of international crimes, such as slavery, take place at the national level, and that all acts of sexual violence are investigated and redressed effectively. Only then can the world hope for a future in which sexual violence is not used as a weapon of war.

Notes

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[2] This definition of the term slavery is adapted from the 1926 Slavery Convention. See also Rome Statute of the International Criminal Court, A/CONF.183/9 (July 1998), article 7 (2) (c).

[3] See Prosecutor v. Kunarac [International Criminal Tribunal for the Former Yugoslavia] Prosecutor's Pre-Trial Brief, No. IT-96-23-PT (8 February 1999) (identifying several indicia of slavery, including control of movement; control of physical environment; psychological control; measures taken to prevent or deter escape; force, threat of force or coercion; duration; assertion of exclusivity; subjection to cruel treatment and abuse; control of sexuality; and ability to buy or sell). "The essence of slavery, then, is the subjugation of an individual to the powers of ownership by another", p. 37. See also final report submitted by Ms. Gay J. McDougall, Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict (E/CN.4/Sub.2/1998/13) (22 June 1998) (hereinafter "final report"), paras. 27-33 (on the definition of slavery, including sexual slavery).

[4] See final report, paras. 36, 37, 46 and 85 (on the doctrine of jus cogens).

[5] See e.g. Report on the situation of human rights in Afghanistan submitted by Mr. Kamal Hossain, Special Rapporteur (E/CN.4/1999/40) (24 March 1999), para. 31 (v), in which the Special Rapporteur recommends the following:

> "All parties to the Afghan conflict should be urged to publicly reaffirm that they are committed to safeguarding internationally recognized human rights and to take measures to prevent human rights abuses, such as deliberate and arbitrary killings, torture including rape, abduction of people for ransom or on grounds of their ethnic identity, religion or political opinions. Such measures would include accepting independent and impartial procedures for investigating reports of human rights abuses and breaches of humanitarian law."

[6] See e.g. Human Rights Watch, Proxy Targets: Civilians in the Civil War in Burundi (April 1998).

[7] See e.g., United States Department of State, Country Reports on Human Rights Practices for 1998, Colombia (April 1999), pp. 558, 565.

[8] In General Assembly resolution 53/160 on the situation of human rights in the Democratic Republic of the Congo (9 February 1999) the Assembly expressed "its concern at the deterioration of the situation of human rights in the Democratic Republic of the Congo, aggravated by the ongoing conflict in the country and the continuing violations of human rights

and international humanitarian law committed in the territory of the Democratic Republic of the Congo, in particular cases of summary and arbitrary execution, disappearances, torture, beatings, arbitrary arrest and detention without trial, sexual violence against women and children and the use of child soldiers", para. 3.

[9] See e.g. Shana Swiss, M.D. et al, "Violence against women during the Liberian civil conflict", Journal of the American Medical Association, Abstracts, 25 February 1998.

[10] Commission on Human Rights resolution 1998/63 on the situation of human rights in Myanmar, para. 3 (c). The Commission expressed its deep concern at the "violations of the rights of women, especially women who are refugees, internally displaced women and women belonging to ethnic minorities or the political opposition, in particular forced labour, sexual violence and exploitation, including rape, as reported by the Special Rapporteur [on Myanmar]."

[11] Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on the mission to Indonesia and East Timor on the issue of violence against women (E/CN.4/1999/68/Add.3) (21 January 1999), para. 43; see also paras 75-110 (on rape and other abuses committed in these regions). "Much of the violence against women in Aceh, Irian Jaya and East Timor was perpetrated in the context of these areas being treated as military zones, which resulted in the subordination of certain civil processes", para. 56. The Special Rapporteur recommended the following:

> "It is increasingly recognized that victims of violence against women need to be compensated and that they require support services. Especially in East Timor, Aceh and Irian Jaya, it is important that the Government set up a process whereby rape victims are compensated. In addition, there appears to be a need for more crisis centres where victims of violence can take shelter and receive legal counselling, vocational training and psychological counselling", para. 54.

[12] Ibid., paras. 62-74 (on rape of ethnic Chinese women). See also Human Rights Watch, World Report 1999, Indonesia and East Timor (December 1998), p. 191.

[13] See Human Rights Watch, The Damaging Debate on Rapes of Ethnic Chinese Women (8 September 1998).

[14] See United States Department of State, Country Reports on Human Rights Practices for 1998, Indonesia (April 1999), pp. 904, 913, 925. "The team stated that the number of incidents probably was higher but that intimidation against witnesses and victims, as well as the reluctance of some victims to report the attacks, had prevented the team from documenting more attacks", para. 925.

[15] Report of the Secretary-General on the abduction of children from northern Uganda (E/CN.4/1999/69) (27 January 1999), para. 5. See also Commission on Human Rights resolution 1998/75 on the abduction of children from northern Uganda, in which the Commission expressed profound concern "at the continuing abduction, torture, detention, rape and forced recruitment of children from northern Uganda."

[16] Also, in Algeria, there continued to be reports of armed rebels abducting women and girls and holding them in captivity as sexual slaves under the guise of "marriage". The victims often were subsequently killed by the rebels. See e.g. Human Rights Watch, World Report 1999, Algeria (December 1998), p. 334. See also Charles Trueheart, "Algeria's President-Elect confronts reign of despair", The Washington Post, 18 April 1999.

[17] UNFPA, Assessment Report on Sexual Violence in Kosovo, mission completed by D. Serrano Fitamant, 27 April-8 May 1999, Albania. The report, based on interviews with refugees and health providers, is available at the United Nations Population Fund Web site (http://www.unfpa.org). See also Sam Kiley, "Serbs make rape a weapon of war", The Times (London), 6 April 1999; Carlotta Gall, "Refugees crossing Kosovo border tell of rapes and killings", New York Times, 20 April 1999; David Rhode, "Albanian tells how Serbs chose her, 'the most beautiful one,' for rape", New York Times, 1 May 1999. The Government of the United States also released a report on violations committed in the Kosovo conflict. See United States Department of State, Erasing History: Ethnic Cleansing in Kosovo (May 1999).

[18] See e.g. Elisabeth Bumiller, "Kosovo victims must choose to deny rape or be hated", New York Times, 22 June 1999.

[19] See e.g. Gordana Igric, "Kosovo rape victims suffer twice", Institute for War and Peace Reporting, 18 June 1999. The article reports that many of the Muslim women who had been held in the Foča rape camp in Bosnia found themselves ostracized by other refugees at a refugee camp in Turkey. Unfortunately, such ostracism is a common occurrence. See e.g. Jan-Ruff-O'Herne, Fifty Years of Silence (1994) (describing the treatment of former Dutch "comfort women" who returned to their internment camp only to be ignored or referred to as "whores" by other internees).

[20] See Human Rights Watch, Getting Away with Murder, Mutilation, and Rape: New Testimony from Sierra Leone (June 1999), pp. 9, 31-38:

> "Throughout the occupation, the rebels perpetrated organized and widespread sexual violence against girls and women. The rebels launched operations in which they rounded up girls and women, brought them to rebel command centres, and then subjected them to individual and gang-rape. The sexual abuse was frequently characterized by extreme brutality. Young girls under seventeen, and particularly virgins, were specifically targeted, and hundreds of them were later abducted by the rebels", p. 9.

[21] Sixth report of the Secretary-General on the United Nations Observer Mission in Sierra Leone (S/1999/645) (4 June 1999), paras. 28-32. See also Joint Statement by Carol Bellamy, Executive Director of UNICEF; Sadako Ogata, United Nations High Commissioner for Refugees; Olara Special Representative of the Secretary-General for Children and Armed Conflict; Mary Robinson, United Nations High Commissioner for Human Rights; and Sergio Vieira de Mello, United Nations Emergency Relief Coordinator, "Crisis in Sierra Leone highlights urgent need for an International Criminal Court", HR/98/40 (17 June 1998).

[22] Commission on Human Rights resolution 1998/53.

[23] There are many credible accounts of sexual violence committed in the ongoing conflict between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam. In an encouraging judgement, criminal sentences were handed down by the Colombo High Court against members of the security forces convicted of the rape and murder of a Tamil schoolgirl. See Human Rights Watch, World Report 1999, Sri Lanka (December 1998), p. 208.

[24] At the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (hereinafter "Statute of the ICC").

[25] As at April 2000, the following eight States had ratified the Statute of the ICC: Belize, Fiji, Ghana, Italy, Norway, San Marino, Senegal and Trinidad and Tobago. A list of signatories and ratifications is maintained by the NGO Coalition for an International Criminal Court at its Web site (http://www.iccnow.org/).

[26] Statute of the ICC, article 11.

[27] Ibid, article 7 (3).

[28] United Nations Development Fund for Women (UNIFEM), Integration of Women's Human Rights into the Work of the Special Rapporteurs (E/CN.4/1997/131), annex (3 April 1997), para. 3. See also the report of the Secretary-General on integrating the human rights of women throughout the United Nations system (E/CN.4/1997/40) (20 December 1996), para. 10:

> "The gender approach which emerged within the United Nations system acknowledges the distinction between the biological and social differences of men and women. As sex refers to biologically determined differences between men and women that are universal, so gender refers to the social differences between men and women that are learned, changeable over time and have wide variations both within and between cultures. Gender is a socio-economic variable in the analysis of roles, responsibilities, constraints, opportunities and needs of men and women in any context" (note omitted).

[29] Article 7 (2) (f) of the Statute of the ICC defines "forced pregnancy" as the "unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law." Article 7 (2) (f) continues: "This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."

[30] PCNICC/1999/L.5/Rev.1/Add.2 (22 December 1999), p.11.

[31] The drafters of the Statute of the ICC were vigilant to have identical language for grave breaches committed in international conflicts and for violations of common article 3 committed in non-international armed conflicts.

[32] The Trial Chamber of the International Criminal Tribunal for Rwanda in the Akayesu decision, Prosecutor v. Akayesu, Judgement, No. ICTR-96-4-T (2 September 1998), para. 506, has found that:

> "... measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group."

[33] Statute of the ICC, article 7 (1) (f).

[34] Ibid., article 8 (2) (a) (ii).

[35] Ibid., article 7 (1) (k).

[36] Ibid., article 8 (2) (a) (iii).

[37] Ibid., article 8 (2) (b) (xxi). See also article 8 (2) (b) (i), 8 (2) (b) (x) and 8 (2) 9 (b) (xi) on other serious violations of the laws and customs of war in international armed conflict.

[38] Ibid., article 8 (2) (c) (ii).

[39] Ibid., article 8 (2) (c) (i). See also article 8 (2) (e) (i) and 8 (2) (e) (xi) on other serious violations of common article 3 in non-international armed conflict.

[40] Article 36 (8) (b) of the Statute of the ICC provides: "States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children." Article 42 (9) provides: "The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children." Article 43 (6) stipulates that the Victims and Witnesses Unit within the Registry "shall include staff with expertise in trauma, including trauma related to crimes of sexual violence."

[41] Statute of the ICC, article 68 (1).

[42] Ibid. See also final report, para. 104 (recommending that victims and witnesses in cases of sexual violence committed during armed conflict be protected from intimidation, retaliation and reprisals and be afforded appropriate support services, including medical care, reproductive health care, counselling and legal assistance).

[43] Statute of the ICC, article 68 (2).

[44] See final report, paras. 88-90 (on the right to an effective remedy and the duty to compensate).

[45] Ibid., para. 90 (on the non-applicability of statutes of limitations).

[46] Ibid., paras. 74-84 (on holding individuals responsible).

[47] It is arguable that included among these criminally liable persons would be those described as functionnaires in the final report (paras. 83-84) who play critical, supporting roles in the bureaucratic or political processes that make the commission of international crimes possible.

[48] This would include propagandists who perpetuate racial, ethnic, religious, gender or other stereotypes in a manner calculated to bring about genocidal violence. See final report, paras. 81-82. See also infra note 78 and accompanying text (on the indictment of journalist and broadcaster Georges Ruggiu) by the International Tribunal for Rwanda.

[49] Statute of the ICC, article 17 (2).

[50] Ibid., article 17 (3).

[51] See final report, para. 95 (on the common failings of municipal law and procedure).

[52] Statute of the ICC, articles 12-15.

[53] Ibid., article 13 (b). A further limitation on the International Criminal Court is that the Security Council, by resolution, can defer a case and stop the Court from commencing or proceeding with an investigation or prosecution of a case for a renewable period of 12 months.

[54] The Trial Chamber for the ICTY has defined rape as "(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; (b) or of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person." Prosecutor v. Furundžija, infra note 64, para. 185. The Trial Chamber for the ICTR has defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive." Prosecutor v. Akayesu, infra note 79, para. 686.

[55] Prosecutor v. Akayesu, infra note 79, para. 686. Cf. final report, para. 21 (on the definition of sexual violence, including rape).

[56] No. IT-96-23-PT. Kunarac was initially charged in the "Foča" indictment, No. IT-96-23 (26 June 1996), amended in 1998 to bring solo charges against the accused. The "Foča" indictment, in which members of a Serb paramilitary unit are charged with slavery as a crime against humanity for detaining nine women in an apartment for the purposes of sexual slavery and forced labour, is discussed in the final report, notes 15, 31, 52 and accompanying text.

[57] No. IT-96-23-I, Amended Indictment (19 August 1998), para. 9.2 (Counts 14-17 of the Indictment). See also No. IT-96-23, Second Amended Indictment (6 September 1999), Third Amended Indictment (1 December 1999).

[58] No. IT-96-23-I, Amended Indictment (19 August 1998), paras. 10.1-10.4 (Counts 18-21 of the Indictment).

[59] See supra note 4 and accompanying text (on the doctrine of jus cogens).

[60] See Kelly D. Askin, Women and International Humanitarian Law, in Women and International Human Rights Law, vol. 1 (Kelly D. Askin and Dorean M. Koenig, eds.) (1999), pp. 41, 83-87.

[61] In the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, the rules of procedure and evidence provide that in cases involving sexual assault, consent shall not be allowed as a defence if the victim had been subjected to or threatened with violence, duress, detention or psychological oppression. International Criminal Tribunal for the Former Yugoslavia, Rules of procedure and evidence, as amended on 25 July 1997, rule 96 (Evidence in cases of sexual assault); International Tribunal for Rwanda, Rules of procedure and evidence, adopted on 29 June 1995, Rule 96 (Rules of evidence in cases of sexual assault). See also final report, para. 25. "The manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime."

Further, a defence of consent clearly should not be allowed when the sexual assault is charged and prosecuted as slavery, crimes against humanity, genocide, torture or other jus cogens crimes to which issues of consent are irrelevant.

[62] "Fact Sheet on ICTY Proceedings", PIS/FS-70 (26 April 2000), available at the ICTY website (http://www.un.org/icty). As at April 2000, 18 individuals had charges against them dropped, seven accused had died, one defendant was acquitted and released, one defendant was convicted and credited with time served and released, another was serving his sentence after pleading guilty, and 27 accused individuals were at large. "ICTY Key Figures", PIS/FS-04 (26 April 2000), available at the ICTY Web site (http://www.un.org/icty).

[63] Kelly D. Askin, Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status, American Journal of International Law vol. 93 (1999), p. 99. For a list and discussion of the indictments containing allegations of sexual violence, see ibid., pp. 99 (note 13), 116-120. These indictments are as follows:

Tadić, No. IT-94-1 (13 February 1995), amended, No. IT-94-1-T (1 September 1995), amended No. IT-94-1-T (14 December 1995);
Meakić and others, "Omarska Camp", No. IT-95-4 (13 February 1995);
Sikirica and others, "Keraterm Camp", No. IT-95-8 (21 July 1995);
Miljković and others, "Bosanski Šamac", No. IT-95-9 (21 July 1995), also known as Simić and others, indictment amended on 11 December 1998 to include new sexual violence charges against one of the accused, Todorović.
Jelisić and Cesić, "Brčko", No. IT-95-10 (21 July 1995), amended, No. IT-95-10-PT (3 March 1998) (Cesić allegedly forced two Muslim brothers to sexually abuse each other);
Karadžić and Mladić, No. IT-95-5 (25 July 1995), Prosecutor v. Karadžić and Mladić, Review of the indictment pursuant to rule 61, Nos. IT-95-5-R61, IT-95-18-R61 (11 July 1996).

Furundžija, "Lašva River Valley", (10 November 1995), amended, No. IT-95-17/1-PT (2 June 1998) (sealed indictment, redacted version);
Delalić and others, "Celebići", No. IT-96-21 (21 March 1996);
Gagović and others, "Foča", No. IT-96-23 (26 June 1996), indictment amended on 13 July 1998 to bring sexual violence charges against one of the accused, Kunarac;
Kovačevič and Drljaca, No. IT-97-24 (13 March 1997) (case officially closed);
Kvočka and others, "Omarska and Keraterm Camps", IT-98-30 (10 December 1998).

In Prosecutor v. Nikolić, Review of the indictment pursuant to rule 61, No. IT-94-2-R61 (20 October 1995), the Trial Chamber invited the Prosecutor to amend the indictment to include charges of sexual violence. Askin, p. 115.

[64] Prosecutor v. Tadić, Opinion and Judgement, No. IT-94-1-T (7 May 1997); Prosecutor v. Delalić, Judgement, No. IT-96-21-T (16 November 1998); Prosecutor v. Furundžija, Judgement, No. IT-95-17/1-T (10 December 1998). The Delalić and Furundžija cases are before the Appeals Chamber. The Tadić case concluded with the defendant's sentence reduced by the Appeals Chamber to 20 years' imprisonment.

[65] The defence in the Furundžija case argued that the testimony of the victim should be inadmissible because she had been traumatized by her ordeal. The Trial Chamber ruled, however, that a person may suffer from post-traumatic stress disorder and still be a perfectly reliable witness. Prosecutor v. Furundžija, Decision [on Defence Motion to Strike Testimony of Witness A], No. IT-95-17/1-T (16 July 1998), para. 109.

[66] "Celebići", para. 493 (citing the Special Rapporteur's final report, para. 55). The Trial Chamber also cited the decision of the International Tribunal for Rwanda in the Akayesu case, discussed infra, in which rape was found to constitute torture. Ibid., para. 490.

[67] The International Criminal Tribunal for the Former Yugoslavia has used the term "superior responsibility" and "superior authority" interchangeably. The International Tribunal for Rwanda and other authorities have referred to the doctrine as "command responsibility". See final report, paras. 76-80 (on command responsibility).

[68] "Celebići", para. 333. Another military commander, Zejnil Delalić, a Bosnian Muslim, was acquitted of 12 counts of grave breaches and war crimes and released immediately.

[69] Ibid., para. 363.

[70] No. IT-99-37-I (22 May 1999). "This indictment is the first in the history of this Tribunal to charge a Head of State during an ongoing armed conflict with the commission of serious violations of international humanitarian law." Louise Arbour, ICTY Prosecutor, Presentation of an indictment for review and application for warrants of arrest and for related orders.

[71] Milosević's co-indictees include the President of Serbia, Milan Milutinović; the Deputy Prime Minister of the FRY, Nikola Sainović; the Chief of the General Staff of the FRY's Armed

Forces, Col. Gen. Dragoljub Ojdanić; and the Minister of Internal Affairs of Serbia, Vlajko Stojiljković. All five indictees have been charged with deportation, murder and persecution as crimes against humanity, and with murder as a violation of the laws or customs of war. The May 1999 indictment is a welcome development, although the question remains as to whether there would have been a crisis in Kosovo had Milosević been prosecuted for alleged crimes committed in the related Bosnian conflict, which also was conducted under his leadership as then-President of Serbia.

[72] No. IT-95-5 (25 July 1995). Karadžić, the former President of the Serbian Democratic Party, has been charged along with Gen. Ratko Mladić, the former commander of the Bosnian Serb army. See also, Prosecutor v. Karadžić and Mladić, Review of the Indictment pursuant to rule 61, Nos. IT-95-5-R61, IT-95-18-R61 (11 July 1996). Despite the indictment, Mladić was reportedly commanding Serb paramilitary units in Kosovo, along with another indictee, Zeljko Raznjatović (also known as "Arkan", who is now deceased). See United Kingdom Briefing on Operation Allied Force, 14 April 1999.

[73] "International Criminal Tribunal for Rwanda Fact Sheet No. 1: The Tribunal at a Glance" (April 2000), available at the ICTR Web site (http://www.ictr.org).

[74] No. ICTR-97-21-I (26 May 1997), Amended Indictment (10 August 1999).

[75] No. ICTR-97-20-I, Amended Indictment (23 June 1999).

[76] No. ICTR-96-13-I, Amended Indictment (29 April 1999).

[77] No. ICTR-98-39 DP (1998). In December 1998, Serushago pleaded guilty to four of the five counts, but pleaded not guilty to rape as a crime against humanity. After a 10-minute recess, the Prosecutor withdrew the rape charge. Serushago was sentenced to 15 years' imprisonment on 5 February 1999.

[78] No. ICTR-97-32-I (9 October 1997). The indictment of Georges Ruggiu, a Belgian journalist and broadcaster accused of making hate radio broadcasts over Radio Télévision Libre des Milles Collines, contained charges of direct and public incitement to commit genocide and crimes against humanity. Ruggiu pleaded guilty to the charges in May 2000.

[79] Prosecutor v. Akayesu, Judgement, ICTR-96-4-T (2 September 1998). See Askin, p. 105. "The Akayesu case in the Rwandan Tribunal was the first international war crimes trial in history to try and convict a defendant for the crime of genocide."

[80] No. ICTR-96-4-I, Amended Indictment, paras. 10A, 12A, 12B (17 June 1997).

[81] For an overview of the case, see Askin, pp. 105-110. Author states that witnesses testified to the following:

> "... gang rape, public rape, multiple instances of rape, rape with foreign objects, rape of girl-children as young as six years of age, forced nudity, forced abortion, forced marriage, forced miscarriage, rapes specifically intended to humiliate,

> sexual slavery, forced prostitution, sexual torture and sexual enslavement. Frequently, the women and girls were killed after being subjected to sexual violence" p. 107 (notes omitted).

[82] Akayesu, para. 704.

[83] Akayesu, para. 686.

[84] Akayesu, para. 596.

[85] "Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict[ing] harm on the victim." Akayesu, para. 729. The Trial Chamber further found that:

> "... measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group" para. 507.

[86] "ICTR detainees status on 27 April 2000", available at the ICTR Web site (http://www.ictr.org). The chart lists the ICTR detainees under the following classifications: 14 political leaders, 10 senior government administrators and 10 military leaders.

[87] Prosecutor v. Kambanda, ICTR-97-23-S (4 September 1998). Kambanda pleaded guilty to a total of six counts of genocide, conspiracy and incitement to commit genocide, complicity in genocide, and crimes against humanity for murder and extermination. He was sentenced to life imprisonment.

[88] No. ICTR-97-21-I (26 May 1997), discussed supra note 74 and accompanying text.

[89] No. ICTR-96-13-I, Amended Indictment (29 April 1999). Musema was convicted of genocide and crimes against humanity for extermination and for rape. He was sentenced to life imprisonment in January 2000.

[90] Prosecutor v. Kayishema and Ruzindana, Judgement, ICTR-95-1-T (21 May 1998). Ruzindana was tried along with Clément Kayishema, the former prefect of Kibuye. Kayishema was sentenced to life imprisonment.

[91] Kelly Dawn Askin, The International Criminal Tribunal for Rwanda and Its Treatment of Crimes Against Women, in International Humanitarian Law: Origins, Challenges and Practices (John Pritchard and John Carey, eds.) (forthcoming 1999), p. 13.

[92] While the Trial Chamber in the Akayesu decision ruled that the defendant, a civilian, was not liable for war crimes (i.e. violations of common article 3 and Additional Protocol II) because the

Prosecution failed to prove that he had engaged in the conduct of hostilities and had acted in support of the war effort, other authorities support the liability of civilians for war crimes. For instance, in a case before the Nürnberg Tribunal, a Japanese hotel manager who had held Dutch women in sexual slavery was convicted of enforced prostitution as a war crime. Trial of Washio Awochi, Case No. 76, reported in XIII Trials of War Criminals before the Nurenberg Military Tribunal under Control Council Law No. 10 (1946).

[93] Ian Brownlie, Principles of Public International Law (4th ed., 1990), p. 485.

[94] Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33 (E/CN.4/2000/62) (18 January 2000), annex. The process of drafting the revised guidelines included synthesizing the work of Mr. Theo van Boven, Special Rapporteur on the right to reparation for victims of gross violations of human rights and humanitarian law, and Mr. Louis Joinet, Special Rapporteur on the question of the impunity of perpetrators of human rights violations.

[95] Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Mr. M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights resolution 1998/43 (E/CN.4/1999/65) (8 February 1999), para. 83.

[96] UNIFEM, Report of the expert group meeting on the development of guidelines for the integration of gender perspectives into United Nations human rights activities and programmes (E/CN.4/1996/105), annex (20 November 1995). See also Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, General Assembly resolution 52/86 of 12 December 1997, annex.

[97] The term "comfort women" is used in this report solely in its historical context. In many ways, the unfortunate choice of such a euphemistic term to describe the atrocity suggests the extent to which the international community as a whole, and the Government of Japan in particular, has sought to minimize the nature of the violations.

[98] Report of the Committee on the Application of Standards, International Labour Conference, 87th Session (June 1999) Geneva, para. 8.

[99] See Taro Karasaki, "Taiwan 'comfort women' join list of claimants", Asahi Evening News, 15 July 1999.

[100] Heisei 4 (wa) 349, 5 (wa) 373, 6 (wa) 51. See also Etsuro Totsuka, "Commentary on a Victory for 'Comfort Women': Japan's Judicial Recognition of Military Sexual Slavery", Pacific Rim Law and Policy Journal vol. 8 (January 1999) p. 47; Taihei Okada, "The 'Comfort Women' Case", ibid., p. 63.

[101] Heisei 5 (wa) 5966, 5 (wa) 17575. The Tokyo District Court held that individuals did not have the right under international law to claim compensation against a State for violations of international law. The court did not make a determination on the facts presented in the case.

[102] Heisei 6 (wa) 1218. While the Tokyo District Court acknowledged that international law violations were committed by the Japanese Imperial Army, it held that individuals did not have the right under international law to claim compensation against a State for violations of international law.

[103] In addition to litigation over military sexual slavery, numerous cases have been filed in Japanese national courts by plaintiffs seeking compensation for wartime forced labour. For instance, in April 1999, the Tokyo-based steelmaker NKK entered into a settlement to pay 4.1 million yen to Kim Kyung Suk, a former forced labourer from the Republic of Korea. See "Steelmaker NKK pays 4.1 million yen to wartime laborer", Japan Times, 7 April 1999.

[104] See e.g. statement by Koh Tanaka, Member of the House of Representatives of Japan, to the fifty-fourth session of the United Nations Commission on Human Rights, 6 April 1998.

[105] Republic of the Philippines House of Representatives, 11th Congress, House Resolution No. 378, introduced by the Honourable Romeo D.C. Candazo (30 September 1998).

[106] In November 1998, Italy's highest appeals court upheld the life sentence of Erich Priebke, a former Nazi SS captain involved in a 1944 massacre of 335 civilians in Italy. In April 1999, Britain's Old Bailey Court imposed a life sentence on Anthony Sawoniuk for war crimes committed when he was a member of the Gestapo and the SS in Nazi-occupied Belarus. And Dinko Šakić is on trial in Zagreb County Court for alleged crimes committed while he was the commander of a concentration camp in Croatia.

[107] In addition to Germany and Switzerland, other countries to receive looted "Nazi gold", as it is commonly referred to, include Argentina, Portugal, Spain, Sweden and Turkey. See United States Department of State, US and Allied Wartime and Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and US Concerns About the Fate of the Wartime Ustasha Treasury (June 1998), available at the United States Department of State Web site (http://www.state.gov/www/regions/eur/). Several major banks in Switzerland and Austria have entered into settlements to compensate Holocaust victims. In 1997, the United States and Great Britain agreed to transfer their Nazi gold holdings to a fund for Holocaust victims and their surviving relatives.

[108] Claims for compensation for wartime forced labour have been made against numerous German companies and banks. For a well-organized list of the accused companies, see "A debt to history? The companies, the allegations, the responses", ABC News, 16 December 1998. Some of the companies have taken steps, in response to pending or potential lawsuits, to compensate victims either through settlements or compensation schemes. See Tony Czuczka, "Slave labor fund set: German firms set up reparation to Nazi-era slave laborers", ABC News, 17 February 1999. Two United States companies, Ford and General Motors, also are accused of using forced labour in their German subsidiaries. See Michael Dobbs, "Ford and GM scrutinized for alleged Nazi collaboration", The Washington Post, 30 November 1998, p. A1. In March 1998, a lawsuit was filed against the Ford Motor Co. in the United States seeking compensation for wartime forced labour. Elsa Iwanowa v. Ford Motor Co. and Ford Werke AG.

[109] See Peter Eisler, "US citizens imprisoned by Nazis to be paid", USA Today, 21 June 1999. The confidential settlement between the United States and Germany was brokered by the United States Department of State which originally had argued for immunity of the Government of Germany in a lawsuit filed in 1994 by a former concentration camp victim. See Hugo Princz v. Federal Republic of Germany, 26 F.3d 1166 (Ct. Apps. D.C. Cir., 1994).

[110] The Commission on Human Rights, in its decision 1999/105, recommended that the Special Rapporteur's final report be transmitted to Governments, to the established international tribunals, to the Preparatory Commission for the Establishment of an ICC, and to other competent bodies of the United Nations.

[111] Final report, para. 102. This recommendation was endorsed by the Sub-Commission on the Promotion and Protection of Human Rights in its resolution 1998/18, paras. 5, 6, 9.

[112] Commission on Human Rights resolution 1991/1 on the situation of human rights in Sierra Leone.

[113] See Sixth report of the Secretary-General on the United Nations Observer Mission in Sierra Leone (S/1999/645) (4 June 1999), para. 34.

[114] Statement by the President of the Security Council (S/PRST/1999/6) (12 February 1999).

[115] Final report, para. 103. This recommendation was endorsed by the Sub-Commission in its resolution 1998/18, para. 7. See also General Assembly resolution 52/86 on crime prevention and criminal justice measures to eliminate violence against women. The General Assembly urged States "to review and evaluate their legislation and legal principles, procedures, policies and practices relating to criminal matters ... to determine if they have a negative impact on women and, if they have such an impact, to modify them in order to ensure that women are treated fairly by the criminal justice system", para. 1.

[116] Illustrating the necessity of adequate protection of victims and witnesses during the investigation of cases involving sexual violence, it is reported that members of the Volunteer Team for Humanity, or Tim Relawan, who were investigating the rapes of ethnic Chinese women in Indonesia, received repeated threats and harassment. One 17-year-old member of Tim Relawan, Martadinata Haryono, was murdered in October 1998. The Indonesian police deny that she was murdered in retaliation for the work she and her mother were doing to investigate the rapes. "Whatever the truth of this matter, the facts that Ms. Haryono and her family were recipients of death threat and anonymous letters casts a cloud over the case." Coomaraswamy, supra note 12, para. 74

[117] See e.g. UNFPA, Assessment Report on Sexual Violence in Kosovo, supra note 18. The author of the report, a psychology consultant specialized in sexual violence and trauma counselling, discusses the importance of psycho-social counselling not only for victims and witnesses, but also for their families and for those persons who work closely and regularly with victims, such as relief and medical personnel, investigators, and counsellors themselves.

[118] Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (United Nations Publication, Sales No. E.96.IV.13) Chap. I, resolution 1, annex II, para. 144 (c). See also Commission on Human Rights resolution 1999/10 on the situations of human rights in Burundi, in which the Commission recognized "the important role of women in the reconciliation process and the search for peace" and urged the Government of Burundi "to ensure the equal participation of women in Burundian society and to improve their living conditions".

[119] See e.g. Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussalli (E/CN.4/1999/33) (8 February 1999). The report illuminates the dire situation of women in the aftermath of armed conflict in which sexual violence was widespread and largely unpunished.

> "The situation of women is of particular concern, especially in the post-genocide period. Many were sexually abused and grievously injured, or even killed. Of those who survived many contracted AIDS from rape, others lost their husbands and are now single parents with many children, sometimes rejected by their in-laws, having to support these children without any means. Particularly unfair to women is the custom that they traditionally do not have the right to inherit their husbands' property. Instead, they can only act as guardians for their children while the latter are still minors. Even those who had managed to flee into exile with their husbands cannot live at home when they return to Rwanda, and are effectively deprived of the necessities of life" para. 56.

See also Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on the mission to Rwanda on the issue of violence against women in situations of armed conflict, (E/CN.4/1998/54/Add.1) (4 February 1998), sect. IV (on the situation of women victims of the Rwandan conflict).

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REPORT OF THE SECRETARY- GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993)

950

REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993)

PRESENTED 3 MAY 1993

(S/25704)

Introduction

1. By paragraph 1 of resolution 808 (1993) of 22 February 1993, the Security Council decided "that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991".

2. By paragraph 2 of the resolution, the Secretary-General was requested "to submit for consideration by the Council at the earliest possible date, and if possible no later than 60 days after the adoption of the present resolution, a report on all aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision [to establish an international tribunal], taking into account suggestions put forward in this regard by Member States."

3. The present report is presented pursuant to that request[1].

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1. On 19 April 1993, the Secretary-General addressed a letter to the President of the Security Council informing him that the report would be made available to the Security Council no later than 6 May 1993.

A

4. Resolution 808 (1993) represents a further step taken by the Security Council in a series of resolutions concerning serious violations of international humanitarian law occurring in the territory of the former Yugoslavia.

5. In resolution 764 (1992) of 13 July 1992, the Security Council reaffirmed that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches.

6. In resolution 771 (1992) of 13 August 1992, the Security Council expressed grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina, including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property. The Council strongly condemned any violations of international humanitarian law, including those involved in the practice of "ethnic cleansing", and demanded that all parties to the conflict in the former Yugoslavia cease and desist from all breaches of international humanitarian law. It called upon States and international humanitarian organizations to collate substantiated information relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make this information available to the Council. Furthermore, the Council decided, acting under Chapter VII of the Charter of the United Nations, that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, should comply with the provisions of that resolution, failing which the Council would need to take further measures under the Charter.

7. In resolution 780 (1992) of 6 October 1992, the Security Council requested the Secretary-General to establish an impartial Commission of Experts to examine and analyse the information as requested by resolution 771 (1992), together with such further information as the Commission may obtain through its own investigations or efforts, of other persons or bodies pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.

8. On 14 October 1992 the Secretary-General submitted a report to the Security Council pursuant to paragraph 3 of resolution 780 (1992) in which he outlined his decision to establish a five-member Commission of Experts (S/24657). On 26 October 1992, the Secretary-General announced the appointment of the Chairman and members of the Commission of Experts.

9. By a letter dated 9 February 1993, the Secretary-General submitted to the President of the Security Council an interim report of the Commission of Experts (S/25274), which concluded that grave breaches and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia, including wilful killing, "ethnic cleansing", mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests. In its report, the Commission noted that should the Security Council or another competent organ of the United Nations decide to establish an ad hoc international tribunal, such a decision would be consistent with the direction of its work.

10. It was against this background that the Security Council considered and adopted resolution 808 (1993). After recalling the provisions of resolutions 764 (1992), 771 (1992) and 780 (1992) and, taking into consideration the interim report of the Commission of Experts, the Security Council expressed once again its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuation of the practice of "ethnic cleansing". The Council determined that this situation constituted a threat to international peace and security, and stated that it was determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them. The Security Council stated its conviction that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.

11. The Secretary-General wishes to recall that in resolution 820 (1993) of 17 April 1993, the Security Council condemned once again all violations of international humanitarian law, including in particular, the practice of "ethnic cleansing" and the massive, organized and systematic detention and rape of women, and reaffirmed that those who commit or have committed or order or have ordered the commission of such acts will be held individually responsible in respect of such acts.

B

12. The Security Council's decision in resolution 808 (1993) to establish an international tribunal is circumscribed in scope and purpose: the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The decision does not relate to the establishment of an international criminal jurisdiction in general nor to the creation of an international criminal court of a permanent nature, issues which are and remain under active consideration by the International Law Commission and the General Assembly.

C

13. In accordance with the request of the Security Council, the Secretary-General has taken into account in the preparation of the present report the suggestions put forward by Member States, in particular those reflected in the following Security Council documents submitted by Member States and noted by the Council in its resolution 808 (1993): the report of the committee of jurists submitted by France (S/25266), the report of the commission of jurists submitted by Italy (S/25300), and the report submitted by the Permanent Representative of Sweden on behalf of the Chairman-in-Office of the Conference on Security and Cooperation in Europe (CSCE) (S/25307). The Secretary-General has also sought the views of the Commission of Experts established pursuant to Security Council resolution 780 (1992) and has made use of the information gathered by that Commission. In addition, the Secretary-General has taken into account suggestions or comments put forward formally or informally by the following Member States since the adoption of resolution 808 (1993): Australia, Austria, Belgium, Brazil, Canada, Chile,

China, Denmark, Egypt*, Germany, Iran (Islamic Republic of)*, Ireland, Italy, Malaysia*, Mexico, Netherlands, New Zealand, Pakistan*, Portugal, Russian Federation, Saudi Arabia*, Senegal*, Slovenia, Spain, Sweden, Turkey*, United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia. He has also received suggestions or comments from a non-member State (Switzerland).

14. The Secretary-General has also received comments from the International Committee of the Red Cross (ICRC), the International Criminal Police Organization and from the following non-governmental organizations: Amnesty International, Association Internationale des Jeunes Avocats, Ethnic Minorities Barristers' Association, Fédération internationale des femmes des carrières juridiques, Jacob Blaustein Institution for the Advancement of Human Rights, Lawyers Committee for Human Rights, National Alliance of Women's Organisations (NAWO), and Parliamentarians for Global Action. Observations have also been received from international meetings and individual experts in relevant fields.

15. The Secretary-General wishes to place on record his appreciation for the interest shown by all the Governments, organizations and individuals who have offered valuable suggestions and comments.

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* On behalf of the members of the Organization of the Islamic Conference (OIC) and as members of the Contact Group of OIC on Bosnia and Herzegovina.

D

16. In the main body of the report which follows, the Secretary-General first examines the legal basis for the establishment of the International Tribunal foreseen in resolution 808 (1993). The Secretary-General then sets out in detail the competence of the International Tribunal as regards the law it will apply, the persons to whom the law will be applied, including considerations as to the principle of individual criminal responsibility, its territorial and temporal reach and the relation of its work to that of national courts. In succeeding chapters, the Secretary-General sets out detailed views on the organization of the international tribunal, the investigation and pre-trial proceedings, trial and post-trial proceedings, and cooperation and judicial assistance. A concluding chapter deals with a number of general and organizational issues such as privileges and immunities, the seat of the international tribunal, working languages and financial arrangements.

17. In response to the Security Council's request to include in the report specific proposals, the Secretary-General has decided to incorporate into the report specific language for inclusion in a statute of the International Tribunal. The formulations are

based upon provisions found in existing international instruments, particularly with regard to competence *ratione materiae* of the International Tribunal. Suggestions and comments, including suggested draft articles, received from States, organizations and individuals as noted in paragraphs 13 and 14 above, also formed the basis upon which the Secretary-General prepared the statute. Texts prepared in the past by United Nations or other bodies for the establishment of international criminal courts were consulted by the Secretary-General, including texts prepared by the United Nations Committee on International Criminal Jurisdiction[2], the International Law Commission, and the International Law Association. Proposals regarding individual articles are, therefore, made throughout the body of the report; the full text of the statute of the International Tribunal is contained in the annex to the present report.

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2. The 1953 Committee on International Criminal Jurisdiction was established by General Assembly resolution 687 (VII) of 5 December 1952.

I. THE LEGAL BASIS FOR THE ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

18. Security Council resolution 808 (1993) states that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. It does not, however, indicate how such an international tribunal is to be established or on what legal basis.

19. The approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty by which the States parties would establish a tribunal and approve its statute. This treaty would be drawn up and adopted by an appropriate international body (e.g., the General Assembly or a specially convened conference), following which it would be opened for signature and ratification. Such an approach would have the advantage of allowing for a detailed examination and elaboration of all the issues pertaining to the establishment of the international tribunal. It also would allow the States participating in the negotiation and conclusion of the treaty fully to exercise their sovereign will, in particular whether they wish to become parties to the treaty or not.

20. As has been pointed out in many of the comments received, the treaty approach incurs the disadvantage of requiring considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective.

21. A number of suggestions have been put forward to the effect that the General Assembly, as the most representative organ of the United Nations, should have a role in

the establishment of the international tribunal in addition to its role in the administrative and budgetary aspects of the question. The involvement of the General Assembly in the drafting or the review of the statute of the International Tribunal would not be reconcilable with the urgency expressed by the Security Council in resolution 808 (1993). The Secretary-General believes that there are other ways of involving the authority and prestige of the General Assembly in the establishment of the International Tribunal.

22. In the light of the disadvantages of the treaty approach in this particular case and of the need indicated in resolution 808 (1993) for an effective and expeditious implementation of the decision to establish an international tribunal, the Secretary-General believes that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. Such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.

23. This approach would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII.

24. In the particular case of the former Yugoslavia, the Secretary-General believes that the establishment of the International Tribunal by means of a Chapter VII decision would be legally justified, both in terms of the object and purpose of the decision, as indicated in the preceding paragraphs, and of past Security Council practice.

25. As indicated in paragraph 10 above, the Security Council has already determined that the situation posed by continuing reports of widespread violations of international humanitarian law occurring in the former Yugoslavia constitutes a threat to international peace and security. The Council has also decided under Chapter VII of the Charter that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, shall comply with the provisions of resolution 771 (1992), failing which it would need to take further measures under the Charter. Furthermore, the Council has repeatedly reaffirmed that all parties in the former Yugoslavia are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches.

26. Finally, the Security Council stated in resolution 808 (1993) that it was convinced that in the particular circumstances of the former Yugoslavia, the establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace.

27. The Security Council has on various occasions adopted decisions under Chapter VII aimed at restoring and maintaining international peace and security, which have involved the establishment of subsidiary organs for a variety of purposes. Reference may be made in this regard to Security Council resolution 687 (1991) and subsequent resolutions relating to the situation between Iraq and Kuwait.

28. In this particular case, the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature. This organ would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions. As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.

29. It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.

30. On the basis of the foregoing considerations, the Secretary-General proposes that the Security Council, acting under Chapter VII of the Charter, establish the International Tribunal. The resolution so adopted would have annexed to it a statute the opening passage of which would read as follows:

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

II. COMPETENCE OF THE INTERNATIONAL TRIBUNAL

31. The competence of the International Tribunal derives from the mandate set out in paragraph 1 of resolution 808 (1993). This part of the report will examine and make proposals regarding these fundamental elements of its competence: *ratione materiae* (subject-matter jurisdiction), *ratione personae* (personal jurisdiction), *ratione loci* (territorial jurisdiction) and *ratione temporis* (temporal jurisdiction), as well as the question of the concurrent jurisdiction of the International Tribunal and national courts.

32. The statute should begin with a general article on the competence of the International Tribunal which would read as follows:

Article 1
Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

A. Competence ratione materiae (subject-matter jurisdiction)

33. According to paragraph 1 of resolution 808 (1993), the international tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.

34. In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims[3]; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907[4]; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948[5]; and the Charter of the International Military Tribunal of 8 August 1945[6].

36. Suggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian law. While international humanitarian law as outlined above provides a sufficient basis for subject-matter jurisdiction, there is one related issue which would require reference to domestic practice, namely, penalties (see para. 111).

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(3) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August

1949, Convention relative to the Treatment of Prisoners of War of 12 August 1949, Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (United Nations, *Treaty Series,* vol. 75, No. 970-973).
(4) Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915), p. 100.
(5) United Nations, Treaty Series, vol. 78, No. 1021.
(6) The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London on 8 August 1945 (United Nations, *Treaty Series,* vol. 82, No. 251); see also Judgement of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (United States Government Printing Office, *Nazi Conspiracy and Aggression, Opinion and Judgement)* and General Assembly resolution 95 (I) of 11 December 1946 on the Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal.

Grave breaches of the 1949 Geneva Conventions

37. The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. These Conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons: namely, wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war, and civilians in time of war.

38. Each Convention contains a provision listing the particularly serious violations that qualify as "grave breaches" or war crimes. Persons committing or ordering grave breaches are subject to trial and punishment. The lists of grave breaches contained in the Geneva Conventions are reproduced in the article which follows.

39. The Security Council has reaffirmed on several occasions that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions in the territory of the former Yugoslavia are individually responsible for such breaches as serious violations of international humanitarian law.

40. The corresponding article of the statute would read:

Article 2
Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Violations of the laws or customs of war

41. The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.

42. The NŸrnberg Tribunal recognized that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war. The NŸrnberg Tribunal also recognized that war crimes defined in article 6(b) of the NŸrnberg Charter were already recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.

43. The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions. However, the Hague Regulations also recognize that the right of belligerents to conduct warfare is not unlimited and that resort to certain methods of waging war is prohibited under the rules of land warfare.

44. These rules of customary law, as interpreted and applied by the NŸrnberg Tribunal, provide the basis for the corresponding article of the statute which would read as follows:

Article 3
Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages,

dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Genocide

45. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished. The Convention is today considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951[7].

46. The relevant provisions of the Genocide Convention are reproduced in the corresponding article of the statute, which would read as follows:

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7. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Advisory Opinion of 28 May 1951, International Court of Justice Reports, 1951, p. 23.

Article 4
Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

Crimes against humanity

47. Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany[8]. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character[9].

48. Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.

49. The corresponding article of the statute would read as follows:

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8. Official Gazette of the Control Council for Germany, No. 3, p. 22, Military Government Gazette, Germany, British Zone of Control, No. 5, p. 46, Journal Officiel du Commandement en Chef Français en Allemagne, No. 12 of 11 January 1946.

9. In this context, it is to be noted that the International Court of Justice has recognized that the prohibitions contained in common article 3 of the 1949 Geneva Conventions are based on "elementary considerations of humanity" and cannot be breached in an armed conflict, regardless of whether it is international or internal in character. *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement of 27 June 1986: I.C.J. Reports 1986,* p. 114.

Article 5
Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;

(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

B. Competence *ratione personae* (personal jurisdiction) and individual criminal responsibility

50. By paragraph 1 of resolution 808 (1993), the Security Council decided that the International Tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. In the light of the complex of resolutions leading up to resolution 808 (1993) (see paras. 5-7 above), the ordinary meaning of the term "persons responsible for serious violations of international humanitarian law" would be natural persons to the exclusion of juridical persons.

51. The question arises, however, whether a juridical person, such as an association or organization, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.

52. The corresponding article of the statute would read:

Article 6
Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Individual criminal responsibility

53. An important element in relation to the competence *ratione personae* (personal jurisdiction) of the International Tribunal is the principle of individual criminal responsibility. As noted above, the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.

54. The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the

former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.

55. Virtually all of the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment.

56. A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.

57. Acting upon an order of a Government or a superior cannot relieve the perpetrator of the crime of his criminal responsibility and should not be a defence. Obedience to superior orders may, however, be considered a mitigating factor, should the International Tribunal determine that justice so requires. For example, the International Tribunal may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice.

58. The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations.

59. The corresponding article of the statute would read:

Article 7
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

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

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal

responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

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

C. Competence *ratione loci* (territorial jurisdiction) and *ratione temporis* (temporal jurisdiction)

60. Pursuant to paragraph 1 of resolution 808 (1993), the territorial and temporal jurisdiction of the International Tribunal extends to serious violations of international humanitarian law to the extent that they have been "committed in the territory of the former Yugoslavia since 1991".

61. As far as the territorial jurisdiction of the International Tribunal is concerned, the territory of the former Yugoslavia means the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters.

62. With regard to temporal jurisdiction, Security Council resolution 808 (1993) extends the jurisdiction of the International Tribunal to violations committed "since 1991". The Secretary-General understands this to mean anytime on or after 1 January 1991. This is a neutral date which is not tied to any specific event and is clearly intended to convey the notion that no judgement as to the international or internal character of the conflict is being exercised.

63. The corresponding article of the statute would read:

Article 8
Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

D. Concurrent jurisdiction and the principle of *non-bis-in-idem*

64. In establishing an international tribunal for the prosecution of persons responsible for serious violations committed in the territory of the former Yugoslavia since 1991, it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed national courts should be

encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures.

65. It follows therefore that there is concurrent jurisdiction of the International Tribunal and national courts. This concurrent jurisdiction, however, should be subject to the primacy of the International Tribunal. At any stage of the procedure, the International Tribunal may formally request the national courts to defer to the competence of the International Tribunal. The details of how the primacy will be asserted shall be set out in the rules of procedure and evidence of the International Tribunal.

66. According to the principle of *non-bis-in-idem,* a person shall not be tried twice for the same crime. In the present context, given the primacy of the International Tribunal, the principle of *non-bis-in-idem* would preclude subsequent trial before a national court. However, the principle of *non-bis-in idem* should not preclude a subsequent trial before the International Tribunal in the following two circumstances:

(a) the characterization of the act by the national court did not correspond to its characterization under the statute; or
(b) conditions of impartiality, independence or effective means of adjudication were not guaranteed in the proceedings before the national courts.

67. Should the International Tribunal decide to assume jurisdiction over a person who has already been convicted by a national court, it should take into consideration the extent to which any penalty imposed by the national court has already been served.

68. The corresponding articles of the statute would read:

Article 9
Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10
Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

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

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

III. THE ORGANIZATION OF THE INTERNATIONAL TRIBUNAL

69. The organization of the International Tribunal should reflect the functions to be performed by it. Since the International Tribunal is established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia, this presupposes an international tribunal composed of a judicial organ, a prosecutorial organ and a secretariat. It would be the function of the prosecutorial organ to investigate cases, prepare indictments and prosecute persons responsible for committing the violations referred to above. The judicial organ would hear the cases presented to its Trial Chambers, and consider appeals from the Trial Chambers in its Appeals Chamber. A secretariat or Registry would be required to service both the prosecutorial and judicial organs.

70. The International Tribunal should therefore consist of the following organs: the Chambers, comprising two Trial Chambers and one Appeals Chamber; a Prosecutor; and a Registry.

71. The corresponding article of the statute would read as follows:

Article 11
Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

(a) the Chambers, comprising two Trial Chambers and an Appeals Chamber;
(b) the Prosecutor; and
(c) a Registry, servicing both the Chambers and the Prosecutor.

A. The Chambers

1. Composition of the Chambers

72. The Chambers should be composed of 11 independent judges, no 2 of whom may be nationals of the same State. Three judges would serve in each of the two Trial Chambers and five judges would serve in the Appeals Chamber.

73. The corresponding article of the statute would read as follows:

Article 12
Composition of the Chambers

The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

(a) three judges shall serve in each of the Trial Chambers;
(b) five judges shall serve in the Appeals Chamber.

2. Qualifications and election of judges

74. The judges of the International Tribunal should be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. Impartiality in this context includes impartiality with respect to the acts falling within the competence of the International Tribunal. In the overall composition of the Chambers, due account should be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

75. The judges should be elected by the General Assembly from a list submitted by the Security Council. The Secretary-General would invite nominations for judges from States Members of the United Nations as well as non-member States maintaining permanent observer missions at United Nations Headquarters. Within 60 days of the date of the invitation of the Secretary-General, each State would nominate up to two candidates meeting the qualifications mentioned in paragraph 74 above, who must not be of the same nationality. The Secretary-General would forward the nominations received to the Security Council. The Security Council would, as speedily as possible, establish from the nominations transmitted by the Secretary-General, a list of not less than 22 and not more

than 33 candidates, taking due account of the adequate representation of the principal legal systems of the world. The President of the Security Council would then transmit the list to the General Assembly. From that list, the General Assembly would proceed as speedily as possible to elect the 11 judges of the International Tribunal. The candidates declared elected shall be those who have received an absolute majority of the votes of the States Members of the United Nations and of the States maintaining permanent observer missions at United Nations Headquarters. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

76. The judges shall be elected for a term of four years. The terms and conditions of service shall be those of the Judges of the International Court of Justice. They shall be eligible for re-election.

77. In the event of a vacancy occurring in the Chambers, the Secretary-General, after consultation with the Presidents of the Security Council and the General Assembly, would appoint a person meeting the qualifications of paragraph 74 above, for the remainder of the term of office concerned.

78. The corresponding article of the statute would read as follows:

Article 13
Qualifications and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) the Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
(b) within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality;
(c) the Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation of the principal legal systems of the world;
(d) the President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall

elect the eleven judges of the International Tribunal. The candidates who receive an absolute majority of the votes of States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

3. In the event of a vacancy in the Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

4. The judges shall be elected for a term of four years. The terms and conditions of service shall be those of the Judges of the International Court of justice. They shall be eligible for re-election.

3. Officers and members of the Chambers

79. The judges would elect a President of the International Tribunal from among their members who would be a member of the Appeals Chamber and would preside over the appellate proceedings.

80. Following consultation with the members of the Chambers, the President would assign the judges to the Appeals Chamber and to the Trial Chambers. Each judge would serve only in the chamber to which he or she was assigned.

81. The members of each Trial Chamber should elect a presiding judge who would conduct all of the proceedings before the Trial Chamber as a whole.

82. The corresponding article of the statute would read as follows:

Article 14
Officers and members of the Chambers

1. The judges of the International Tribunal shall elect a President.

2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.

3. After consultation with the judges of the International Tribunal, the President shall assign the judges to the Appeals Chamber and to the Trial Chambers. A judge shall serve only in the Chamber to which he or she was assigned.

4. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of the Trial Chamber as a whole.

4. Rules of procedure and evidence

83. The judges of the International Tribunal as a whole should draft and adopt the rules of procedure and evidence of the International Tribunal governing the pre-trial phase of the proceedings, the conduct of trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

84. The corresponding article of the statute would read as follows:

Article 15
Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

B. The Prosecutor

85. Responsibility for the conduct of all investigations and prosecutions of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 should be entrusted to an independent Prosecutor. The Prosecutor should act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

86. The Prosecutor should be appointed by the Security Council, upon nomination by the Secretary-General. He or she should possess the highest level of professional competence and have extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor should be appointed for a four-year term of office and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

87. The Prosecutor would be assisted by such other staff as may be required to perform effectively and efficiently the functions entrusted to him or her. Such staff would be appointed by the Secretary-General on the recommendation of the Prosecutor. The Office of the Prosecutor should be composed of an investigation unit and a prosecution unit.

88. Staff appointed to the Office of the Prosecutor should meet rigorous criteria of professional experience and competence in their field. Persons should be sought who have had relevant experience in their own countries as investigators, prosecutors,

criminal lawyers, law enforcement personnel or medical experts. Given the nature of the crimes committed and the sensitivities of victims of rape and sexual assault, due consideration should be given in the appointment of staff to the employment of qualified women.

89. The corresponding article of the statute would read as follows:

Article 16
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

C. The Registry

90. As indicated in paragraph 69 above, a Registry would be responsible for the servicing of the International Tribunal. The Registry would be headed by a Registrar, whose responsibilities shall include but should not be limited to the following:

(a) public information and external relations;
(b) preparation of minutes of meetings;
(c) conference-service facilities;
(d) printing and publication of all documents;
(e) all administrative work, budgetary and personnel matters; and
(f) serving as the channel of communications to and from the International Tribunal.

91. The Registrar should be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she would be appointed to serve for a

four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

92. The corresponding article of the statute would read as follows:

Article 17
The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.

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

3. The Registrar shall be appointed by the Secretary-General athosefter consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

IV. INVESTIGATION AND PRE-TRIAL PROCEEDINGS

93. The Prosecutor would initiate investigations ex officio, or on the basis of information obtained from any source, particularly from Governments or United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor would assess the information received or obtained and decide whether there is a sufficient basis to proceed.

94. In conducting his investigations, the Prosecutor should have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

95. Upon the completion of the investigation, if the Prosecutor has determined that a prima facie case exists for prosecution, he would prepare an indictment containing a concise statement of the facts and the crimes with which the accused is charged under the statute. The indictment would be transmitted to a judge of a Trial Chamber, who would review it and decide whether to confirm or to dismiss the indictment.

96. If the investigation includes questioning of the suspect, then he should have the right to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient

means to pay for it. He shall also be entitled to the necessary translation into and from a language he speaks and understands.

97. Upon confirmation of the indictment, the judge would, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender and transfer of persons, or any other orders as may be necessary for the conduct of the trial.

98. The corresponding articles of the statute would read as follows:

Article 18
Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19
Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or

transfer of persons, and any other orders as may be required for the conduct of the trial.

V. TRIAL AND POST-TRIAL PROCEEDINGS

A. Commencement and conduct of trial proceedings

99. The Trial Chambers should ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence and with full respect for the rights of the accused. The Trial Chamber should also provide appropriate protection for victims and witnesses during the proceedings.

100. A person against whom an indictment has been confirmed would, pursuant to an order or a warrant of the International Tribunal, be informed of the contents of the indictment and taken into custody.

101. A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights[10], which provides that the accused shall be entitled to be tried in his presence.

102. The person against whom an indictment has been confirmed would be transferred to the seat of the International Tribunal and brought before a Trial Chamber without undue delay and formally charged. The Trial Chamber would read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. After the plea has been entered, the Trial Chamber would set the date for trial.

103. The hearings should be held in public unless the Trial Chamber decides otherwise in accordance with its rules of procedure and evidence.

104. After hearing the submissions of the parties and examining the witnesses and evidence presented to it, the Trial Chamber would close the hearing and retire for private deliberations.

105. The corresponding article of the statute would read:

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10. United Nations, *Treaty Series,* vol. 999, No. 14668, p. 171 and vol. 1057, p. 407 (proces-verbal of rectification of authentic Spanish text).

Article 20
Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

B. Rights of the accused

106. It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.

107. The corresponding article of the statute would read as follows:

Article 21
Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

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

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

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

C. Protection of victims and witnesses

108. In the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses. Necessary protection measures should therefore be provided in the rules of procedure and evidence for victims and witnesses, especially in cases of rape or sexual assault. Such measures should include, but should not be limited to the conduct of *in camera* proceedings, and the protection of the victim's identity.

109. The corresponding article of the statute would read as follows:

Article 22
Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

D. Judgement and penalties

110. The Trial Chambers would have the power to pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law. A judgement would be rendered by a majority of the judges of the

Chamber and delivered in public. It should be written and accompanied by a reasoned opinion. Separate or dissenting opinions should be permitted.

111. The penalty to be imposed on a convicted person would be limited to imprisonment. In determining the term of imprisonment, the Trial Chambers should have recourse to the general practice of prison sentences applicable in the courts of the former Yugoslavia.

112. The International Tribunal should not be empowered to impose the death penalty.

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

114. In addition to imprisonment, property and proceeds acquired by criminal conduct should be confiscated and returned to their rightful owners. This would include the return of property wrongfully acquired by means of duress. In this connection the Secretary-General recalls that in resolution 779 (1992) of 6 October 1992, the Security Council endorsed the principle that all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void.

115. The corresponding articles of the statute would read as follows:

Article 23
Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

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

Article 24
Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

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

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

E. Appellate and review proceedings

116. The Secretary-General is of the view that the right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has, *inter alia,* been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary-General has proposed that there should be an Appeals Chamber.

117. The right of appeal should be exercisable on two grounds: an error on a question of law invalidating the decision or, an error of fact which has occasioned a miscarriage of justice. The Prosecutor should also be entitled to initiate appeal proceedings on the same grounds.

118. The judgement of the Appeals Chamber affirming, reversing or revising the judgement of the Trial Chamber would be final. It would be delivered by the Appeals Chamber in public and be accompanied by a reasoned opinion to which separate or dissenting opinions may be appended.

119. Where a new fact has come to light which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber, and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor should be authorized to submit to the International Tribunal an application for review of the judgement.

120. The corresponding articles of the statute would read as follows:

Article 25
Appellate proceedings

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

(a) an error on a question of law invalidating the decision; or
(b) an error of fact which has occasioned a miscarriage of justice.

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

Article 26
Review proceedings

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

F. Enforcement of sentences

121. The Secretary-General is of the view that, given the nature of the crimes in question and the international character of the tribunal, the enforcement of sentences should take place outside the territory of the former Yugoslavia. States should be encouraged to declare their readiness to carry out the enforcement of prison sentences in accordance with their domestic laws and procedures, under the supervision of the International Tribunal.

122. The Security Council would make appropriate arrangements to obtain from States an indication of their willingness to accept convicted persons. This information would be communicated to the Registrar, who would prepare a list of States in which the enforcement of sentences would be carried out.

123. The accused would be eligible for pardon or commutation of sentence in accordance with the laws of the State in which sentence is served. In such an event, the State concerned would notify the International Tribunal, which would decide the matter in accordance with the interests of justice and the general principles of law.

124. The corresponding article of the statute would read as follows:

Article 27
Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 28
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

VI. COOPERATION AND JUDICIAL ASSISTANCE

125. As pointed out in paragraph 23 above, the establishment of the International Tribunal on the basis of a Chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision. In practical terms, this means that all States would be under an obligation to cooperate with the International Tribunal and to assist it in all stages of the proceedings to ensure compliance with requests for assistance in the gathering of evidence, hearing of witnesses, suspects and experts, identification and location of persons and the service of documents. Effect shall also be given to orders issued by the Trial Chambers, such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of the trial.

126. In this connection, an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations.

127. The corresponding article of the statute would read as follows:

Article 29
Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;
(b) the taking of testimony and the production of evidence;
(c) the service of documents;
(d) the arrest or detention of persons;
(e) the surrender or the transfer of the accused to the International Tribunal.

VII. GENERAL PROVISIONS

A. The status, privileges and immunities of the International Tribunal

128. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 would apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff. The judges, the Prosecutor, and the Registrar would be granted the privileges and immunities, exemptions and facilities accorded to

diplomatic envoys in accordance with international law. The staff of the Prosecutor and the Registrar would enjoy the privileges and immunities of officials of the United Nations within the meaning of articles V and VII of the Convention.

129. Other persons, including the accused, required at the seat of the International Tribunal would be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

130. The corresponding article of the statute would read:

Article 30
The status, privileges and immunities of the International Tribunal

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.
4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

B. Seat of the International Tribunal

131. While it will be for the Security Council to determine the location of the seat of the International Tribunal, in the view of the Secretary-General, there are a number of elementary considerations of justice and fairness, as well as administrative efficiency and economy which should be taken into account. As a matter of justice and fairness, it would not be appropriate for the International Tribunal to have its seat in the territory of the former Yugoslavia or in any State neighbouring upon the former Yugoslavia. For reasons of administrative efficiency and economy, it would be desirable to establish the seat of the International Tribunal at a European location in which the United Nations already has an important presence. The two locations which fulfil these requirements are Geneva and The Hague. Provided that the necessary arrangements can be made with the host country, the Secretary-General believes that the seat of the International Tribunal should be at The Hague.

132. The corresponding article of the statute would read:

Article 31
Seat of the International Tribunal

The International Tribunal shall have its seat at The Hague.

C. Financial arrangements

133. The expenses of the International Tribunal should be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

134. The corresponding article of the statute would read:

Article 32
Expenses of the International Tribunal

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

D. Working languages

135. The working languages of the Tribunal should be English and French.

136. The corresponding article of the statute would read as follows:

Article 33
Working languages

The working languages of the International Tribunal shall be English and French.

E. Annual report

137. The International Tribunal should submit an annual report on its activities to the Security Council and the General Assembly.

138. The corresponding article of the statute would read:

Article 34
Annual report

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, REPORTS ON THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN ITS CAUSES AND CONSEQUENCES
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FURTHER PROMOTION AND ENCOURAGEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, INCLUDING THE QUESTION OF THE PROGRAMME AND METHODS OF WORK OF THE COMMISSION

ALTERNATIVE APPROACHES AND WAYS AND MEANS WITHIN THE UNITED NATIONS SYSTEM FOR IMPROVING THE EFFECTIVE ENJOYMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission resolution 1997/44

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Introduction

1. The Commission on Human Rights, at its fifty-third session, in its resolution 1997/44, welcomed the report of the Special Rapporteur on violence against women, its causes and consequences (E/CN.4/1997/47 and Add.1-4) and commended the Special Rapporteur for her analysis of violence in the family and violence in the community. In the same resolution, the Commission decided that the mandate of the Special Rapporteur should be renewed for a period of three years and requested the Special Rapporteur to report annually to the Commission on Human Rights, beginning at its fifty-fourth session, on activities relating to her mandate.

2. In follow-up to her previous reports on violence against women in the family and in the community, the present report analyses various forms of violence against women as perpetrated and/or condoned by the State. **(1)** The first chapter addresses violence against women in armed conflict. In chapter II, the Special Rapporteur looks at custodial violence against women. In chapter III, she examines violence against refugee and internally displaced women.[**back to the contents**]

Country visits

1. The Special Rapporteur would like to draw the attention of the Commission on Human Rights to the report of her mission to Rwanda (22 to 31 October 1997) on the issue of rape and sexual violence against women in armed conflicts (E/CN.4/1998/54/Add.1). The Special Rapporteur would also like to take this opportunity to express her appreciation to the Government of Rwanda for facilitating her visit and enabling her to meet with all relevant interlocutors, both governmental and non-governmental, in the country. The Special Rapporteur regrets that her visit to Afghanistan and Pakistan, scheduled for December 1997, had to be postponed and hopes that, with the renewed indulgence of the Governments of Afghanistan and Pakistan, the Special Rapporteur will be in a position to carry out this visit in 1998.

2. Furthermore, in 1998/99, before the fifty-fifth session of the Commission, the Special Rapporteur is planning to visit the United States of America on the issue of violence against women in prisons. The Special Rapporteur also hopes to visit the Asian and Middle Eastern regions to report on violence against women and religious laws.

3. Having completed a first cycle of reports on violence against women in the family, in the community and by the State in the last three years, the Special Rapporteur envisages, in her forthcoming reports, to explore further in-depth specific aspects of domestic violence, trafficking and forced prostitution, as well as violence against women perpetrated and/or condoned by the State. Corresponding missions to countries of special concern are also envisaged.

4. As indicated in her previous report, the Special Rapporteur still intends to make brief follow-up reports to her reports on country visits. Such reports would include information on the implementation of the Special Rapporteur's recommendations, as well as new developments in the countries concerned in connection with the issues studied. In addition, information regarding the need to carry out any follow-up missions or recommendations as to how other activities and programmes of the Office of the High Commissioner for Human Rights could assist in the follow-up would be included. Due to reasons

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of page limitation, such information has not been included in the present report.

Communications with Governments

1. With regard to communications concerning individual allegations of violence against women, the Special Rapporteur participated in sending joint urgent appeals and/or communications with the Special Rapporteurs on torture and on freedom of opinion and expression, as well as with the Special Rapporteur on the situation of human rights in the Sudan. The Special Rapporteur also sent a number of individual communications to Governments, but due to the delay in transmitting these cases, the replies of Governments will only be reflected in the Special Rapporteur's next report. [back to the contents]

I. VIOLENCE AGAINST WOMEN IN TIMES OF ARMED CONFLICT

1. Violence against women during times of armed conflict has been a widespread and persistent practice over the centuries. There has been an unwritten legacy that violence against women during war is an accepted practice of conquering armies.

2. It has been posited that the military establishment is inherently masculine and misogynist, inimical to the notion of women's rights. **(2)** The masculinity cults that pervade military institutions are intrinsically anti-female and therefore create a hostile environment for women. The large number of sexual harassment cases in United States military institutions is cited as an example of the misogyny within the armed forces. There exists a difference of opinion about whether women should play a role in dismantling this apparatus or whether they should enter military institutions in large numbers and fight for institutional equality. This remains an unfinished debate.

3. Laws drafted in the past few centuries have provided some measure of protection for women during armed conflict. These laws, codified as humanitarian law or the laws of war, play a significant part in the training of military personnel throughout the world. They set forth standards of individual criminal responsibility for soldiers who derogate from the standards and confer universal jurisdiction on certain international delicts. Universal jurisdiction provides all countries jurisdiction to arrest, prosecute and punish the alleged perpetrator of certain crimes. The codification of the laws of war through the Geneva Conventions was a direct result of the Second World War.

4. Until recently, violence against women in armed conflict has been couched in terms of "protection" and "honour". Article 27 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War treats violence against women as a crime of honour rather than as a crime of violence. By using the honour paradigm, linked as it is to concepts of chastity, purity and virginity, stereotypical concepts of femininity have been formally enshrined in humanitarian law. Thus, criminal sexual assault, in both national and international law, is linked to the morality of the victim. When rape is perceived as a crime against honour or morality, shame commonly ensues for the victim, who is often viewed by the community as "dirty" or "spoiled". Consequently, many women will neither report nor discuss the violence that has been perpetrated against them. The nature of rape and the silence that tends to surround it makes it a particularly difficult human rights violation to investigate.

5. Perhaps more than the honour of the victim, it is the perceived honour of the enemy that is targeted in the perpetration of sexual violence against women; it is seen and often experienced as a means of humiliating the opposition. Sexual violence against women is meant to demonstrate victory over the men of the other group who have failed to protect their women. It is a message of castration and emasculation of the enemy group. It is a battle among men fought over the bodies of women.

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6. Rape is used by both sides as a symbolic act. As depicted by Second World War posters in which the rape of a woman was used to evoke the image of the "rape" of France, rape is used by one side to demoralize the other. The rape of "their" women is then used to increase the sentiments against the enemy and further demonize them. This process of demonization or dehumanization may, in turn, lead to more rapes. Rape during warfare has also been used to terrorize populations and induce civilians to flee their homes and villages. It is often seen as one of the "perks" for soldiers and an inducement to display courage on the battlefield - in other words, as a natural consequence of war. The alleged endemic nature of rape in war has been institutionalized by militaries through forced prostitution and military sexual slavery. Such practices have been justified as a mechanism to avoid the rape of innocent civilians.

7. The consequences of sexual violence are physically, emotionally and psychologically devastating for women victims. Few countries have adequately trained personnel to meet the needs of victim-survivors. Additionally, in some situations, forced impregnation has likewise been used as a weapon of war to further humiliate the rape victim, by forcing her to bear children of the perpetrator. Some rape survivors have given birth to the unwanted children of rape. Likewise, some survivors have been forced into the role of sole head of the household with little earning power. All these problems have been invisible in the past, but in the last few decades, important momentum has been generated as new norms are created to address sexual violence during armed conflict.

8. The 1949 Geneva Conventions were promulgated in reaction to international armed conflict and world wars and thus were primarily designed to set standards applicable during times of international armed conflict. Contemporary forms of warfare are not traditionally international in character. Rather, they are being fought within Nation States, generally between States and guerrilla movements. Common article 3 of and Protocol II to the Geneva Conventions apply humanitarian legal standards to internal armed conflicts.

9. Increasingly, non-State actors such as paramilitary troops and guerilla organizations are becoming important actors in the internal affairs of States. The role of non-State actors poses challenges under international law, which was conceptualized to govern States and their actors and agents. The Velásquez decision of the Inter-American Court of Human Rights (3) sets forth the standard of State responsibility for non-State, paramilitary operatives. The State is under a due diligence standard to prevent, prosecute and punish offenders who violate the rights of others, whether they are acting as official agents of the State or as paramilitaries. The same standard has been interpreted to extend to other non-State actors, thereby providing a mechanism of State accountability for the prevention, prosecution and punishment of private violations of human rights.

10. What is less clear under international law is the means by which to hold non-State actors accountable for the human rights violations they commit. The Special Rapporteur, however, agrees with international human rights experts that non-State actors conducting war are likewise bound by common article 3. Thus, non-State actors contesting State power must respect international humanitarian law. Individual criminal responsibility and universal jurisdiction also apply to individuals waging war against the State. Since women are often the victims of violence perpetrated by non-State actors during armed conflict, for example forced marriages by non-State actors in Algeria and in Kashmir, it is imperative that the international community evolve unequivocal standards which ensure human rights protection to victims who live in areas not under the control of formal State authorities.

11. Increasingly, women are entering the ranks of the combatants and, for the first time in history, women are being charged with war crimes. Women, for example, were active participants in the genocide in Rwanda, some of whom perpetrated sexual violence against other women. In Peru and Sri Lanka, women combatants are increasingly playing a role in the front lines of battle. The Geneva

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Conventions framed their standards in terms of male soldiers and combatants. Such standards need to be reformulated to take into account the needs of women prisoners of war and the challenges of women war criminals.[back to the contents]

A. Cases of violence against women in times of armed conflict

1. The following are cases of violence against women during times of armed conflict as reported by independent fact finders; their stories have been corroborated by more than one source. The list is neither exhaustive nor representative, but it serves to point to the nature and degree of violence perpetrated against women during times of armed conflict. Some of the case studies were given to the Special Rapporteur in direct testimony, others are drawn from the reporting of international human rights non-governmental organizations, such as Amnesty International and Human Rights Watch.

Afghanistan

1. Taliban edicts have placed a virtual ban on women in the public sphere. This has had a devastating impact on the health-care system in Kabul. As female nurses form the backbone of the health system, their inability to work has seriously impaired the capacity of health services. Nurses who have gone to help patients have been repeatedly beaten by the Taliban guards. On 30 October 1997, the Taliban official in charge of the security area, reportedly a 17 year-old youth, came to the hospital. Upon seeing that two nurses were not wearing burqas but were only covered with scarves and long coats, he became very angry and dragged the two women to a nearby tree and began beating them with a branch. When one tried to run away, he forced her onto the ground and held her in between his feet while beating her with a stick. **(4)**

1. Though the Taliban in Afghanistan have taken the denial of human rights of women to new lows, laying down rule after rule denying women their basic human rights, all warring factions in Afghanistan are responsible for violations of women's human rights. The international community has yet to take concerted action to ensure the protection of women's rights in Afghanistan. If, as it is alleged, members of the international community have provided support to the warring factions, it then has a duty to ensure that women's rights are protected by those factions that receive foreign assistance.

Algeria

1. In March 1994, a faction called the Armed Islamic Group issued a statement classifying all unveiled women who appear in public as potential military targets. To punctuate this threat, gunmen on a motorbike shot and killed two unveiled high school female students who were standing at the bus station waiting to go home. **(5)**

2. The Algerian civil war is perhaps the most violent conflict in the world today. Although both men and women are targets, and both sides are guilty of human rights violations, the armed Islamic opposition reserve particularly harsh treatment for women who do not conform to their strict dictates, including unveiled women, professional women, and independent, single women living alone. They also engage in forced marriages and other forms of abduction of women living in areas under their control. As non-State actors during armed conflict, they are nonetheless governed by humanitarian law.

Bosnia and Herzegovina: the case of B.

1. "It began as soon as I arrived. During the day we stayed in a big sports hall. The guards were always there. If they caught us talking they would take a woman out, beat her and more than the usual number of men would rape her. They liked to punish us. They would ask women whether they had male

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relatives in the city. I saw them ask this of one woman, and they brought her 14 year-old son and forced him to rape her. Some of us were selected by name and some were just chosen. If a man could not rape (i.e. he was physically unable) he would use a bottle or a gun or he would urinate on me. Some of the local Serbs wore stockings on their heads to disguise their faces because they did not want to be recognized. [Nevertheless] I recognized many of them. They were colleagues - doctors with whom I worked. The first [man] who raped me was a Serbian doctor named Jodic. I had known Jodic for ten years." **(6)**

2. Despite the widespread nature of these abuses and the many indictments that have been filed, no one has yet been convicted of sexual assault by the International Tribunal on the Former Yugoslavia. The slow pace of the Tribunal has caused frustration within the international community.

Indonesia: the words of Dom Martinho, former Bishop of Dili, East Timor

1. "People came all the time to tell me in secret, to clear their conscience of the things they were forced to do or see. They come to tell it, women too, even young girls. One young girl was put in a tank of water with a Timorese man and soldiers forced them to have sex in front of the soldiers in the tank of water ... they seemed to have no moral sense, no humanity. One of their favourite customs was to rape wives in front of their husbands, right there, sometimes with the children there too." **(7)**

2. The Special Rapporteur has received a large number of submissions regarding sexual violence in East Timor by Indonesian security forces. Among the violations complained of are sexual violence, rape, forced marriage, forced prostitution and the intimidation of female relatives of suspected activists. Indonesian State authorities have not responded in accordance with their international obligations. No cases have thus far resulted in prosecution.

Guatemala

1. In 1996, Vilma C. Gonsalves, a trade union leader, received death threats and was abducted. She was raped and suffered other physical injuries perpetrated by men who were heavily armed. In February 1996, she received a letter saying "whore we give you 48 hours to leave the country". On the same day she was abducted. **(8)**

2. Although the Peace Agreement was signed on 29 December 1996 between the Government of Guatemala and the National Revolutionary Unit, isolated incidents of violence against women still persist.

Haiti

1. "The men entered the room where S., my husband's other child, and my cousin were sleeping. My cousin was seventeen and they tried to rape her but they realized that she had her period and left her alone ... . One of the armed civilians put a gun across my cousin's legs and molested her. He put his hands under her gown and felt her breasts and rubbed his hands over her stomach and her thighs. After this, the soldiers ransacked the house and stole their provisions. Two of the men were in uniform and one other, who was a local policeman, was dressed in civvies." **(9)**

2. Despite the return of the popularly elected leadership in 1994, very little has been done to break the impunity enjoyed by the armed forces in Haiti.

India: the case of Devki Rani (Punjab)

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1. "My legs were stretched apart and hands tied behind in the police post. The SI (Sub-Inspector) climbed on my thighs. I was tortured and molested by the ASI (Assistant Sub-Inspector), the Head Constable and two other men. My head was dipped in the water several times. My son Rajesh Kumar was compelled to disrobe me. I was kept in wrongful confinement for three days." **(10)**

2. After a petition was filed in the High Court by an international human rights organization, a trial has been initiated and is currently under way.

3. In the village of Kunan Poshpor, Kashmir, a large number of women have claimed to have been raped by soldiers of the Rajputana Rifles. Human rights activists claim that the case was not properly investigated. The Government called on the non-government press council to undertake an independent investigation and they called the charges "baseless". International NGOs in their fact-finding missions claim that the investigation was not properly conducted and that the authorities have been more concerned with shielding the government forces than investigating the charges of rape. **(11)**

4. Although India has a strong legal framework for prosecuting cases of rape by security forces, including provisions relating to custodial rape that provide victim-friendly evidentiary procedures, neither investigation nor prosecution by State authorities has been adequately pursued, thus suggesting a lack of political will to prevent, prosecute and punish such violations of women's human rights.

5. The counter-violence by armed opposition groups in Jammu and Kashmir is equally condemnable as being in violation of human rights standards. In particular, the Special Rapporteur calls attention to allegations of "forced marriages" by which unmarried women are abducted, raped by and then forced to become the brides of members of the armed opposition. Such violations constitute wartime sexual slavery as well as rape and torture.

Japan: the case of Chong, a former "comfort woman" during the Second World War

1. "One day in June, at the age of 13, I had to prepare lunch for my parents who were working in the field and so I went to the village well to fetch water. A Japanese soldier surprised me there and took me away ... . I was taken to the police station in a truck where I was raped by several policemen. When I shouted, they put socks in my mouth and continued to rape me. The head of the police station hit me on the left eye because I was crying. I lost eyesight in the left eye. After ten days or so I was taken to the Japanese army garrison ... . There were around 400 other Korean young girls with me and we had to serve over 5,000 Japanese soldiers as sex slaves every day. Each time I protested, they hit me or stuffed rags in my mouth. One held a matchstick to my private part until I obeyed him. My private parts were oozing with blood." **(12)**

2. The Government of Japan has made some welcome efforts at dealing with the problems of past violence to "comfort women". The Government of Japan and successive Japanese prime ministers have expressed remorse and have apologized to former "comfort women". A private fund called the Asian Women's Fund has been set up to assist individual victims with a grant of 2 million yen each. As of this writing, over 100 victims have applied to receive funds and about 50 would have actually received atonement money. The Fund also attempts to help elderly women in countries in which there exist former "comfort women", but where cultural restraints prevent women from coming forward. The Government has set aside 700 million yen from the national budget for medical and welfare projects of the Asian Women's Fund. It has also made a commitment to raise awareness and to include reference to these tragedies in textbooks so that such practices do not emerge in the future. However, the Government of Japan has not accepted legal responsibility. Perhaps it is waiting for decisions of the six court cases filed with Japanese courts.

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Liberia

1. A survey of 20 women and girls over the age of 15 years was conducted in Monrovia and its environs in 1994, nearly five years after civil conflict broke out in Liberia. **(13)** At the time the survey was conducted, the capital city had over 500,000 people living in it. The surveys were conducted by Liberian health workers in four types of setting: high schools, markets, displaced persons camps, and urban communities in Monrovia. Interviewees were randomly selected at these sites.

2. The survey was conducted to find out how common it was for women who were living in Monrovia to have experienced violence, rape, and sexual coercion from soldiers or fighters since the war began in 1989. Sexual coercion was defined as being forced into a relationship with a combatant because of war time conditions, e.g. in order to feed oneself or one's family, to get shelter or clothing, or for protection and safety.

3. Nearly half (49 per cent) of the 205 women and girls surveyed experienced at least one type of physical or sexual violence. Soldiers or fighters beat, tied up or detained (locked in a room and kept under armed guard) one in every six of the women and girls (17 per cent). They strip-searched nearly one third of the women and girls (32 per cent) one or more times. They raped, attempted to rape, or sexually coerced more than one in every seven (15 per cent). In addition, a large percentage of the women and girls (42 per cent) witnessed a soldier killing or raping someone else.

4. In the Liberian civil conflict, nearly half the women and girls in the survey were subjected to at least one act of physical or sexual violence by soldiers and fighters during the first five years of the war. Being accused of belonging to a particular ethnic group or fighting faction was a significant risk factor for physical violence and attempted rape. Women who were aged 20 or older when the war began were at risk of being tied up or strip-searched. Young women and women who were forced to cook for soldiers or fighters were particularly at risk of sexual violence.

5. In the beginning of the Liberian civil conflict, the government army and fighting factions were divided primarily along ethnic lines. It was common for civilians, when confronted by a soldier or fighter, to be forced to identify their ethnic group by speaking their ethnic language. In the survey, those women who were confronted by a soldier or fighter and accused of belonging to an enemy ethnic group or fighting faction were more likely to experience violence. The sample did not include significant numbers from the main ethnic groups involved in the early fighting. Although the data did not reveal whether women of those ethnic groups were at greater risk than other ethnic groups, it was clear that violence against women affected all of the 15 ethnic groups in the sample.

6. When fighters took control of a village, sometimes a fighter would force a woman from the village to cook for him. When women crossed checkpoints, sometimes a fighter would take a woman from the checkpoint and force her to cook for him. Women reported that being forced to cook for a soldier meant that she was subjected to his control in a variety of ways: more than half of the women who were forced to cook experienced sexual violence.

Mexico

1. Paula Galeana Balanzar, Alba E. Hurtado, and Rocio Mesino Mesino have been receiving death threats for their activities. In June 1995, State security forces killed 17 peasants in Aguas Blancas who were demonstrating for the release of a fellow villager. These women, village organizers, were witnesses. Since then they have been continually harassed. **(14)**

2. The southern Mexican States of Chiapas and Guerrero have been in a state internal armed conflict in

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recent times. Human rights groups have chronicled human rights violations, including violence against women.

China: Tibet

1. A 20-year-old nun who was serving a five-year sentence after having participated in a demonstration in 1992 was beaten along with other imprisoned nuns by prison guards after they sang nationalist songs. The prison medical staff then gave her medication which left her unconscious. Later, she was diagnosed with tuberculoma which caused her subsequent death. Even though the death occurred in custody, the Chinese authorities did not investigate her death. **(15)**

Peru: the case of Iris

1. "They forced me against my will to take off my clothes and then pushed my head down, and then every officer who passed stuck his hand inside my vagina, then they took one of my earrings and punctured my bottom with it, and then placed a barrel of a machine gun in my anus, then pulled me up, just like that, naked with my face blindfolded." **(16)**

2. Rape has been used by both sides to the conflict in Peru as an instrument of war. Women have been threatened, raped and murdered by government security forces and by the Shining Path guerrillas. There is little national redress for women victims of sexual violence and thus some cases have been filed before the Inter-American Court of Human Rights. A recent decision of the Inter-American Court found that Maria Elena Loayza had been arbitrarily detained, tortured and raped by Peru's security forces and so ordered her release. On 2 October 1997, the Peruvian Government released the university teacher, who had been imprisoned since 1993.

Rwanda: the case of Emma **(17)**

1. Emma, a Tutsi, was married to a Hutu after her father was killed in 1964 for being a spy. The marriage did not work and she returned home to live with her mother, bringing along her five children. During the genocide, her husband came and took away the children and she went off to the forest. The rest of the family stayed behind. The Interahamwe tried to force her mother to have sex with her son. When she refused, they broke all her teeth and killed her. Two sisters were raped and were asked to dig their own graves. They were both killed by machetes. Emma and another sister went to the commune in Tabaa hoping to receive protection from the State. She was proved very wrong. First the authorities separated the intellectual Tutsis from the rest and killed them. Emma and the others had to dig the graves. Then the raping began. She was raped by about 15 men on the premises of the commune. She could hardly move or keep her legs together. She fled into the forest with her sister. Again a group of Interahamwe found her and she and her sister were raped. Her sister was killed after being raped. The perpetrator who killed her sister lives free in Tabaa.

2. Emma fled toward Zaire but at the military barrier she was raped again - the soldier said he wanted to "taste a Tutsi" - and she was beaten on her genitalia. By that time she had puss coming out of her internal wounds and she was terribly ill. She disappeared into the forest again and wandered, eating grass and berries. Finally the Rwandan Patriotic Front came into her region and she was taken to the hospital. She and her aunt are the only survivors of the genocide from her family.

3. Despite the widespread occurrence of rape, the International Criminal Tribunal for Rwanda initially failed to include the charge of rape in indictments. Only in August 1997, after a concerted international effort by women's non-governmental organizations, did the prosecutor begin charging perpetrators with sexual violence. Nonetheless, only two perpetrators have been charged with rape. Only recently, at the

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national level, has the Government begun charging individuals with sexual violence during the genocide. According to the Genocide Act in Rwanda, sexual violence is a category-one crime which makes perpetrators eligible for the death penalty.

Sri Lanka

1. On 7 September 1996, Krishanthi Kumaraswamy was returning home in Kaithadi, Jaffna, after taking an examination when, according to witnesses, she was last seen at the Chemmuni checkpoint on the Kandy Jaffna Road. When she did not return, her mother, her brother and a neighbour went in search of her. They too disappeared. After a month of urgent appeals, the President intervened. Four bodies were finally exhumed and confirmed to be those of Krishanthi, her mother, brother and the neighbour. Allegedly, Krishanthi was gang-raped before she was murdered.

2. Eleven members of the security forces were arrested, two of whom were released after turning State's witness. In response to the national and international pressure, the case has been given priority and is currently being presented before a trial at bar, only the fourth trial at bar in the history of Sri Lanka. A trial at bar is heard by a panel of judges in the High Court, bypassing initial proceedings in the magistrate court. At the time of this writing, the prosecution was in the process of presenting its evidence. Though the Government was quick to act in this case, other rape cases have not received the same attention. The case of Koneswary Murugesupillai is a case in point. Ms. Murugesupillai, a mother of four from Central Camp village, was allegedly gang-raped and then murdered when a grenade was exploded on her abdomen by Sri Lankan police in May 1997. As of this writing, there has been no response by the Government. **(18)**

1. Abuses by the opposition group, the Liberation Tigers of Tamil Eelam, have been likewise documented. Specifically, women civilians have been among those who have been murdered and mutilated in attacks on Sinhala border villages in the east of the country and in bombings of crowded areas in the north-east and in Colombo.

United States of America: the case of Yoon Keum E.

1. Kenneth Markle, a private in the United States Army stationed in the Republic of Korea, battered Yoon Keum E. to death with a coke bottle and then stuffed it into her vagina, and shoved an umbrella into her anus. In order to eliminate evidence of her murder, he spread soap powder over her body. Lastly he stuffed matches into her mouth. **(19)**

2. The Korean Supreme Court sentenced Private Markle to 15 years' imprisonment. Abuses committed by foreign military personnel, including United Nations peacekeeping forces, have raised some important issues. Questions arise as to which courts should try them and whether humanitarian law applies. There is a need for the international community to deal with this issue in a more systematic manner, especially if there continues to be a need for international peacekeepers.[**back to the contents**]

B. The legal framework

1. Since classical times there have been codes of war aimed at disciplining soldiers for illegal conduct in the field. Traditionally, rape did not constitute such conduct since women were, and in many cultural contexts still are, considered to be the property of their husbands and rape was viewed as a crime of honour. By the late Middle Ages, however, notions of non-combatant immunity and the classification of rape in wartime as illegal had begun.

2. Today, the framework for the protection of women from sexual violence during armed conflict is

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based on international humanitarian law, which includes treaty law, customary international law, and the practice of international war crime tribunals. The first conventions of modern times to regulate warfare were the Hague Conventions of 1907. Article 46 of the Regulations Respecting the Laws and Customs of War on Land Annexed to Hague Convention No. IV of 1907 states that "family honour and rights ... must be respected" by warring parties. According to judicial interpretation, the Hague Convention had become part of customary international law by 1907 and warring parties after that time were bound by the spirit of the Convention. **(20)**

3. Today, the 1949 Geneva Conventions, however, constitute the primary framework governing international humanitarian law. According to article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault".

4. Although the Geneva Conventions primarily relate to international armed conflict, article 3 common to all the Conventions protects the rights of individuals in internal conflicts. According to common Article 3,"the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

"(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

"(b) taking of hostages;

"(c) outrages upon personal dignity, in particular humiliating and degrading treatment.

1. The International Court of Justice, in Nicaragua v. USA, **(21)** held that common article 3 is an accepted part of customary international law in addition to being a treaty provision and thus binds all parties to a conflict, whether State or non-State actors, irrespective of whether they are a party to the Geneva Conventions.

2. Grave breaches of the Fourth Geneva Convention are enumerated in article 147. Anyone who commits a grave breach is subject to individual criminal liability and universal jurisdiction, by which any one of the High Contracting Parties can prosecute the crime. According to article 147, grave breaches include:

"wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

1. Although neither common article 3 nor grave breaches enumerated in article 147 include sexual violence per se, recent indictments before the International Criminal Tribunal for the Former Yugoslavia (ICTY) have defined sexual violence as torture, inhuman punishment, great suffering or serious injury. In addition, the International Committee of the Red Cross, in its aide-mémoire 3 of December 1992, declared that the article 147 provisions on grave breaches included rape. This expansive interpretation has allowed for the prosecution of individuals for sexual violence as a grave breach of international humanitarian law also under common article 3.

2. In 1977, two additional protocols were added to the Geneva Conventions. In the second Protocol

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Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault" are proscribed. The first Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) has a similar provision.

3. In addition to the Geneva Conventions, other areas of human rights law prohibit violence against women, including sexual violence. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines "torture", in its article 1, as:

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him [or her] or a third person information or a confession, punishing him [or her] for an act he [or she] or a third person is suspected of having committed, or intimidating or coercing him [or her] or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

1. Although rape has not always been clearly defined as torture, increasingly it is being recognized as such. As early as 1992, the Special Rapporteur on torture clearly defined rape as a form of torture. The prosecutors at both the ICTY in The Hague and the International Criminal Tribunal on Rwanda (ICTR) in Arusha have indicted individuals for rape as a form of torture. Furthermore, a recent decision by the European Court of Human Rights in the case of Aydin v. Turkey of 25 September 1997 found that the:

"[r]ape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victims which do not respond to the passage of time as quickly as other forms of physical and mental violence ... the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the Convention".

1. In addition to the Torture Convention, the Convention on the Prevention and Punishment of the Crime of Genocide, the Slavery Convention, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women are other human rights instruments which have a bearing on the concept of sexual violence during times of armed conflict.[**back to the contents**]

C. Application of the framework

1. Unlike many other areas of international law, international humanitarian law has been interpreted by international tribunals specifically established to address the question of criminal acts during armed conflict. The International Military Tribunal at Nürnberg (Nürnberg Tribunal), the International Tribunal for the Far East (Tokyo Tribunal), the International Criminal Tribunal for Rwanda at Arusha and the International Criminal Tribunal for the Former Yugoslavia at The Hague are four international tribunals that have been set up to deal with the issue of individual criminal liability for cases of war crimes, grave breaches and crimes against humanity. The Nürnberg Tribunal was the first to be established. The offences were divided into "crimes against peace", "war crimes" and "crimes against humanity". Rape was not included in any of the descriptions and no one at Nürnberg was tried for sexual violence.

2. The term "crimes against humanity" was developed at the Nürnberg Tribunal to provide a mechanism by which to try political leaders of the Axis countries whose policies had promoted or led to the

perpetration of war crimes. And yet, the section which was utilized for prosecutions was the section on war crimes, which finds its parallel in the grave breaches section of the subsequent Fourth Geneva Convention. Crimes against humanity were an important addition to the list of international delicts, particularly since they may be committed during times of peace, as well as times of war. The victims must be civilians, but the perpetrators may also be civilians. The crimes, however, must be widespread and systematic, coupled with persecution on political, racial or religious grounds. Thus far, gender has not been included as an independent basis of persecution. However, crimes against humanity could be interpreted in light of developing norms of refugee law, in which gender is increasingly being recognized as a distinct basis of persecution.

3. Although the Nürnberg Statute did not include rape as a crime, the occupying powers in Germany listed rape as a crime against humanity under Control Council Rule No. 10. However, no one was prosecuted under this provision. At the Tokyo Tribunal the situation was somewhat different. The "Rape of Nanking" illustrated that rape was a violation of the recognized customs and conventions of war. The Japanese commanders Hiroto and Toyoda were indicted and convicted on such grounds.

4. Fifty years later, the United Nations Security Council established two ad hoc international tribunals for the prosecution of war crimes committed in the territories of the former Yugoslavia and in Rwanda. For the first time in history, rape during wartime has been explicitly included as a crime against humanity. Unfortunately, despite the widespread nature of these crimes, rape was not included in the relevant sections on war crimes or grave breaches in the respective statutes. Nonetheless, the Office of the Prosecutor (OTP) has charged specific defendants with sexual violence as a war crime, a crime against humanity, genocide, enslavement, a grave breach and enforced prostitution. The creativity demonstrated by the OTP in its promotion of social justice must be commended(22). However, in recent times there appears to be less interest in charging defendants with sexual violence. Additionally, the Tribunals have yet to set forth their decisions on these issues.

5. The OTP has brought rape charges in 6 of the 20 public indictments of the ICTY and in 2 of the ICTR public indictments. Other types of sexual violence, including assault and mutilation, have also been charged by both the ICTY and the ICTR. This is the first time in history that such specific charges of sexual violence have been brought before international tribunals. Notably, each defendant has generally been charged with more than one count.

6. The OTP has charged defendants with rape as a war crime under common article 3 even though rape is not explicitly mentioned therein. Instead, "torture" has been interpreted to include rape, especially in cases of multiple or repetitive instances of rape causing serious bodily harm or suffering. Under common article 3, rape has also been charged in isolated instances of rape and other instances of sexual assault and sexual mutilation as "cruel treatment", an "outrage upon human dignity" and "humiliating and degrading treatment".

7. Besides charging defendants under common article 3, the Office of the Prosecutor has also charged defendants with grave breaches of the Geneva Conventions. Again, defendants who have committed sexual violence have been charged with "torture", in cases of multiple and repetitive instances of rape causing serious bodily harm or suffering. In cases of isolated instances of rape and other forms of sexual assault they have been charged with "wilfully causing great suffering or serious injury to body or health". In situations where there is no serious physical injury, they have been charged with "inhuman treatment".

8. In addition to common article 3 and the section on grave breaches, the OTP has also charged rape as a crime against humanity, both as a specifically proscribed act and as "torture" and "enslavement". The introduction of sexual violence as enslavement constitutes an important contribution to international law

by the OTP. The Foca indictment included a charge of enslavement, a crime against humanity, for a situation in which women were detained against their will and forced for several months to provide sexual and household services for persons. The OTP argued that this constituted a slavery-like practice encompassed within the term "enslavement".

9. The OTP has also charged rape as a genocidal act in indictments at both the ICTY and the ICTR. The charge of genocide has been used against superior authorities in the chain of command. This is a welcome innovation of the OTP. They appear to have received support from the Trial Chamber when it suggested in the Foca indictment that forced pregnancy may be evidence of "genocidal intent" even though this is not specifically spelled out in the Genocide Convention. There is a clear link between sexual violence, forced impregnation and genocide. The OTP must be congratulated for recognizing this and pushing the bounds of international law.

10. In addition to innovative charging, the Office of the Prosecutor is assisted by victim-friendly statutes and rules of procedure. The centrepiece in terms of women's rights is rule 96 of the rules of procedure and evidence (IT/32/Rev.3/Corr.1 of 6 February 1995) of the ICTY and a similar rule in the ICTR which sets forth evidentiary procedure for cases of sexual assault. According to rule 96 on sexual assault:

"In cases of sexual assault:

"(i) No corroboration of the victim's testimony shall be required.

"(ii) Consent shall not be allowed as a defence if the victim:

(a) Has been subjected to or threatened with or has reason to

fear violence, duress, detention or psychological oppression; or

(b) Reasonably believes that if the victim did not submit, another might be so subjected, threatened or put in fear.

"(iii) Before evidence of the victim's consent is admitted the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible.

"(iv) Prior sexual conduct of the victim shall not be admitted in evidence."

1. Rules 69 and 75 of the rules of procedure and evidence, which provide for the protection of both victims and witnesses, are also extremely important for the prosecution of sexual assault cases. Witness protection appears to be a central problem facing the Tribunals in cases of sexual assault. Victims and witnesses do not come forward to testify because they are frightened by the threat of reprisals. The lack of witness protection in Rwanda is a key reason why women are not coming forward to make formal complaints.

2. Victim protection programmes must include a mechanism for ensuring the protection of testifying witnesses. One way to accomplish this is through the provision for witness incognito, which has been used in certain contexts such as prosecutions for organized crime. Witness incognito would be particularly useful in situations where the perpetrators have not been arrested.

3. In an amicus curiae brief addressed to the ICTY, it is argued that the ICTY "should give every attention, on the merits of each individual case, to preserving the anonymity of witnesses for as long as possible throughout the criminal process". **(23)** The argument against schemes for witness incognito in

trial proceedings is that it denies the defendant the right to face and cross-examine his accusers. Additionally, in some national contexts, witness incognito has been used as a tool of State oppression against human rights activists.

4. In other contexts, however, the interests of fairness and the administration of justice may require certain innovative procedures. There are two types of witness protection programmes. The first is the non-disclosure of the identity of the victim to the public, which is being used in the case against Akayesu before the ICTR. In that context, the Tribunal appears willing to prohibit disclosure and, in some cases, allow for closed-circuit television so that the victim need not see the accused. The second form of witness protection requires an absolute prohibition on the identification of the witness to the accused. Given the reality of the wars in the former Yugoslavia and Rwanda, such a measure could serve as an incentive for victims to come forward.

5. Despite the innovations undertaken by the Office of the Prosecutor, developments have not always gone far enough. On two occasions, amicus curiae of legal academics have been the only method to force the OTP to take note of sexual violence. In Rwanda, there were no indictments for sexual violence until an amicus curiae from legal academics and practitioners pointed out the extent of available evidence to support the charge. To the credit of the Prosecutor's Office, it amended the indictments in August 1997 to include indictments on rape and sexual assault. In the face of the large number of sexual violence cases during the genocide, the Special Rapporteur urges the ICTR to take a more pro-active stance on the issue of sexual violence.

6. The indictments are a first step in the process of fighting impunity. Ultimately, however, the Trial Chambers determine whether these charges will stand. However, dicta from the three-member Trial Chambers at the ICTY indicate that the courts are responsive to prosecuting sexual violence. Such dicta include statements extending rape charges to include non-custodial situations; affirming that sexual violence may be an element of genocide and that forced impregnation may be evidence of genocidal intent; reaffirming the inadequacy of the chain of command and the responsibility of officers and political leaders for the conduct of their men; and defining rape as a form of torture.

7. The process of drafting the statute for the proposed International Criminal Court (ICC) is paralleling the processes in The Hague and Arusha. Thus far, however, the legal innovations of the two Tribunals specifically regarding violence against women have not adequately informed the drafting process. Much of the gender-specific language remains bracketed and, thus, contentious. The Special Rapporteur is particularly concerned with the definitions of crimes. It is imperative that the statute goes beyond merely replicating the outdated provisions of the Geneva Conventions and explicitly includes sexual violence, forced prostitution, forced impregnation and rape in the sections defining war crimes, genocide and crimes against humanity. In addition, the rules of procedure must be designed to be victim-friendly. Rules of procedure, such as rule 96 of the ICTY rules of procedure and evidence, should be incorporated as part of the evidentiary procedures of the ICC.

8. The creation of a gender-sensitive International Criminal Court would be a welcome and timely development in international human rights and humanitarian law. By providing an enforcement mechanism for human rights and humanitarian law, the ICC has the potential to serve as an important tool for combating impunity by affording redress to victims and their families and countering the failures of national systems, which are often most acute in times of armed conflict. It also has the potential to remedy the inequities inherent in a system of ad hoc tribunals, such as the ICTY and the ICTR, as well as serve as a model criminal court for criminal courts within national jurisdictions. However, if it fails to explicitly incorporate developing standards relating to sexual violence against women, it could in fact serve as a legal setback.

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9. The Special Rapporteur is also concerned that the trigger mechanisms for the initiation of prosecutions must be non-political. Reliance on the Security Council and its determination that prosecution would not interfere with international peace and security would politicize the criminal court and make it selective and biased in its application. The implicit notion that impunity for core crimes is "negotiable" is unacceptable.

10. Victims as well as non-governmental organizations working in the field should be given the opportunity to trigger investigations along with an independent and powerful prosecutor's office. The independence of the prosecutor is absolutely essential if the ICC is to develop into an effective international mechanism. In order for it to adequately address violence against women, the prosecutor's office must have a legal adviser or department on gender crimes, as does the ICTY. A person trained to work with victims of violence against women is essential for the prosecution of sexual violence. The ICC statute must also contain measures for witness protection and witness incognito, so long as they are compatible with the rights of the defendant.

11. Finally, the ICC should provide a mechanism of accountability for non-State actors. In the case of paramilitaries and other non-State actors close to the State, the Velásquez decision of the Inter-American Court of Human Rights provided an unequivocal way in which to hold States accountable by requiring them to maintain due diligence standards in preventing, prosecuting and punishing human rights violations. As for non-State actors waging war on the State, it must be clear that they are bound by international humanitarian law and the principles of individual culpability and universal jurisdiction.
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D. Economic and social consequences

1. Armed conflict poses enormous economic and social consequences for women. Women experience armed conflict as direct victims, as refugees and as widows whose husbands have been killed by the conflict. They suddenly emerge as the primary breadwinners and, as in Rwanda, the number of female-headed households dramatically increases. Without the necessary skills to become breadwinners they become further disempowered.

2. The general militarization of society has further consequences for women. As far back as the Second World War, social commentators have been arguing that the militarization of society leads to a culture of violence and that everyday life is imbued with such violence. The use of violence to resolve conflict at the national level leads to the acceptance of violence as a means of resolving conflict in the family and in the community. Both in times of war and times of relative peace, women are often seen as the legitimate victims of this culture of violence.

3. The economic consequences of violence in times of armed conflict are extensive, resulting in the denial of basic amenities to the general population, of which women and their children constitute the majority. Areas affected by armed conflict often do not have electricity, water or appropriate housing or medical services. Food supply to these areas is also affected. Women, many of whom are heads of household, are confronted by the challenge of maintaining their families. In addition, the brain drain resulting from situations of armed conflict leaves a dearth of, inter alia, qualified medical, psychological and legal professionals.

4. The international community, which often plays a role in the conflict through the provision of arms, financial support to one of the warring parties and political sanctioning of the conflict, must likewise play a role in reconstruction after the conflict has ended. An aspect of economic reconstruction must be the economic empowerment of women, especially of war widows and women heads of household. Training programmes for the development of skills and special courses for women is an important part

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of normalizing life processes in war-torn societies.

5. Economic consequences are not the only factors that emerge. High levels of trauma and trauma-related illness are experienced by populations living in conflict situations. Thus, the process of reconstruction and reconciliation must take into account the problem of psychological healing and trauma. Counsellors trained to work with victim-survivors of violence against women must be available to assist women navigating their way through State structures and taking control of their lives. Victim-survivors of sexual violence are in special need of advocacy, counselling and support. Centres that employ a victim-centred methodology should be established as an aspect of the reconstruction and rehabilitation process.[back to the contents]

E. Armed conflict: recommendations

International

1. Existing humanitarian legal standards should be evaluated and practices revised to incorporate developing norms on violence against women during armed conflict. The Torture and Genocide Conventions and the Geneva Conventions, in particular, should be re-examined and utilized in this light.

2. Since peacekeeping has become an important part of the activities of the United Nations, peacekeepers should be given necessary training in gender issues before they are sent to troubled areas. Offences committed by peacekeepers should also be considered international crimes and they should be tried accordingly.

3. Reconstruction and rehabilitation are important components of rebuilding post-conflict societies. The international community should have a special fund and project that has as its primary focus the provision of comprehensive services to post-conflict societies, from economic reconstruction to psychological counselling and social rehabilitation. Such a programme should also include training in human rights and democratic governance.

4. The international legal responsibility of non-State actors should be clarified under international human rights and humanitarian law so that violations by non-State actors do not meet with impunity.

The International Criminal Court

1. The statute of the International Criminal Court should explicitly incorporate provisions on violence against women, both substantively and procedurally.

2. In order for the ICC to be effective in ensuring justice for female victims of war crimes, a gender perspective must be integrated into all areas of the ICC statute. Among the aspects that should be included are:

(a) A gender perspective in the definition of genocide that includes rape and other acts of sexual violence such as forced impregnation, forced sterilization and sexual mutilation;

(b) Unequivocal language condemning rape, enforced prostitution and other forms of sexual violence as grave breaches and serious violations of the laws and customs of war;

(c) Unequivocal language condemning rape, enforced prostitution and forced impregnation, as well as other forms of sexual violence, as crimes against humanity;

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(d) Legal remedies for victims, including an individual right to compensation, rehabilitation and access to social services;

(e) Non-political trigger mechanisms;

(f) An independent prosecutor's office with a strong gender division;

(g) Victim-friendly rules of evidence for prosecuting cases of sexual violence based on those currently operative for the ICTY and the ICTR.

National

1. States should make every effort to end impunity for criminal acts under international humanitarian law that occur within their borders and by their security forces. This should include:

(a) Acting with due diligence to prevent, punish and prosecute perpetrators of such crimes, including crimes of sexual violence;

(b) Providing redress for victims, including compensation for injuries and costs, within national mechanisms;

(c) Providing economic, social and psychological assistance to victim-survivors of sexual violence during times of armed conflict.

1. All States should ratify the relevant international instruments of human rights and humanitarian law including the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination.

2. Every State should cooperate with international agencies to apprehend those who have been indicted by international tribunals dealing with war crimes.

3. Every State should amend its penal law, codes of military conduct and other specialized procedures to ensure that they conform with international human rights and humanitarian law.

4. Every State should ensure that their evidentiary procedure does not discriminate against women and that it provides protective mechanisms for victims and witnesses in cases of sexual assault. Rule 96 of the ICTY rules of procedure and evidence should be used as a model.

5. Every State should ensure that all military and law enforcement personnel undergo systematic gender sensitization training. Such training should provide information on how to:

(a) Identify sexual assault as a serious crime under international law;

(b) Outline gender-sensitive procedures in terms of investigation and prosecution and provide an obligatory gender-sensitive methodology; and

(c) Address underlying attitudes of members of the forces which may lead to gender-insensitive action

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when operating in the field.

1. In addition to gender training for military and law enforcement authorities, other elements of the criminal justice system should also receive training. The prosecution, the judiciary and forensic experts should be given training courses on how to address problems of sexual violence.
2. Every State should adopt the United Nations Code of Conduct for Law Enforcement Officials and update their military codes in order to address sexual violence effectively.

Non-State actors

1. All non-State actors should act within the bounds of international humanitarian and human rights law, recognizing that they are liable for individual crimes against international humanitarian law and that, under universal jurisdiction, they may be prosecuted for such crimes in any court of law.

Non-governmental organizations

1. Non-governmental organizations should make every effort to work with Governments to prevent, punish and prosecute violations of international human rights and humanitarian law.

2. Non-governmental organizations should work towards increasing awareness of the actual situation of women during times of armed conflict through education and training. They should continue to monitor armed conflict situations and expose cases of violence against women both nationally and internationally, utilizing the many international and regional human rights bodies and complaint mechanisms.

3. Non-governmental organizations should provide support services for women victims of armed conflict including economic empowerment and social, psychological and support programmes. They should also be made aware of their legal rights. Non-governmental organizations should assist these women to come forward as victims so that they may end the cycle of impunity.

4. Non-governmental organizations working in the mainstream of human rights should work towards ensuring that all their work incorporates a gender perspective.

5. Gender-sensitive documentation methodologies should be further refined to protect against retraumatizing or placing at risk victim-survivors of violence against women during the fact-finding process. [**back to the contents**]

II. CUSTODIAL VIOLENCE AGAINST WOMEN

1. Custodial violence against women is a particularly egregious violation of a woman's human rights. The State, when it assumes responsibility for an individual, whether such responsibility is undertaken for punitive or rehabilitative reasons, has heightened responsibility for the individual within its custody.

2. The de facto and de jure parameters of custody vary. Internationally, custody has not been clearly defined. Most often used in terms of national criminal justice regimes, custody may also be used broadly to describe the many situations in which the State serves as the physical keeper of an individual, such as in situations of compulsory psychiatric institutionalization or State schooling. Generally, in terms of criminal custody, the term "custody" encompasses both police custody and penal custody, each of which serve as the site for violence against women perpetrated and/or condoned by the State. While the Special Rapporteur notes that violence against women by the State occurs in situations of State psychiatric custody, medical custody, educational custody, and police or penal custody, this chapter will look solely

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at the last form of custody, that which occurs at the hands of the police or military for criminal justice or pseudo-criminal justice purposes.

3. Women are targeted by the State in their numerous and varied public and private roles. Increasingly, women are targeted by the State for their public activism. Women human rights advocates and activists are arbitrarily detained or arrested, tortured, arbitrarily murdered, "disappeared", and ill-treated at the hands of State actors. Anti-terrorism acts and emergency regulations providing nationwide, easy-to-abuse powers of detention, arrest, investigation and interrogation are often the tools through which silencing occurs. [**back to the contents**]

A. Police custody

1. Forms of police custody include arrest, detention, preventive detention, pre-trial detention and/or court lock-up. Although confinement by the State is an aspect of all of the above-listed manifestations of police custody, each form is slightly different.

2. The understanding of what constitutes an arrest does not differ significantly from State to State: it is a formal procedure undertaken by the State, whereby the State assumes physical control of a person through physical confinement with legal notice. The term "detention", however, has numerous meanings. Generally, it is used to describe the holding of an individual by the police at their station or at a court lock-up without formal charges having been made. Detention is often used during the investigative stage of a case, for the purpose of interviewing or interrogating suspects, and, in some cases, for the individual's safety.

3. While the United Nations Body of Principles for the Protection of All Persons under Any Form or Detention or Imprisonment does not use the term custody, it sets forth the following associated definitions:

(a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;

(c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;

(d) "Detention" means the condition of detained persons as defined above;

(e) "Imprisonment" means the condition of imprisoned persons as defined above.

1. Preventive detention is frequently used in Bangladesh, India and Sri Lanka. Preventive detention finds justification on two grounds. First, in laws such as Sri Lanka's Prevention of Terrorism Act, custody can be used as a mechanism of "protection" for the general public, in order to try to prevent a crime that the police have grounds to believe is being planned or is likely to occur. Often such laws allow for at least temporary clandestine detentions. It is within the context of incommunicado detentions that the majority of blatant State violations of human rights occur. Incommunicado detentions create a situation of immense power for the State or non-State actor who acts as the jailor with little oversight or accountability to balance such power.

2. Second, laws that provide for "safe custody" are used as a mechanism of "protection" for children and

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women who are victims of certain crimes or circumstances that leave them with no alternative place to go. Victims are thus kept in prison. In Bangladesh, those found in safe custody are usually: (a) girls marrying outside their religious community or against their parents will; (b) rape victims; (c) women and girl children rescued from brothels; (d) destitute women forcibly evicted from their homes due to domestic violence; (e) victims of trafficking; and (f) lost and mentally handicapped children.

3. To imprison such women is manifestly unjust. Not only does it constitute a violation of their human rights by discriminating on the basis of gender, but also it places women and children at great risk of custodial violence. Numerous cases have been recorded in which women in "safe custody" have been abused and, in some cases, killed.

4. Pre-trial detention most often is in court lock-ups in which pre-trial prisoners wait for their cases to be called that day. In Pakistan, such facilities tend to be used more readily to detain women, and thus State facilities often house more women than men. Many of these women are held illegally for days and nights on end despite the fact that they have not been arrested and thus are not awaiting trial.

5. Penal custody refers to post-conviction confinement in a prison, penitentiary or jail. At this stage of State custody, the responsibility for the prisoner shifts from the policing authorities to the correctional authorities. The vulnerability of women increases during long-term penal custody in which they are under the sole control of prison authorities. In most countries, prison officials are predominantly male, thus creating a situation ripe for sexual abuse, harassment and coercion. Additionally, the world's prison population remains overwhelmingly male. In many cases women are housed in the same facilities as male prisoners. Generally, however, they are segregated from male prisoners. [**back to the contents**]

B. Other forms of custody

1. In many cases, the fact of custody may be obscured: handcuffs may not be used, rights may not be read and jail bars may not be apparent. When police or military personnel enter homes to search, question, intimidate and/or harass, there is at the very least an unspoken presumption, if not an overt order, that those within the home cannot leave, thereby placing them in de facto, albeit in many cases unofficial, custody of the State.

2. Due to the breakdown in the rule of law, such tactics are particularly widespread in times of armed conflict and violent civil unrest, in which both State actors and non-State actors to the conflict or unrest target individuals in their homes. Numerous human rights violations that occur within custodial settings, such as disappearances, extrajudicial executions and torture, including rape, are perpetrated in such circumstances of "constructive custody". Women, the traditional denizens of the private sphere, are particularly vulnerable to such abuse.

3. Custody often extends beyond the four walls of the prison or court lock-up through psychological confinement. Victim-survivors of violence against women in custody report that, even after they were released from overt "custody", the fear that was instilled during their time in custody in many cases carried over into their private lives. Torture, including rape, is utilized by States specifically for such purposes, to inflict pain and suffering upon and to instil fear in an individual both immediately and in the future. Although the actual physical and/or sexual torture may end once an individual is released, owing to the trauma inflicted the suffering continues long after, manifesting itself as flashbacks, physical memories and generalized fear. Psychological custody must be recognized as a distinct form of custody, for which the State maintains the responsibility for remedy and redress. [**back to the contents**]

C. Forms of custodial violence against women

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1. In many cases, custodial violence is non-sex specific. Women, like men, are subjected to enforced disappearances, torture and cruel or inhuman treatment, and arbitrary executions. However, even if apparently gender-neutral forms of custodial violence are utilized with gender in mind, if authorities select their techniques based on their perceptions of female versus male frailty, strength or endurance, they are generally not understood as such. Thus, discussion of gender-specific forms of custodial violence revolve largely around custodial rape and other forms of sexual violence against women.

2. The most particularized element in custodial violence against women is the sexualization of torture. Although the sexual anatomy of men as well as women is targeted in the physical stages of torture, rape and the threat of rape, as well as other forms of sexual violence such as sexual harassment, forced impregnation, virginity testing, forced abortion, forced prostitution and forced miscarriage, are perpetrated more consistently against women detainees.

3. Rape has been used as a form of torture not only directly against the rape victims, but also against male family members who are forced to witness the rape of the wives, sisters, partners, daughters or mothers. The act of being forced to watch the rape of another has been recognized as a distinct psychological form of torture. Surprisingly, however, in such scenarios, the rape itself often has not qualified as torture. Rather, like the electric shock, the shackles, or the police baton, the rape of women has been viewed as a weapon of the torturer. Thus, the attack on the woman's body is perpetrated as an attack on the male and, in many cases, is perceived as such, except by the woman herself.[**back to the contents**]

D. Cases of custodial violence against women

Albania

1. In May 1994, police forcibly entered a factory in Tirana to enforce an order of the Mayor of Tirana calling for part of the property to be handed over to the Women's Democratic Front. Six women were among those at the factory. Despite their requests to have the police wait for the director of the factory to arrive, the police subjected the women to ill-treatment. Armanda Bogdani, who was pregnant at the time, had her hair pulled out by the police. The police also punched Violeta Gjoka and Tatjana Karamani for having attempted to settle the problem. Zeqine Dervishi, the vice-president of the opposition party, was taken into custody. She was punched, kicked, insulted, sworn at, and, when she refused to enter the cell, beaten repeatedly and called a whore. **(24)**

Bahrain

1. On 29 February 1996, eight women (Muna Habib al-Sharrakhi, Zahra Salman Hilal, Iman Salman Hilal, Na'ima 'Abbas, Huda Salih al-Jallawi, Mariam Ahmad al Mu'min, Zahra 'Abdali, and Nazi Karimi) were allegedly arrested and were being held in incommunicado detention at increased risk of being tortured. It is believed that their arrests may have been connected to public demands by the women, for the release of political prisoners, two of whom were the husbands of two of the detained women. **(25)**

Bangladesh

1. Shima Chowdhury, a 16-year-old garment factory worker, was walking with her boyfriend near the town of Chittagong. Police personnel arrested both on the grounds that a woman may not walk with a man to whom she is not married, despite the fact that there is no basis under Bangladesh law for such an arrest. They were taken to a nearby police camp. She was afterwards transferred to another police station, where she was forced to drink a glass of what she thought was muddy water. She became dizzy

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and, in that state, the policemen raped her, after which she gradually lost consciousness. The next morning, Shima was taken to the emergency ward of the Chittagong Medical College Hospital. A medical inquiry board was set up after Shima disclosed that she had been raped. In October 1996, when the case went to court, the court, on a plea from the police, sent her to "safe custody" at the Chittagong Jail, an exceptional, unwarranted order. Shima remained in detention without access to a lawyer or visits by her friends or family. She developed severe health problems. Shima died in February 1997, allegedly from typhoid fever. **(26)**

2. The four policemen accused of raping Shima were acquitted by a trial court on 14 July 1997. The judge reportedly deplored the actions of government lawyers who, in presenting such a weak case, effectively allowed the police to get away with custodial rape.

Chad

1. Belkoum Odette, who was accused of stealing bracelets, was arrested on 15 September 1996 and held for over 10 days at the Béboto gendarmerie headquarters. When the armed forces searched her house and found nothing, she was tied with her arms behind her back and whipped. The deputy commandant hit her and authorized others to do so as well. He burned her nipples. Her 15-year-old daughter was tied up and raped by the security forces as Belkoum Odette lay there dying. The main perpetrator of the murder and rape was arrested but escaped from prison with inside help. He is reported to be working at the Presidential Palace. **(27)**

Colombia

1. Margarita and Lina Mariá Arregocés are teachers and founders of the Sabana School in Planadas de Mosquera. They were arrested in November 1995 on charges of "conspiring to commit a crime" and belonging to the Colombian Armed Revolutionary Forces. On 28 February 1996, Reinaldo Villaba, a human rights lawyer, received an invitation from the paramilitary group Colombia sin Guerilla to Margarita's funeral. This death threat was sent just before the appeals court ordered the release of the two sisters. There have been numerous other instances of acquitted political prisoners being targeted by security or paramilitary force. **(28)**

Kenya

1. Josephine Nyawira Ngengi, a human rights activist and the sister of a well-known government critic, has been arrested three times and tortured while in detention. She was beaten and blunt objects were forced into her vagina until she bled. According to Ngengi, "at one point, one officer got so incensed that he took a wooden plank and hit me hard on the head. I was then ordered to wipe the blood from the resulting wound with my tongue, which I did." **(29)**

Pakistan

1. Murder, zina (sexual intercourse between partners not married to each other), blasphemy, rape and hijacking are some of the offences that receive the death penalty under the Hudood Ordinance. The death penalty in Pakistan is applied in a discriminatory fashion since the testimony of women, whether they are the accused or the victim, is not heard. Women have been sentenced to being stoned to death for zina without the testimony of the woman ever being heard. A pregnant woman may be sentenced to death without the assurance that the execution will be delayed until after the birth. **(30)**

Tunisia

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1. Tourkia Hamadi is one of many women who have been imprisoned for their alleged support of "unauthorized political opposition parties". She was arrested in 1995 for her alleged support of al-Nahda, the illegal Islamist party, and had helped her husband seek political asylum in France. Since her husband's departure in 1992, Hamadi has been repeatedly taken into custody and interrogated. Numerous women have been forced to endure repeated interrogation, torture, threats of prosecution, harassment and intimidation. Other women have been arrested solely on the basis of their alleged "association" with supporters or leaders of the Islamist movement. In addition, wives of exiled Islamist members cannot leave Tunisia to be with their husbands because their passports have been confiscated. **(31)**

Turkey

1. After being forcibly taken from her home and then detained by security forces in Ankara for 15 days, Sevil Dalkiliç, a 33-year-old woman lawyer, was tortured severely and coerced into signing a statement implicating herself in several bombings. Subsequently, after an allegedly unfair trial, she was sentenced to 30 years' imprisonment for illegal membership in the Kurdish Workers' Party (PKK), throwing explosives and separatism. In addition to being verbally abused and threatened with death, Dalkiliç was sexually assaulted repeatedly and threatened with rape. Allegedly, in the process of her torture, her jaw was dislocated, she was subjected to electric shock, hosed with pressurized cold water, forced to watch other detainees being stripped and beaten, and denied sleep, food and access to toilet facilities. Her arrest and subsequent torture occurred after she accepted and then investigated a case involving the suspicious death of a person of Kurdish background in which State involvement had been alleged. **(32)**
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E. National measures to prevent custodial violence

1. The Special Rapporteur would like to draw attention to reports compiled by the Commission on the Status of Women relating to "physical violence against detained women that is specific to their sex", from which much of her information has been drawn.

2. Most, if not all, countries have explicit legal prohibitions on custodial violence, including torture, rape, force, coercion, threats and any form of physical violence or abuse of an individual in the custody of the State. Such prohibitions are contained in penal codes, constitutions, ministerial decrees and other specialized legislation.

3. Many countries, including Cameroon, Cuba, Egypt and Switzerland, penalize, under either the penal law or administrative functions, sexual intercourse between a man and a woman involving the abuse of the man's professional authority. In Cuba, special sanctions are applied to anyone who, while wearing a military uniform or appearing as a public official, violates the physical integrity of a detained woman by sexual abuse or harassment. In the United States of America, sexual abuse of one inmate by another constitutes a federal criminal violation of civil rights if it can be proved that the inmate's actions were taken with approval or encouragement of a law enforcement officer.

4. Section 114A of India's Evidence Act provides that in cases of, inter alia, custodial rape, where the victim claims non-consent and where sexual intercourse has been proved, there then arises a rebuttable presumption of non-consent. In other words, once the prosecution fulfils its burden of proving that sexual intercourse did occur, it has no additional burden of proving non-consent.

5. In order to avoid violence by male inmates against female inmates and to provide women with some level of privacy, most States detain men and women separately either in the same prison or in separate facilities altogether. Contact between male and female prisoners is generally either completely

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proscribed or subject to strict limitations and supervision.[back to the contents]

F. International standards on the treatment of individuals in State custody

1. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights are the two primary international instruments addressing human rights abuses by the State, including of individuals within the custody of the State. In addition to the proscriptions against torture and ill-treatment, disappearances, arbitrary detention and arbitrary executions contained within these treaties, international standards exist for the treatment of individuals in State custody.

2. The Special Rapporteur would like to call attention to those existing United Nations mechanisms, in addition to her mandate, that have the capacity to address State violence against women, which are the following:

(a) The Special Rapporteur on the question of torture;

(b) The Special Rapporteur on extrajudicial, summary or arbitrary executions;

(c) The Special Rapporteur on the independence of judges and lawyers;

(d) The Special Rapporteur on religious intolerance;

(e) The Working Group on Enforced or Involuntary Disappearances of the Commission on Human Rights;

(f) The Committee against Torture; and

(g) The United Nations Voluntary Fund for Victims of Torture, which provides monetary compensation to victims of torture.

1. The Standard Minimum Rules for the Treatment of Prisoners require, so far as is possible, men and women prisoners to be detained in separate facilities. In institutions that hold both male and female prisoners, separate quarters within the institution must be provided for women.

2. The Standard Minimum Rules proscribe male prison authority over female inmates. According to rule 53:

"(1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.

"(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.

"(3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women."[back to the contents]

G. Recommendations

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1. States should fully implement the Standard Minimum Rules for the Treatment of Prisoners and ensure that protective measures are guaranteed in all situations of custody.

2. States should abolish "protective custody" and should assist non-governmental organizations, in particular by providing financial resources, to create alternatives for women in need of shelter.

3. States should work towards the abolition of laws and emergency regulations that curtail the rights of suspects and grant State authorities wide discretionary powers of detention and interrogation, thereby creating a situation ripe for custodial violence.

4. States should have mechanisms of redress for custodial violence and should hold perpetrators of custodial violence accountable under national laws.

5. States should provide ongoing gender-sensitization training for police and prison personnel.

6. States should abolish discriminatory laws and evidentiary rules that lead to disproportionate levels of incarceration of women for crimes like adultery.

7. States should provide legal literacy training for women.

8. Upon arrest or detention by a State authority, States should immediately provide attorneys or advocates for women.

9. Traditional human rights mechanisms should make an effort to investigate violence against women in custody, giving such violations the same priority as violence against men in custody. In their reporting, such mechanisms should consistently incorporate a gender analysis.[**back to the contents**]

III. VIOLENCE AGAINST REFUGEE AND INTERNALLY DISPLACED WOMEN

1. The plight of refugee and internally displaced women, and the suffering that they may face on account of their gender, has generated widespread discussions as to how the international community can best protect such women. The risks to which they are exposed will be considered in two ways in this chapter: the persecution that they fear or have suffered which has caused them to leave their home, and the risk of ensuing violence which they face having become refugees.

2. The 1951 Convention relating to the Status of Refugees defines "refugee" as an individual who has "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion...". Additionally, refugee women may face persecution on the grounds of language, ethnicity, culture or gender, criteria which may also be interpreted to define the term "social group" in accordance with the Convention. Internally displaced women are likewise forced to leave their homes because of such persecution. The main difference between refugee and internally displaced women is that internally displaced women have not crossed any international border and, thus, cannot avail themselves of the protection of international law.[**back to the contents**]

A. The nature of gender-based violence in creating refugee situations

1. Gender-based violence has been widely documented. It serves not only as a basis for flight, but also as a consequence of flight within countries of asylum and/or refugee camps. Various forms of violence against women give rise to refugee flows.

2. The use of systematic rape during times of armed conflict as a weapon of war to intimidate, humiliate

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and degrade women, their families and communities, has been brought to the attention of the international community most recently following the conflicts in the territories of the former Yugoslavia and Rwanda. Furthermore, some harmful traditional practices affecting the health of women and girls, especially female genital mutilation, have been recognized by some States as a form of persecution and are in violation of international law.

3. Women or girls may be killed by their own family members as a result of what is known as "crimes against honour"; in particular circumstances such action is endorsed and exacerbated by the community in order to save the family honour. Reports indicate that, in some countries, if an unmarried woman loses her virginity, she is considered to have brought shame upon her family, even if this results from being the victim of rape. The victim's parents are no longer able to marry her, and she may be exposed to a great risk of persecution by members of the community, as well as her own family.

4. In other situations, women have fled when the authorities have failed to protect them from physical abuse, including domestic violence and rape, inflicted as punishment for failing to conform to the social or cultural norms advocated by their attackers. These and other forms of gender-based violence may cause women to flee their homes to become internally displaced or to leave their country and seek refugee status under the 1951 Convention.[**back to the contents**]

B. The current legal status of persecution on the grounds of gender

1. Gender-based violence is a violation of international law, in particular the fundamental right to the security of person, including the right not to be subjected to torture or cruel, inhuman or degrading treatment. However, the recognition of gender-based persecution as a ground for refugee status is relatively new. Increasingly, States and international organizations are recognizing the argument that persecution based on gender is a legitimate ground for granting refugee status.

1. International developments

1. The European Parliament in 1984 determined that women facing cruel or inhuman treatment because of the perception that they transgressed social mores should be considered a special group for the purposes of determining refugee status.

2. A 1995 report of the Inter-American Commission on Human Rights on Haiti concluded that rape as a weapon of terror against women is a crime against humanity in peacetime. The United States Board of Immigration Appeals has also recognized that Haitian women raped for political retribution may qualify for asylum.

3. Neither the 1951 Convention nor the 1969 Organization of African Unity Convention on the Specific Aspects of Refugee Problems in Africa recognize gender-based persecution as a grounds for granting refugee status. Additionally, both conventions fail to provide for the particularities of women's experiences as refugees, the most notable of which is the difficulties women face in meeting the legal criteria for persecution established by the Convention which is due primarily to the fact of their exclusion from public life. The Convention on the Elimination of All Forms of Discrimination against Women has also been criticized as it does not address issues surrounding refugee women.

1. At the same time, however, the Executive Committee of the Programme of the United Nations High Commissioner for Refugees has in recent years, and as already mentioned above, adopted a number of conclusions focusing on refugee women and gender-based persecution in an attempt to adapt the 1951 Convention to the realities of our times.

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2. The Office of the High Commissioner (UNHCR) encourages countries to consider that rape or other forms of sexual violence, when committed as measures of oppression against a person's race, religion, nationality, membership of a particular social group or political opinion, and particularly when such actions are condoned by the authorities concerned, should be grounds for asylum. Rape and sexual violence may be considered grounds for persecution within the definition of the term "refugee" in the statute of the Office (para. 6 A(ii) and the 1951 Convention (art. 1 A (2)) if the acts are perpetrated or "knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection". **(33)**

3. UNHCR also recognizes that female genital mutilation constitutes a serious violation of the human rights of women, in accordance with the Convention on the Rights of the Child and the Declaration on the Elimination of Violence against Women, thereby providing a legitimate ground for seeking asylum. Forcible abortion or sterilization may also constitute gender-based persecution and thus lead to the granting of refugee status. Presently, however, Canada and the United States of America are the only countries that have incorporated this policy into their refugee determination procedures.

4. The UNHCR Executive Committee condemned persecution through sexual violence as a gross violation of human rights, a grave breach of humanitarian law, and a particularly serious offence to human dignity. The Executive Committee urged States to respect and ensure the fundamental right to personal security, and to recognize as refugees persons whose claim to refugee status is based on a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group, or political opinion.

5. The Executive Committee has recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum seekers who, for example, face particularly severe gender-based discrimination may be considered as a "particular social group" within the meaning of the 1951 Convention's refugee definition. The Special Rapporteur is encouraged that UNHCR, in its efforts to institutionalize a policy on gender-based persecution, recently convened an expert seminar on gender-based persecution in Geneva and is currently elaborating guidelines on gender-based persecution.

6. Most recently, the United Nations Division for the Advancement of Women, in cooperation with the Centre for Refugee Studies at York University in Canada convened an Expert Group Meeting on Gender-Based Persecution in Toronto, from 9 to 12 December 1997. The meeting considered, inter alia, the legal claims and needs of refugee women and those who are internally displaced and made recommendations in that respect, which the Special Rapporteur would like to support.

1. In this context, experts at the meeting recognized that severe discrimination and harassment, particularly, but not exclusively, in armed conflict or in an atmosphere of insecurity, may constitute persecution. It considered that severe restrictions on women's enjoyment of their human rights, including with respect to education, employment and freedom of movement, such as forced seclusion, meet the definition of persecution for the purposes of the 1951 Convention in those cases where women experience such restrictions as a profound violation of their dignity, autonomy and status of human beings. The meeting noted that penalties imposed on women for violating social mores which do not amount to violations of human rights may be disproportionate and that, in such circumstances, social mores and the threat of penalty for their transgression will amount to persecution. The meeting, therefore, recommended that such ill-treatment be recognized as persecution and considered that past persecution, combined with the risk of ill-treatment upon return, may give rise to compelling reasons for non-return.**(34)**

2. The meeting also recommended that persecution as a result of expressed or imputed feminism, or failure to conform to conventional gender roles, or because of activities during armed conflict or

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imputed opinion as a result of the opinion of family members should all be regarded as persecution on the grounds of political opinion for the purposes of the 1951 Convention.

1. The meeting further recommended, where a woman's sex or gender is a significant reason for persecution, her fear of persecution should be recognized as being on account of her membership of a particular social group under the 1951 Convention, namely "women". The claimant should, however, not need to prove that all other women have a well-founded fear of persecution or, conversely, that she would be singled out from among other women.

2. National developments

1. A number of countries have developed, in their refugee determination guidelines and procedures, important precedents relating to women seeking asylum on the grounds of gender-based persecution. Below, the Special Rapporteur has selected some national examples, including case studies, which provide judicial interpretations, to illustrate recent developments in connection with gender-based persecution.

2. In 1996, Canada reissued its "Gender Guidelines for Asylum Adjudications", originally issued in March 1993. Through these guidelines, Canada became the first Government to recognize formally that a woman fleeing persecution on gender-specific grounds can claim to "fear persecution on account of her membership in a particular social group".

3. The Canadian experience has shown that female claimants generally fall into four main categories, namely those who fear persecution: (i) on the same basis as men; (ii) because of their kinship and/or family relations; (iii) because of a failure to conform to social mores and cultural norms; or (iv) because of violence committed against them due to their gender. The Supreme Court of Canada has incorporated the "gender" element in its reinterpretation of "social group", describing it as a section of society "defined by an innate or unchangeable characteristic" such as "gender, linguistic background or sexual orientation".

4. A test to determine whether people could be considered to constitute a "particular social group" for the purposes of the 1951 Convention, was articulated by Justice Mahoney in the Federal Court of Appeal case of Mazers v. Canadian Minister of Employment and Immigration. This case involved a claim for refugee status on the basis of membership of a particular social group by a group of Trinidadian women who were victims of domestic violence. Justice Mahoney's test stated that:"[a] particular social group means: a natural or non-natural group of persons with (i) similar shared background, habits, social status, political outlook, education, values, aspirations, history, economic activity or interests contrary to those of the prevailing government, and (ii) sharing basic, innate, unalterable characteristics, consciousness and solidarity."

1. The meaning of "social group" under the 1951 Convention was also considered in the case of R. v. The Immigration Appeal Tribunal and the Secretary of State for the Home Department, ex parte Syede Khatoon Shah, which concerned a claim for asylum in the United Kingdom by a citizen of Pakistan who stated that she had suffered domestic violence and faced the death penalty for alleged adultery under Sharia law. She argued that she belonged to a definable group, namely women who had suffered domestic violence in Pakistan. The special adjudicator said:

"It appears to me that there is no accepted definition of social group and it is no more possible for a woman who has suffered domestic violence to be herself within the meaning of social group in the Convention than it is for anyone who has been divorced to say that s/he is a member of a social group for the purposes of (the) Convention or, indeed, anyone who has a criminal record to be able to say

similarly."

1. This decision has been criticized in that the individualized approach of the Convention refugee definition requires attention to personal circumstances, time and place, all of which may combine to distinguish those at risk from others who may share similar characteristics and yet not be in danger. The criticism maintains that although there will be policy pressures to limit refugee categories in periods of increased displacement, there is no rational basis for denying protection to individuals who, even if divided in lifestyle, culture, interests and politics, may yet be linked across another dimension of affinity.

2. The final conclusion of the case provided that the facts established were capable of bringing the client within article 1 A (2) of the 1951 Convention. However, this case has unfortunately since been overturned, nullifying what would have been an extremely valuable precedent in asylum law.

3. In the Matter of MK in the United States a women from Sierra Leone had requested asylum on the grounds of persecution based on domestic violence. Independent evidence was produced which demonstrated that violence against women, especially wife-beating, is common, disobedience on the part of a wife is considered a justification for punitive measures by the husband, police are unlikely to intervene except in cases of severe injury or death, and few cases of violence go to court. Court acknowledged the lack of national protection and made a finding of persecution. In defining persecution, the judge referred to internationally recognized human rights instruments such as the United Nations Declaration on the Elimination of Violence against Women.

4. In R. v. Secretary of State for the Home Department, ex parte Miatta Sharka, the High Court in the United Kingdom of Great Britain and Northern Ireland addressed the issues of rape and gender-specific violence as a basis for asylum for citizens of Sierra Leone. Although the case was dismissed, it is interesting to note the remarks made by Justice Turner on the position of women who fear rape or gender-specific violence and the relation of such fear as grounds for asylum: "I have no difficulty with the concept that if there was systematic rape as part of an envisaged policy of an organization or group within a country that included rape as one of its activities, such would be capable of amounting to a Convention reason".

5. The United States "Guidelines on Gender Issues in Asylum Claims" recognize a variety of forms of gender-related persecution including: sexual violence, including sexual abuse, rape, infanticide, female genital mutilation, forced marriage, slavery, domestic violence and forced abortion.

6. In the case of Fatin v. Immigration and Naturalization Service, the Iranian claimant based her claim for asylum in the Unites States of America on persecution based on her membership in a particular social group and her political opinion. She claimed that she would be forced to submit to the traditional Muslim view of a woman's proper role within society, including wearing the chador or veil, while in public. She asserted that discriminatory treatment of women in the Islamic Republic of Iran was in direct conflict with her belief in freedom of expression and equality of the sexes. The court held that although feminism could qualify as a political opinion within the meaning of the statute, the administrative record did not establish that Iranian feminists are generally subject to treatment so harsh as to qualify as persecution.

7. The Australian guidelines governing asylum claims specify that "rape and other forms of sexual assault are acts which inflict severe pain and suffering (both mental and physical)... such treatment clearly comes within the bounds of torture as defined by the Convention against Torture. Furthermore, sexual violence amounts to a violation of the prohibition against cruel, inhuman or degrading treatment, the security of person and in some instances the right to life as contained in a variety of instruments".

8. A number of European courts have also interpreted sexual violence and rape as forms of persecution. An Order by the Austrian Ministry of the Interior dated 11 August 1995, regarding the granting of asylum for victims of rape specifies that: "On the basis of the Geneva Convention and the 1991 Asylum Law, rape just like any other violation of a person's physical integrity is a ground for asylum, provided it was motivated by one of the reasons in the Geneva Convention." In France, the Commision des recours des refugies granted refugee status to a women who had been raped a number of times by the military and further detained for refusing to return to the military camp for fear of sexual violence owing to her fear of persecution. The German authorities granted refugee status to a women who expressed her political opinion and showed her aversion to strict Islamic rules not only through conversation and refusing to join prayers, but by refusing to wear the chador. The court considered that women's disagreement with the dress regulations and the subordinate role of women to be a political opinion.

9. The United States Immigration and Naturalization Service (INS) decision, In Re Kasinga, is an encouraging development advocating recognition of female genital mutilation as grounds for political asylum. Fauziya Kasinga, aged 19, was a member of the Tchamba-Kunsuntu tribe of northern Togo. Young women of that tribe normally undergo female genital mutilation at age 15. Kasinga was not subject to this procedure due to the protection of her influential father. Upon the death of her father, however, her aunt forced her into a polygamous marriage to a 45 year-old man, and both of them planned to submit her to the procedure before consummation of the marriage. After fleeing to Ghana and Germany, Kasinga sought asylum in the United States of America where she had relatives.

10. The case of Kasinga was well documented as to the practice and effects of female genital mutilation and the international campaign to eradicate harmful traditional practices affecting the health of women and children. In defining female genital mutilation and finding that the described level of harm constituted "persecution", the INS followed the 1995 Gender Guidelines which state that rape, sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds.

11. One concurring opinion in the case stated that "there is nothing about a social group definition based upon gender that requires us to treat it as either an aberration, or as an unanticipated development requiring a new standard". The concurring judge was of the opinion that social group was a catch-all category beyond political opinion, race, religion or ethnicity, and emphasized that social group claims, unlike political opinion claims, are status-based and do not necessarily require a showing that the specific individual's opinions or activities were the cause of the persecution.

12. Another interesting development at national level in relation to traditional practices as a basis for asylum on the grounds of persecution, was a case before the Australian Refugee Review Tribunal. The Tribunal denied refugee status to a women who had refused an arranged marriage, and had been assaulted and raped by the suitor as a result. The Tribunal concluded that the rape did not occur for a Convention reason but was a criminal act at the hands of an individual. As there had not been a systematic failure of State protection but rather a failure to act based on an insinuation from the applicant's father that she was a liar. The assault and rape were as such not interpreted as persecution in this context, as State protection had not been systematically denied.

3. Academic opinion

1. Criticisms expressed within academic circles generally conclude that international law has failed to establish an adequate framework within which to tackle the very unique problems of refugee women. Suggestions as to how this should be done comprise two main schools of thought, one of which argues

that gender should be included as a persecution ground in the Convention's definition of refugee, and that the term persecution should be reformulated to take the experience of women into account, whilst the other maintains that issues of gender can and should be dealt with within the existing structure.

2. If the Convention recognized persecution because of gender, individual women would then merely have to prove that they were persecuted because they were women rather than proving that they were members of a social group of persecuted women with common beliefs and practices.

3. One writer is of the opinion that sexual violence should be attributed to the State if the authorities are unwilling to offer protection to the victim. He suggests that Iranian women who refuse to wear a veil or chador and are persecuted are not being persecuted because they are women, because women who wear veils are not persecuted. The woman is persecuted because she refuses to be a "proper" woman in the eyes of the authorities. Her refusal is an expression of political and/or religious opinion and these are the grounds on which she should claim asylum. He maintains that the general pattern of discrimination against women in a society is not persecution based on gender, but on political or religious opinion that women should not be denied certain rights.[**back to the contents**]

C. Cases of violence against refugee and internally displaced women

1. The following are cases of violence against refugee and internally displaced women and cases of claims for asylum on the grounds of gender-based persecution which illustrate the different forms of violence against women that may serve as the basis for such claims.

Nepal

1. A 22-year-old Tibetan woman, in flight from China via Nepal to India, was allegedly raped 12 times by a group of Nepalese men led by a police officer on 15 and 16 December 1996. The multiple rape reportedly took place on the outskirts of Barabisa, 90 km north-east of Kathmandu.
On 20 December 1996, the victim was treated in a hospital in Kathmandu for internal injuries. It is reported that the Nepalese authorities initiated an investigation, after being notified of the incident. However, to date no action appears to have been taken to bring the perpetrators to trial.

2. Whilst a group of Tibetans, in flight from China via Nepal to India, were being detained at Chogsham police post in Lama Bhagar, north-eastern Nepal, 12 policemen reportedly tried to persuade a Tibetan man to provide a girl from his group for sexual services, in return for safe passage to Kathmandu. The group refused to cooperate with the police and were later released after handing over 8,000 yuan to the policemen. **(35)**

Somalia

1. A Somali mother feared returning to Somalia and losing custody of her two children, a daughter, aged 10, and a son, 7. According to documentary evidence, the children belonged to the clan of their father, and for this reason a divorced woman would not be awarded custody of her children. She allegedly also feared that she would be powerless to prevent her daughter from being subjected to female genital mutilation against her wishes. The mother described the terror of her own experience of female genital mutilation and the resulting health problems she experienced on reaching adulthood.

2. With respect to the claim of the 10-year-old girl, the panel found that her rights to personal security would be grossly infringed if she were forced to undergo female genital mutilation, citing article 3 of the Universal Declaration of Human Rights. The Convention on the Rights of the Child, which explicitly protects children from acts of cruelty and torture and requires States to take steps to abolish traditional

practices prejudicial to the health of children, was also referred to. **(36)**

China

1. In 1995, the Supreme Court of Canada considered an appeal from a Chinese refugee claimant who feared forcible sterilization upon return to China. **(37)** The dissenting opinion found that forced sterilization could be considered to be persecution, as follows:

"... it is utterly beyond dispute that forced sterilization is in essence an inhuman and degrading treatment involving body mutilation and constitutes the very type of fundamental violation of basic human rights that is the concern of refugee law." **(38)**

1. In a decision of the United States Board of Immigration Appeals published in December 1996, the Board held that forced sterilization or forced abortion substitutes for (past) persecution on account of political opinion and qualified the asylum seeker as a refugee under the amended definition of that term.

2. A Chinese national had been employed as a birth control officer for three years in his commune. On four occasions he participated with other officers in seeking out women who had violated the one-child policy imposed by the Government, tying the women up with ropes and taking them to the hospital where they were forcibly aborted or sterilized. He testified that he was aware of all the methods used to implement the one-child policy in his commune, including forcible abortion on women in advanced stages of pregnancy and the killing by injection of foetuses born alive. The claimant was excluded from being granted asylum in Canada under article 1 F (a) of the 1951 Convention, as the panel found that the claimant had been an active participant in persecutory acts amounting to crimes against humanity. Failing this, it was undisputed that the claimant was an accomplice to crimes against humanity as he was a knowing member of a birth control unit whose objective was to implement birth control policies, including forcible abortion and sterilization. The Federal Court of Canada denied leave for judicial review of this decision. **(39)**

Romania

1. The claimant was physically abused by her husband in Romania for 16 years. The claimant testified that she was told repeatedly by policemen that they could not get involved because she and her husband were a married couple, and that they would only get involved if the beating was connected to a crime. The documentary evidence confirmed the unavailability of protection for abused women in Romania. Although domestic violence is estimated to be widespread, many authorities and doctors, invoking Romania's strong family tradition, refuse to consider it a serious issue. The claimant was determined to be granted refugee status under the 1951 Convention by reason of a well-founded fear of gender-related persecution. **(40)**[**back to the contents**]

D. Violence against refugee women

1. Refugee women and girls are particularly vulnerable to sexual attacks whilst in flight. There are reports of gang-rape, forced "marriages" and sexual mutilation by bandits, members of armed groups or fellow refugees. The need to cross military lines or areas affected by anarchy or civil war in order to reach safety puts women and girls in especially perilous circumstances as they are at great risk of being subjected to sexual exploitation in return for passage to safety, the grant of refugee status, or legal documentation.

2. Gender-based violence which occurs in countries of asylum or in refugee camps has been widely documented, including in the preliminary report of the Special Rapporteur. Refugee camps are

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frequently in dangerous locations, near war zones or disputed borders. Armed attacks on the camps often involve the rape and abuse of women. Soldiers are known to have kidnapped refugee children and demanded sex from their mothers as a ransom for their return. Where there is no opportunity for work in the camp, or where camp administrative systems do not ensure that women receive their rations, the difficulty of meeting basic subsistence needs often leads women or girls to prostitute themselves in exchange for food, shelter and protection.

3. Due to the general decline in law and order, traditional behavioural norms within affected communities often break down. Refugee women and girls have reportedly been raped by other refugees. Furthermore, the frustration of camp life can lead to increased domestic violence including sexual abuse within the family. In a normal community environment the extended family might become the main protectors of a vulnerable wife or daughter, but such family groups are often dispersed during conflict and displacement. The knowledge that chances of being reported or punished are minimal exacerbates women's vulnerability. In the refugee camps around Rwanda in 1994, it has been reported that virtually every women and girl past puberty was raped and/or sexually assaulted.

4. Occasions and opportunities for rape are frequent in refugee camps. Preventative measures such as lighting the passageways to toilets and washrooms, building male and female toilet blocks in separate areas (so that women and girls do not risk going to the forest for privacy), building separate wash areas for women, and changing the layout of the camps would make life more secure for the female population. The Special Rapporteur is pleased to note that such measures are currently being implemented by UNHCR.

5. Apart from the brutality and trauma of the rape and sexual violence itself, medical problems suffered by refugee women include miscarriages, unwanted pregnancy, infections, sexually transmitted diseases and HIV/AIDS, psychological trauma, depression, suicide, nightmares, insomnia and fear. The provision of medical and psycho-social care and counselling are, therefore, critical. The main obstacle to providing care is often the victims' unwillingness to talk about their experience. Their shame and fear of rejection by partners or their family often prevents them from seeking medical attention and support. As already mentioned, in many societies a woman's chastity is considered to be a matter of family honour. Even under normal circumstances, in many communities sex is not a matter which is discussed. Thus it has been found to be more prudent to provide care and treatment for women more generally, so as to avoid singling out rape victims.

6. Within the country of asylum, as the community tries to reinforce its cultural identity away from home, the resurgence of harmful traditional practices affecting the health of women and children, such as female genital mutilation, also render women vulnerable to violence. [**back to the contents**]

E. Projects to protect women refugees from gender-based violence

1. UNHCR has carried out various projects related to violence against refugee women and has been able to improve and modify its projects in the light of experiences gathered in the process.

Crisis intervention teams in Ngara camp, United Republic of Tanzania

1. In view of the extreme sensitivity of the topic of sexual violence, UNHCR considered it crucial to involve refugees themselves in identifying an appropriate response mechanism to sexual violence and rape, at the same time developing confidence and trust. Participatory discussions indicated that during the first few months a degree of security against assault was offered due to extreme overcrowding in the camps and lack of privacy. It was, however, noted that after that sexual violence increased.

2. In response, in March 1995 crisis intervention teams (CITs) were established, composed of refugees and supported by non-governmental organizations, to provide community service in each camp. Motivating the implementation of CITs was the belief that victims would be more willing to report an assault on a refugee who shared the same language and culture and understood the social ramifications and significance of the event. CIT members, who were constantly present in the community, could offer more sustained support for victims. Additionally, CIT members could act as advocates for the victims during the process of gathering relevant information, thereby sparing them the ordeal of answering the same questions from many different professionals.

1. The Refugee Information Network (RIN) was created in late 1994 after it became apparent that the existing channels of communication between humanitarian organizations and the refugees were too narrow. RIN consisted of newsletters, radio broadcasts, bulletin boards, posters, videos and discussion sessions. Information systems were used for an awareness campaign on sexual violence.

2. Concrete measures for increasing safety were introduced. Water points were open only during daylight hours and refugees organized a timetable for different groups using the same taps. Security guardians at water points caught blackmailing refugees were dismissed from their jobs. Also, provision of wood fuel to the most vulnerable individuals in the camps by humanitarian agencies was arranged. Unfortunately, after a short period of time the arrangement had to cease for financial reasons.

Kenya

1. In Kenya, in 1993, UNHCR established the Vulnerable Women and Children's Programme in an effort to prevent the occurrence of sexual violence in the Somali refugee camps in north-eastern Kenya. The magnitude and severity of violence against women in the Dadaab camps in the North Eastern Province led to the establishment of the Women Victims of Violence (WVV) project in October 1993. The primary focus of the project was to prevent a range of problems associated with physical and mental trauma, particularly those resulting from the social stigma of rape in a traditional society. Medical care for victims of violence, physical and legal protection of refugee women, and the empowerment of women through income-generating activities and community groupings constituted important elements of the project. The project also emphasized protection and sensitization training for local security personnel, local government officials, implementing partners and community elders that sought to raise awareness about the rights of refugee women and the peculiar problems they must confront.

2. Through the live-fencing programme, 100 kilometres of live thorn bushes were planted within the camps to serve as a strategy to prevent bandits from reaching the living quarters of refugees. Local police presence within the camp and their capacity to respond rapidly to the sighting of bandits had a deterrent effect.

3. An agreement was signed with the Kenya Chapter of the International Federation of Women Lawyers to send a female lawyer to UNHCR. Under this system legal counsel was provided and follow-up action with the police and magistrates was undertaken to ensure the prosecution of apprehended culprits.

4. The "WVV" project achieved a reduction in the incidence of rape, although it initially experienced a rise in fraudulent claims of rape, in the expectation that additional assistance, and particularly third country settlement, would be obtained. This project has since developed successfully and has been institutionalized to achieve a useful preventive effect.[**back to the contents**]

F. Recommendations

1. States parties to the 1951 Refugee Convention are urged to adopt guidelines with respect to gender-

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related asylum claims.

2. There is a great need for more female doctors to meet the gynaecological and related care needs of refugee women. Training is necessary for health professionals to make them aware of the particular problems faced by women, particularly in relation to gender-based violence.

3. Confidential medical assistance, legal assistance, and culturally appropriate, community-based psycho-social counselling for victims and their families should be provided to prevent rejection of and attachment of social stigma to the victims.

4. As a measure of protection against rape in refugee camps, special accommodations for unaccompanied women and girls with sufficient security personnel should be provided. Where practical, women and girls should have the ability to lock their sleeping and washing facilities.

5. Women should be allowed to make an individual decision regarding repatriation. Urgent resettlement for rape victims might provide the best chances for emotional recovery for victims of rape for whom neither repatriation nor local integration is a viable solution.

6. Refugee women almost always require legal assistance and should be given some legal literacy training to improve their knowledge of their legal rights. Any such training should highlight the interrelationship between protection and social services in the camp and address issues such as child marriage, child labour, adult marriage and abortion.

7. Asylum procedures must be revised to sensitively address women refugees who have suffered violence, including rape during times of armed conflict. Interviewing procedures must be designed to facilitate the detection of gender-based violence. It has been documented that many women refugees are suffering from post-traumatic disorders and require psychological counselling in order for them to cope with all that they have suffered and seen. The asylum process often appears confusing, frightening and humiliating. Female refugees should be interviewed by female officers who have expertise in international human rights law as well as international and national refugee law, who have been trained and who are aware of the circumstances and problems faced by women in particular countries.

8. Governments should seek to remove legal and administrative barriers to women seeking asylum on the basis of gender-based persecution. [**back to the contents**]

Notes

1. The Special Rapporteur would like to thank the following people for their assistance in compiling this report: Lisa M. Kois, Rosanna Favero, Minari Fernando, Sunithi Kuruppu, Helen Kinsella, Andréa Séguin, Vidya Ram, Shobana Kanagasingham, Astrid Aafjes, Ali Miller, Karen Parker, Kelly Dawn Askin, Christine Chinkin, Diane Orhenlicher and the War Crimes Research Office of the Washington College of Law, Mel James and Amnesty International, and the Office of the Prosecutor for the ICTY. [**back to the text**]

2. See Judith G. Gardham, "The Law of Armed Conflict: A Feminist Perspective" in Mahoney (ed), Human Rights in the Twentieth Century, the Netherlands, Kluwer Academic Publishers, 1993, pp. 419-436.[**back to the text**]

3. The Velásquez Rodríguez case, Inter-American Court of Human Rights, Ser. C., No. 49, Human Rights Law Journal, vol. 212, 1988. [**back to the text**]

4. Amnesty International, Memorandum on Women's Rights in Afghanistan, February 1997. [back to the text]

5. Karima E. Bennoune, "The War Against Women in Algeria", in Ms. Magazine, September/October 1995, London, p. 22.[back to the text]

6. Human Rights Watch, The Human Rights Watch Global Report on Women's Rights, New York, Human Rights Watch, 1995, p. 18. [back to the text]

7. Information submitted to the Special Rapporteur on violence against women, Unpublished, November 1997, p. 4.[back to the text]

8. Amnesty International, Urgent Action, AI Index: AMR 34/08/96, 1 March 1996. [back to the text]

9. Human Rights Watch, op. cit., p. 40.[back to the text]

10. Amnesty International, India: Submission to the Human Rights Committee Concerning Implementation of Articles of the ICCPR, July 1997, p. 35.[back to the text]

11. Human Rights Watch, op. cit. pp. 60-65.[back to the text]

12. Testimony given to the Special Rapporteur during her mission to the Republic of Korea and Japan in 1995.[back to the text]

13. S. Swiss and P.J. Jennings, "Violence against Women During the Liberian Civil Conflict" Journal of the American Medical Association, 25 February 1998 (in press).[back to the text]

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15. Amnesty International, People's Republic of China, Six Years after Tiananmen: Increased Political Repression and Human Rights Violations, AI Index: ASA 17/28/95, June 1995, pp. 12-13.[back to the text]

16. Human Rights Watch op. cit. 85.[back to the text]

17. Testimony given to the Special Rapporteur during her mission to Rwanda in 1997. [back to the text]

18. Information submitted to the Special Rapporteur in Sri Lanka. [back to the text]

19. The National Campaign for Eradication of Crime by US troops in Korea, Seoul, 1997, p. 15. [back to the text]

20. Theodor Meron, "Rape as a Crime under International Humanitarian Law" in 90 American Journal of International Law, vol. 90, 1993, p. 424.[back to the text]

21. I.C.J. Reports, 1986.[back to the text]

22. Note that the ICTY and the ICTR share the same Prosecutor, with the Office of the Prosecutor at The Hague and an Office in Kigali, headed by the Deputy Prosecutor.[back to the text]

23. Christine Chinkin, "Amicus Curiae Brief on Protective Measures for Victims and Witnesses" in

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34. Report of the Expert Group Meeting on Gender-Based Persecution, organized by the Division for the Advancement of Women and the Centre for Refugee Studies at York University, Canada, held in Toronto from 9 to 12 November 1997 (EGM/GBP/1997/Report, para. 41). [back to the text]

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37. Chan v. Canada, 1995, ibid., p. 73. [back to the text]

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INTEGRATION OF THE HUMAN RIGHTS OF WOMEN AND THE GENDER PERSPECTIVE VIOLENCE AGAINST WOMEN, MS RADHIKA COOMARASWAMY

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INTEGRATION OF THE HUMAN RIGHTS OF WOMEN AND THE GENDER PERSPECTIVE

VIOLENCE AGAINST WOMEN

Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44

GE.00-11334 (E)

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Executive summary

The purview of this report is "from voluntary migration to trafficking in women: the continuum of women's movement and the human rights violations perpetrated during the course of that movement".

The report details the evolution of the Special Rapporteur's position on trafficking. It includes an overview of the Special Rapporteur's work undertaken throughout the year in regard to trafficking. The report also provides a critique of the 1949 Convention for the suppression of the traffic in persons and the exploitation of the prostitution of others.

The report highlights the fact that women move and are moved, consensually and non-consensually, legally and illegally, for numerous reasons, including social, political, cultural and economic reasons. The element that distinguishes trafficking from other forms of movement is the non-consensual nature of trafficking. The need for a clear definition of trafficking, thus far lacking in international law, is emphasized. For the purposes of this report, the Special Rapporteur uses the following definition of trafficking. Trafficking in persons means the recruitment, transportation, purchase, sale, transfer, harbouring or receipt of persons: (i) by threat or use of violence, abduction, force, fraud, deception or coercion (including abuse of authority), or debt bondage, for the purpose of; (ii) placing or holding such person, whether for pay or not, in forced labour or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in (i).

It is emphasized that movement and migration, coupled with Governments' reactions to and attempts to restrict such movements through immigration and emigration policies and the exploitation of such attempts by traffickers, place women in situations in which they are unprotected or only marginally protected by law. Immigrant women are placed by the State in situations of enhanced vulnerability to violence because of the lack of independent legal protections afforded to both documented and, in particular, undocumented immigrant women. Thus, women who attempt to exercise their freedom of movement are often placed in vulnerable positions vis-à-vis the protection of their human rights. The report highlights the Special Rapporteur's concern about the apparent link between protectionist, anti-immigration policies and the phenomenon of trafficking. Additionally, the report raises concern over the law and order approach that is overwhelmingly adopted by Governments to combat trafficking. Such approaches are often at odds with the protection of human rights and may create or exacerbate existing situations that cause or contribute to trafficking in women.

The report addresses the root causes of migration and trafficking. It highlights the fact that the lack of rights afforded to women serves as the primary causative factor at the root of both women's migrations and trafficking in women. The failure of existing economic, political and social structures to provide equal and just opportunities for women to work has contributed to the feminization of poverty, which in turn has led to the feminization of migration, as women leave their homes in search of viable economic options. Further, political instability, militarism, civil unrest, internal armed conflict and natural disasters also exacerbate women's vulnerabilities and may result in an increase in trafficking.

States' responsibility to prevent, investigate and punish acts of trafficking in women and provide protection to trafficked persons is highlighted. Under the Universal Declaration of Human Rights and the numerous international and regional instruments to which States have agreed to be bound, Governments are responsible for providing protections to trafficked persons. In addition to treaty obligations, States have a duty to act with due diligence to prevent, investigate and punish violations of human rights and provide remedies and reparation to victims of violations. This duty extends to violations by both State and non-State actors.

Lastly, the Special Rapporteur sets out her conclusions and outlines several recommendations, at the root of which are the protection and promotion of women's human rights.

I. INTRODUCTION

A. The purview of the report - from voluntary migration to trafficking in women: the continuum of women's movement and the human rights violations perpetrated during the course of that movement

1. Trafficking in persons must be viewed within the context of international and national movements and migrations that increasingly are being undertaken owing to economic globalization, the feminization of migration, armed conflict, the breakdown or reconfiguration of the State, and the transformation of political boundaries. The Special Rapporteur highlights the fact that trafficking in women is one component of a larger phenomenon of trafficking in persons, including both male and female adults and children. Nonetheless, she would like to highlight the woman-specific character of many violations of human rights committed during the course of trafficking. She calls on Governments to respond to such violations of human rights through policies based on gender-awareness.

2. Despite recognition of trafficking as a global phenomenon that cuts across age and gender, in accordance with her mandate and expertise, the Special Rapporteur has limited this report to trafficking in women. However, the definition proposed and the analysis provided of core elements, trafficking routes, causes and consequences, etc., are not age specific and, in some cases, not gender specific and thus she hopes that this report may contribute to efforts to combat trafficking in children as well. The Special Rapporteur holds that the phenomenon of trafficking in children needs different, child-specific remedies that are likewise gender-specific.

3. Women move and are moved, with and without their consent, for a myriad of reasons. Trafficking in women must be understood to exist within a continuum of women's movement and migrations. The Special Rapporteur is of the firm belief that women and all other persons must enjoy freedom of movement. Trafficking in women, as the Special Rapporteur defines and understands it, is a particularly violent form of movement, which has to be prohibited. Nevertheless, the Special Rapporteur is of the opinion that trafficking must be considered in the broader context of violations that are committed against women in the course of their movement and migrations. While the experience of being trafficked may affect the level or degree of marginalization or violations that are perpetrated against women, trafficking is not the sole determinant of whether women's human rights are violated in the course of their national and international movements. Movement and migration, coupled with Governments' reactions to and attempts to restrict such movements through immigration and emigration policies, and the exploitation of such attempts by traffickers, place women in situations in which they are unprotected or only marginally protected by law. As such, women who attempt to exercise their freedom of movement are often placed in vulnerable positions vis-à-vis the protection of their human rights.

4. Overt forms of violence, including, but not limited to rape, torture, arbitrary execution, deprivation of liberty, forced labour and forced marriage, are perpetrated against women who seek to exercise their freedom of movement. Additionally, the discriminatory policies and practices of Governments, particularly those that seek to curb women's movement, help to create a climate in which such violations are officially tolerated, if not encouraged or in some cases perpetrated by State actors. The Special Rapporteur is concerned that, in some cases,

Governments, in their attempts to respond effectively to growing international concern about trafficking, may misconstrue the needs of victims and, in so doing, institute policies and practices that further undermine the rights of women, especially the freedom of movement and the right to earn a living. It is for this reason that the Special Rapporteur believes that trafficking must be appropriately situated in its global context of movement and migrations and the feminization of such movement and migrations. As such, and with special emphasis on trafficking, it is the violations of women's human rights committed in the course of women's movements that this report seeks to highlight.

B. The evolution of the Special Rapporteur's position on trafficking

1. The Special Rapporteur's previous work on trafficking

5. As evidenced in her two prior reports on trafficking, the Special Rapporteur's position in respect of trafficking in women has evolved as her understanding of the complexities of trafficking has developed. The evolution of the Special Rapporteur's position may be seen in the divergent views expressed in her prior reports. The present report builds on the previous reports of the Special Rapporteur, in particular her reports on violence in the community (E/CN.4/1997/47), in which she included a section on trafficking in women and forced prostitution (paras. 71 (b) and 119), and her report on her visit to Poland on the issue of trafficking and forced prostitution (E/CN.4/1997/47/Add.1).

6. The Special Rapporteur would also like to note the work and reports of the Working Group on Contemporary Forms of Slavery and the Special Rapporteur on the sale of children on issues of trafficking.

2. Overview of the work undertaken by the Special Rapporteur during the year

7. This year the international community has commenced numerous initiatives on trafficking. The Special Rapporteur has followed such initiatives very closely and has officially intervened in the processes being undertaken. In particular, the Special Rapporteur would like to congratulate United Nations Member States for their efforts to elaborate a protocol to prevent, suppress, and punish trafficking in women to the draft international convention against transnational organized crime. The Special Rapporteur, however, would like to express her concern that the first modern international instrument on trafficking is being elaborated in the context of crime control, rather than with a focus on human rights. She views this as a failure of the international human rights community to fulfil its commitment to protect the human rights of women. In a statement to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime of the Commission on Crime Prevention and Criminal Justice, she highlighted the inextricable link between the prevention and eradication of trafficking and the protection of the human rights of trafficked persons.

8. Member States of the South Asian Association for Regional Cooperation (SAARC) have undertaken to draft the first regional treaty on trafficking. The Special Rapporteur congratulates the SAARC countries on this initiative. She has communicated to SAARC Heads of State her concern that the SAARC convention should not conflict with either the above-mentioned trafficking protocol or their existing obligations under international law. She has encouraged

SAARC Governments to refrain from finalizing the convention until the trafficking protocol has been adopted, so as to avoid any possible conflicts between the two international instruments. The Special Rapporteur regrets that, owing to regional tensions, the issue of trafficking has been sidelined.

3. Overview of other United Nations work/projects on trafficking

9. For the first time, the High Commissioner for Human Rights has identified trafficking as one of her priority themes. In 1998, the High Commissioner appointed an in-house working group on trafficking to identify the most effective role which the Office of the High Commissioner for Human Rights could take towards eradicating the practice. Since that time, the High Commissioner has hired a focal point on trafficking, in order to assist her in understanding the complex issues of trafficking, develop a strategy to address trafficking from a human rights perspective and follow international developments on trafficking closely. The High Commissioner made informal interventions in both the Vienna and the SAARC processes.

C. The definition of trafficking

10. At present, there is no internationally agreed definition of trafficking. The term "trafficking" is used by different actors to describe activities that range from voluntary, facilitated migration, to the exploitation of prostitution, to the movement of persons through the threat or use of force, coercion, violence, etc. for certain exploitative purposes. Increasingly, it has been recognized that historical characterizations of trafficking are outdated, ill-defined and non-responsive to the current realities of the movement of and trade in people and to the nature and extent of the abuses inherent in and incidental to trafficking.[1]

11. Rather than clinging to outdated notions of the constituent elements of trafficking, which date back to the early nineteenth century, new understandings of trafficking derive from an assessment of the current needs of trafficked persons in general, and trafficked women in particular. New definitions also must be specifically tailored to protect and promote the human rights of trafficked persons, with special emphasis on gender-specific violations and protections.

12. Trafficking is a dynamic concept, the parameters of which are constantly changing to respond to changing economic, social and political conditions. Although the purposes for which women are trafficked change and the ways in which women are trafficked the countries from which and to which they are trafficked change, the constituent elements remain constant. At the core of any definition of trafficking must be the recognition that trafficking is never consensual. It is the non-consensual nature of trafficking that distinguishes it from other forms of migration. The lack of informed consent must not be confused with the illegality of certain forms of migration. While all trafficking is, or should be, illegal, all illegal migration is not trafficking. It is important to refrain from telescoping together the concepts of trafficking and illegal migration. At the heart of this distinction is the issue of consent.

13. Documentation and research shows that trafficking occurs for a myriad of exploitative purposes to which trafficking victims have not consented, including but not limited to forced and/or bonded labour, including within the sex trade, forced marriage and other slavery-like practices. It is the non-consensual and exploitative or servile nature of the purpose with which

the definition concerns itself. The Special Rapporteur, thus, believes that an expansive definition of trafficking that encompasses the common elements of the trafficking process is necessary. The common elements are the brokering, accompanied by the exploitative or servile conditions of the work or relationship in which the trafficked person ends up, coupled with the lack of consent in arriving at that position. The structure of the trafficking definition must distinguish trafficking as a separate violation from its component parts. For the purposes of this report, the Special Rapporteur uses the following definition of trafficking.

> "Trafficking in persons means the recruitment, transportation, purchase, sale, transfer, harbouring or receipt of persons:
>
> (i) by threat or use of violence, abduction, force, fraud, deception or coercion (including the abuse of authority), or debt bondage, for the purpose of:
>
> (ii) placing or holding such person, whether for pay or not, in forced labour or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in (i)."

14. Subsection (1) of the definition covers all persons involved in the trafficking chain: those at the beginning of the chain, who provide or sell the trafficked person, and those at the end of the chain, who receive or purchase the trafficked person, hold the trafficked person in forced labour and profit from that labour. Criminalizing the activities of all parties involved throughout the process of trafficking would facilitate efforts to both prevent trafficking and punish traffickers.

15. The Special Rapporteur believes that the definition of trafficking should require that the movement or transport involved is such as to place the victim in an unfamiliar milieu where she is culturally, linguistically or physically isolated and denied legal identity or access to justice. Such dislocation increases trafficked women's marginalization and therefore increases the risk of abuse, violence, exploitation, domination or discrimination both by traffickers and by State officials such as the police, the courts, immigration officials, etc. Although the crossing of geographic or political borders is sometimes an aspect of trafficking, it is not a necessary prerequisite for these elements to be present. Trafficking occurs within, as well as across, national borders.

16. Although numerous separate abuses are committed during the course of trafficking, which themselves violate both national and international law, it is the combination of the coerced transport and the coerced end practice that makes trafficking a distinct violation from its component parts. Without this linkage, trafficking would be legally indistinguishable from the individual activities of smuggling and forced labour or slavery-like practices, when in fact trafficking does differ substantively from its component parts. The transport of trafficked persons is inextricably linked to the end purpose of trafficking. Recruitment and transport in the trafficking context is undertaken with the intent to subject the victim of the coerced transport to additional violations in the form of forced labour or slavery-like practices.

17. In order to address the exigencies of modern manifestations of trafficking in women, the definition of trafficking focuses on "forced labour or slavery-like practices", rather than narrowly focusing on prostitution or sexual exploitation. Documentation on trafficking patterns reveal that

trafficking is undertaken for numerous purposes, including but not limited to prostitution or other sex work, domestic, manual or industrial labour, and marriage, adoptive or other intimate relationships. The common elements found in all of the trafficking patterns are: (i) the lack of consent; (ii) the brokering of human beings; (iii) the transport; and (iv) the exploitative or servile conditions of the work or relationship. Thus, any definition of trafficking must capture these elements.

II. TRAFFICKING IN WOMEN

A. The history of international law relating to trafficking

18. International law relating to trafficking in women has an extensive history. This history, however, is characterized by a long string of ineffectual legal instruments that date back to 1904, when the first binding international legal instrument in this area, the International Agreement for the Suppression of the White Slave Trade, was adopted. Historically, anti-trafficking movements have been driven by perceived threats to the "purity" or chastity of certain populations of women, notably white women. The treaty, which focused on the protection of victims rather than the punishment of perpetrators, proved ineffective. Consequently, in 1910, the International Convention for the Suppression of White Slave Traffic, which bound the 13 ratifying countries to punish procurers, was adopted.

19. Subsequently, the drafters of the Covenant of the League of Nations deemed trafficking of such significance that they included "general supervision over the execution of agreements with regard to the traffic in women and children" within the League's mandate. Under the auspices of the League of Nations, both the 1921 Convention for the Suppression of Traffic in Women and Children and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age, were concluded. The 1921 Convention called for the prosecution of persons who trafficked in children, the licensing of employment agencies and the protection of women and children who immigrate or emigrate. The 1933 Convention required States Parties to punish persons who trafficked women of full age, irrespective of the women's consent.

20. These four conventions on trafficking were eventually consolidated by the United Nations in the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949 Convention), which continues to stand as the sole international treaty on trafficking. This is not to say that the protections of trafficked persons' human rights are confined to the 1949 Convention. States have a duty to provide protection to trafficked persons pursuant to the Universal Declaration of Human Rights, as well as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Convention on the Protection of the Rights of Migrant Workers and Members of their Families (not yet in force), the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, and International Labour Organization Conventions No. 29 concerning Forced Labour and No. 105 concerning the Abolition of Forced Labour.

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B. The 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others: a critique

21. Approaches to trafficking have been informed by the debate surrounding prostitution and the legal paradigms developed to address prostitution. There are four primary legal paradigms for addressing prostitution: (i) criminalization; (ii) decriminalization; (iii) legalization/ regulation; and (iv) decriminalization combined with a human rights approach. Criminalization takes two forms: prohibition and toleration. Both criminalization approaches view sex work as a social evil that should be subjected to penal measures. Toleration treats sex work as a necessary evil. Legislation based on this perspective is generally silent on the legality of prostitution itself. Likewise, it refrains from specifically targeting the sex worker. The prohibitionist approach, however, seeks to abolish prostitution through the criminalization of all acts and actors, including the sex worker herself. Decriminalization is based on the view that sex work is often a personal choice, and thus a private matter between consenting adults. Thus, relationships between sex workers and pimps, brothel owners, clients and landlords and the acts arising out of such relationships are viewed as outside the purview of criminal law. Decriminalization seeks only to punish non-consensual acts. Legalization also seeks to address prostitution outside the purview of criminal law. Instead, it seeks to regulate prostitution through zoning, licensing and, in some cases, mandatory health checks. Lastly, decriminalization with a human rights approach calls for the protection of the legal rights of sex workers. Thus, it calls for decriminalization of prostitution and related acts, and the application of existing human rights and labour rights to sex workers and sex work.

22. Among these paradigms, the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others arises out of a prohibitionist perspective and seeks to criminalize acts associated with prostitution, though not prostitution itself. The 1949 Convention has proved ineffective in protecting the rights of trafficked women and combating trafficking. The Convention does not take a human rights approach. It does not regard women as independent actors endowed with rights and reason; rather, the Convention views them as vulnerable beings in need of protection from the "evils of prostitution". As such, the 1949 Convention does very little to protect women from and provide remedies for the human rights violations committed in the course of trafficking, thereby increasing trafficked women's marginalization and vulnerability to human rights violations. Further, by confining the definition of trafficking to trafficking for prostitution, the 1949 Convention excludes vast numbers of women from its protection. Documentation shows that trafficking is undertaken for a myriad of purposes, including but not limited to prostitution or other sex work, domestic, manual or industrial labour, and marriage, adoptive or other intimate relationships.

23. The 1949 Convention, which fails to define trafficking, focuses solely on trafficking for the purpose of prostitution. In accordance with article 1, Parties to the Convention agree to punish any person who, to gratify the passions of another: (1) procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) exploits the prostitution of another person, even with the consent of that person. Thus, under the treaty, trafficking is not a distinct, cognizable offence; the treaty equates trafficking with the exploitation of prostitution. Although the Convention obligates States Parties to undertake unspecified measures to provide social, medical and legal measures to end prostitution and

rehabilitate women, to repeal legislation for the registration of prostitutes and to provide some level of international cooperation, it does not address the causes or the situations that lead to trafficking.[2]

24. Notably, the 1949 Convention does not prohibit prostitution per se. Rather, it seeks to abolish prostitution by targeting and punishing third-party involvement in prostitution. In so doing, it defers greatly to national laws on issues of prosecution. As such, it does not prohibit States from prosecuting sex workers in addition to third parties. Although, practically, targeting third parties would seem to protect sex workers from being penalized, such applications under national law have shown that it is the women who suffer the burden of criminalization, even when laws are crafted solely or primarily to target procurers, pimps and johns. For example, this has reportedly been the case in India, where the Immoral Traffic (Prevention) Act, which does not make prostitution, per se, illegal, but targets solicitation, enticement, procuring, living off the earnings of prostitution, keeping a brothel, detaining persons in premises where prostitution is practised, etc., has been most apparently invoked against sex workers.

25. The 1949 Convention allows States to punish women who have been subjected to international trafficking by sanctioning their expulsion. In accordance with article 19 (2), States Parties are called upon to repatriate persons referred to in article 18 who desire to be repatriated or who may be claimed by persons exercising authority over them or whose expulsion is ordered in conformity with the law. Under the later parts of this clause, trafficked women, who do not have legal residency in the country, are likely to be deported. In the process of deportation, trafficked women may be subjected to detention (protective or punitive) and/or forced "rehabilitation".

26. The Convention, which has been adopted by a mere 69 countries, has weak enforcement mechanisms. Although the Convention requires States Parties to report annually to the United Nations Secretary-General in regard to implementation of the Convention at the national level, no independent treaty body has been established to monitor the implementation and enforcement of the treaty. Less than half of the 69 States Parties report. Since 1974, the Working Group on Contemporary Forms of Slavery, mandated under the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, has reviewed States action in respect of trafficking.[3] Although the Working Group is empowered to receive and publicly review information on trafficking, it lacks a mandate to take action on the reports.

C. Current definitions of trafficking under international law

27. Despite the lack of a coherent definition, increasingly international instruments, including the Convention on the Elimination of All Forms of Discrimination against Women, the Declaration on the Elimination of Violence against Women and the Rome Statute of the International Criminal Court, have included proscriptions on trafficking. Likewise, the World Conference on Human Rights and the Fourth World Conference on Women addressed trafficking in their conference documents. Regrettably, these instruments have not contributed to the development of a clear definition of trafficking itself.

28. Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women states: "States Parties shall take all appropriate measures, including legislation, to

suppress all forms of traffic in women and exploitation of prostitution of women." According to the travaux préparatoires (the legislative history of the treaty), a debate arose as to whether article 6 should call for States Parties to combat prostitution per se or merely the exploitation of prostitution. A proposal put forward by Morocco for the abolition of prostitution in all its forms was rejected and the emphasis was placed on trafficking and the exploitation of prostitution. Although this history gives us insight into the drafter's perspective, it too fails to provide a definition of trafficking or, for that matter, the constituent elements of "exploitation of prostitution". General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women goes farther in defining the parameters of the exploitation of prostitution. According to General Recommendation No. 19:

29. Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.

30. According to the definition of violence against women set forth in article 2 of the Declaration on the Elimination of Violence against Women,

> "Violence against women shall be understood to encompass, but not be limited to, the following: ... (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution."

31. The Rome Statute of the International Criminal Court includes enslavement (art. 7.1 (c)) in its list of crimes against humanity. According to article 7.2 (c), "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children. This signifies the modern approach of linking trafficking to slavery-like practices.

32. The documents arising from the World Conference on Human Rights (1993) and the Fourth World Conference on Women (1995) both called upon States to combat trafficking, but failed to provide adequate definitions of the term. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights stressed the importance of working towards the elimination of violence against women in public and private life. It addressed the issue of "international trafficking" as a form of gender-based violence and called for its elimination through international cooperation in such fields as economic and social development and through national legislation.[4] Whereas the Forward Looking Strategies of the Third World Conference on Women (1985) solely addressed traffic in women for prostitution and forced prostitution,[5] the Beijing Platform for Action reflects a broader understanding of trafficking. The Beijing Platform for Action, calls upon Governments to take appropriate measures to address the root factors, including external factors, that encourage trafficking in women and girls for prostitution and other forms of commercialized sex, forced marriages, and forced labour in order to eliminate

trafficking in women, including by strengthening existing legislation with a view to providing better protection of the rights of women and girls and to punish the perpetrators, through both criminal and civil remedies.[6]

33. The General Assembly, the Economic and Social Council, the Commission on Human Rights and the Commission on the Status of Women have all passed resolutions on trafficking. None of these resolutions, however, define trafficking. They include: General Assembly resolution 50/167 of 22 December 1995; Commission on Human Rights resolution 1995/25 of 3 March 1995; Commission on the Status of Women resolutions 39/6 of 29 March 1995 and 40/4 of 22 March 1996; Commission on Human Rights resolution 1996/24 of 19 April 1996; Commission on Human Rights resolution 1997/19 of 11 April 1997, adopted without vote; Economic and Social Council resolution 1998/20 of 28 July 1998; Commission on Human Rights resolutions 1998/30 of 17 April 1998 and 1999/40 of 26 April 1999.

34. Despite the plethora of international instruments, there is no clear or agreed upon definition of trafficking. An assumption seems to have been made by the international community of a shared understanding of trafficking. Because of its traditional links with the debates on prostitution outlined above, the definition of trafficking has been a contentious issue. Increasingly, however, the various sides of the debate are attempting to reconcile their differences and are seeking to build consensus in the name of protecting the human rights of trafficked women.

III. VIOLATIONS PERPETRATED AGAINST WOMEN IN THE COURSE OF MOVEMENT

A. Violence against women

35. Because of the lack of independent legal protections afforded to both documented and, in particular, undocumented immigrant women, exacerbated by immigrant women's social and cultural marginalization, immigrant women are placed by the State in situations of enhanced vulnerability to violence. Women move and are moved, consensually and non-consensually, legally and illegally, for a myriad of social, political, cultural and economic reasons. Women's movement is increasingly impeded by legal obstacles erected by the State and thus women and their movement are increasingly forced underground.

36. The Global Survival Network has identified four types of situations that result in women's and girl's involvement in the sex trade.[7] The Special Rapporteur's own research suggests that these typologies could also be applied to other forms of labour for which women migrate or are trafficked. The first group includes women who have been completely duped and coerced. Such women have no idea where they are going or the nature of the work they will be doing. The second group comprises women who are told half-truths by their recruiters about their employment and are then forced to do work to which they have not previously agreed and about which they have little or no choice. Both their movement and their power to change their situation are severely restricted by debt bondage and confiscation of their travel documents or passport. In the third group are women who are informed about the kind of work they will be doing. Although they do not want to do such work, they see no viable economic alternative, and therefore relinquish control to their trafficker who exploits their economic and legal vulnerability

for financial gain, while keeping them, often against their will, in situations of debt bondage. The fourth group is comprised of women who are fully informed about the work they are to perform, have no objections to performing it, are in control of their finances and have relatively unrestricted movement. This is the only situation of the above four that cannot be classified as trafficking.

37. These typologies highlight the changing nature of the experiences of women who move or are moved. Women's status often does not remain fixed: their position may shift between the four categories. Throughout the course of their movement, irrespective of how, why or where they move, women are subjected to myriad forms of violence. Women's vulnerability in terms of violations of their rights and violence against them increase as their marginalization increases. Thus, trafficked women, by the mere nature of the definition of trafficking proposed above, are more likely to suffer violence, particularly in the light of the atmosphere of impunity that exists in respect to violations committed by traffickers and the lack of rights, remedies and redress afforded to trafficked persons.

38. As discussed above, the characteristic that distinguishes trafficking and facilitated migration is the non-consensual nature of trafficking. Violence and threats of violence are common - perhaps the most common - forms of coercion employed against trafficked women. In particular, rape and other forms of sexual violence are often used to break trafficked women physically, mentally and emotionally and to obtain their enforced compliance in situations of forced labour and slavery-like practices. Rape and other forms of sexual violence are used as weapons against migrant women irrespective of the nature of the work they are to perform. Forms of sexual violence, however, are most persistently used against trafficked women to "condition" them for forced sex work.

39. Whether locked in a sweatshop or factory, or locked in a brothel, migrant women and trafficked women are often subjected to arbitrary and enforced deprivation of liberty at the hands of both non-State and State actors. Women's movement is either overtly impeded through locks, bars and chains or less conspicuously (but no less effectively) restricted by confiscation of their passports and travel documents, stories of arrest and deportation, threats of retaliation against family members, or threats that the nature of their work will be revealed to family and community members, and physical violence. Traffickers use the law, and the threat of deportation, to their advantage. "To immobilize their victims psychologically and prevent their escape, frequently they threaten the women with deportation. Since deportation implies risks to the women's families because of the still existing smuggling debt, public humiliation and ostracization because of disclosure of the woman's activity, and possibly further victimization, this threat is highly effective."[8] Some advocates have compared the violence perpetrated against trafficked women to torture and cruel or inhuman treatment in violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

40. An aspect of the definition of trafficking used by the Special Rapporteur is the fact that victims of trafficking end up in situations of forced labour or slavery-like practices, both of which are enforced by and constitute violence in their own right. Women overwhelmingly perform the highest percentage of unskilled paid labour, including assembly-line labour, cleaning, cooking and caring work, either in private houses as domestic workers or in restaurants and hotels, or as entertainers and sex workers.[9] These jobs are usually the lowest paid jobs, with

few to no occupational protections, labour rights or job security. In addition, lack of or inadequate laws and labour standards, and the illegal or semi-legal nature of the work form the basis for forced, servile and exploitative working conditions, varying from humiliating treatment, low payment and extreme working hours to bonded labour or forced labour.

41. In the case of international migration for marriage, legal residence is often linked to the citizen husband's continuing sponsorship. As a consequence, women who enter the marriage market either by choice or by deception, force or coercion, are placed in vulnerable positions under the law. Many immigrant wives are subjected to domestic violence, including marital rape, but have little or no access to legal remedies. To seek the assistance of the police or the judiciary may be to make themselves subject to immediate deportation, which is often not desired by the women. Thus, the lack of formal mechanisms of redress reinforces and legitimizes the women's forced and servile domestic situation. Increasingly, however, countries such as the United States are creating legal exemptions for battered immigrant women, whereby they are able to obtain or retain their legal residency status irrespective of their husband's continuing sponsorship.

B. Discriminatory practices that cause or contribute to violence: restrictions on mobility, nationality laws, equal protection, labour rights, etc.

42. In the past few years, the international community and Governments have consistently expressed their concern about trafficking in women.[10] The Special Rapporteur welcomes this trend and would like to encourage Governments in their efforts to find ways and means of protecting and promoting the human rights of trafficked persons and combating trafficking. However, while Governments have been endeavouring to seek ways and means to combat trafficking, they (particularly Governments of northern countries) simultaneously have been taking measures to fortify their external borders against the perceived threat of unfettered immigration. Such policies may conflict with strategies to effectively combat trafficking and protect the rights of trafficked persons. The Special Rapporteur urges Governments to ensure that immigration laws are compatible with international human rights standards.

43. On the issue of trafficking, Governments overwhelmingly adopt a law and order approach, with an accompanying strong anti-immigration policy. Such an approach is often at odds with the protection of human rights. Further, while many government policies may be inspired by benevolent intentions, they often serve to either create or exacerbate existing situations that cause or contribute to trafficking in women. Policies and practices that either overtly discriminate against women or that sanction or encourage discrimination against women tend to increase women's chances of being trafficked.

44. Despite the fact that trafficked women, and more generally undocumented migrant women, are often the victims of crime, they are often perceived and treated as criminals in countries of destination. The media, often encouraged by the official anti-immigration policies of the State, create and propagate the image of the immigrant as criminal. Such perceptions are caused by the intersection of racism and xenophobia, which is increasingly found implicit in the official policies of highly industrialized States. Such stereotyping serves to marginalize and increase the vulnerability of undocumented immigrants. Further, in addition to all the risks that

their male compatriots shoulder, female migrants face threats to their bodily integrity because of the ever present, added risk of sexual abuse by the smugglers, male migrants and even police and immigration officials. Even if they are victimized, however, these undocumented migrants continue to be classified as criminals because of their immigration status and attendant offences which they may have committed.[11]

45. The arrest, in December 1998, of 53 trafficked women in Toronto highlights the problems of a law enforcement approach. The women, who were reportedly trafficked from Asia into Canada and sold for approximately $16,000-$25,000 (Canadian), were then forced to work off an approximately $40,000 debt. Although the year-long operation was meant to target the agents behind the operation, the women were likewise arrested and charged on prostitution-related charges. Some women also faced charges under the Immigration Act. The women's bail was set at $1,500. The women described situations of forced labour and sexual slavery and the traffickers were charged with forcible confinement. Nonetheless, law enforcement agents were hesitant to label the operation sexual slavery owing to the existence of "contracts", under which the women's travel documents were confiscated, their movements restricted and they were forced to work off their debt by performing approximately 400-500 sex acts. Because some of the women had agreed to migrate to work in the sex trade, law enforcement agents concluded that "they knew exactly what they were getting into".

46. In particular, the Special Rapporteur is concerned that many Governments equate illegal migration, particularly illegal migration for prostitution, with trafficking in women. Illegal migration is not trafficking per se, even though some trafficking is undertaken by means of illegal migration. Similarly, the illicit smuggling of human beings is not per se trafficking, even though some traffickers may smuggle trafficking victims across borders. In some cases, the distinction may be subtle. However, in terms of crafting policy to address trafficking, it is essential that the distinction be made. Laws and policies on immigration designed to combat or prohibit illegal migration or migrant smuggling may cause or contribute to trafficking by lessening access to legal measures by trafficked parties. It is essential that Governments ensure that such laws are compatible with their obligations and their stated intentions to combat trafficking in persons.

47. The Governments of many countries have responded to calls to combat trafficking by restricting women's rights to freedom of movement and mobility. Reportedly, Nepal and Romania are two such countries. The Special Rapporteur is disturbed by the increasing use of "profiles" of potential victims. The profiling of potential victims leads to discrimination against women, not only based on their sex, but also on their economic and marital status.

48. According to reports, in 1998 in Braila, Romania, sex workers were summoned to the local police station, where their passports were confiscated. Reportedly, the women were informed that the denial of travel documents was being undertaken to protect Romania's international reputation. Many of the women targeted undertook consensual migratory sex work in Turkey, but did not engage in sex work in Romania. The women were also threatened with arrest and imprisonment for numerous fabricated offences relating to domestic sex work, as well as exposure in their communities and families.

IV. ACCOUNTABILITIES FOR VIOLATIONS OF WOMEN'S HUMAN RIGHTS

49. The Special Rapporteur would like to highlight the precedent-setting case which, according to reports, was successfully prosecuted in the United States by the Justice Department in Washington D.C. and the US Attorney's office in south Florida against 15 members of the Cadena family, who were trafficking women from Mexico to the United States. The leader of the ring pleaded guilty to charges that he headed a group that trafficked at least 23 women into the United States. The women were reportedly lured to the United States with promises that they would be employed as nannies and domestic workers, but were then forced to work as sex workers. The women were allegedly forcibly kept in slavery-like conditions. They were locked in windowless rooms and were given no money. They were forced to work until they repaid a $2,000 smuggling fee. The traffickers threatened the women with reprisals against their families if they tried to escape. In addition to jail terms of up to 15 years, the convicted parties were ordered to pay restitution to the women in the amount of $1 million.

A. Direct State responsibility

50. The State becomes directly responsible for an act of one of its actors, even if such an act was undertaken outside the scope of the State actor's official capacity. States are also responsible for the actions of non-State actors that are carried out on the State's behalf. As such, in the context of trafficking, a State is responsible for acts committed by its own actors, be they immigration officials, border patrols or police. "States have a responsibility to provide protections to trafficked persons pursuant to the Universal Declaration of Human Rights and through ratification or accession to numerous international and regional instruments."[12] Such protections are found in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (not yet in force), the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and International Labour Organization Conventions No. 29 concerning Forced Labour and No. 105 concerning the Abolition of Forced Labour.

B. Due diligence

51. In a two-year study, the Global Survival Network found cases in which the police were actively involved in trafficking. The more common scenario, however, was that the police knowingly turn a blind eye to trafficking and thus failed in their duty to provide protection to victims of trafficking. "International human rights instruments impose a duty upon States to respect and ensure respect for human rights law, including the duty to prevent and investigate violations, to take appropriate action against violators and to afford remedies and reparation to those who have been injured as a consequence of such violations."[13] These duties combine to constitute the State's duty to act with due diligence to "prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted by the damages resulting from the violation". [14]

52. In addition to being articulated in international instruments themselves, the due diligence standard, as articulated in the Velásquez-Rodriquez case, has been widely accepted as the measure by which State responsibility for violations of human rights by non-State actors is assessed. The Special Rapporteur would like to highlight, in addition to her previous reports, the prominence that has been given to the due diligence standard, inter alia, in reports by other Special Rapporteurs, including the Special Rapporteurs on torture, on extrajudicial, summary and arbitrary executions, and on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self determination; reports by representatives of the Secretary-General, including the Representative on internally displaced persons; by treaty bodies such as the Committee on the Elimination of All Forms of Discrimination against Women, and the Committee on the Elimination of All Forms of Racial Discrimination; by expert group meetings such as the meeting on children and juveniles in detention; in resolutions and declarations, particularly on violence against women, and writings by publicists.[15]

53. Due diligence requires more than the mere enactment of formal legal prohibitions. The States' measures must effectively prevent such actions. Failing effective prevention, a prompt and thorough investigation, resulting in prosecution of the culpable parties and compensation for the victim, must be undertaken. In order to comply with the due diligence standard, the State must act in good faith. Accordingly, the Inter-American Court stressed that States must employ all means of a legal, political, administrative and cultural nature that promote the protection of human rights, and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damage.[16] The European Commission has likewise found that the European Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective.[17] The Special Rapporteur, in her 1999 report on domestic violence (E.CN.4/1999/68), enumerated a list of considerations in assessing State compliance with the due diligence standard.

V. LACK OF RIGHTS AND DENIAL OF FREEDOM: THE ROOT CAUSES OF TRAFFICKING

54. The root causes of migration and trafficking greatly overlap. The lack of rights afforded to women serves as the primary causative factor at the root of both women's migrations and trafficking in women. While such rights inevitably find expression in constitutions, laws and policies, women nonetheless continue to be denied full citizenship because Governments fail to protect and promote the rights of women. In the home, in the community and in State structures, women are discriminated against on numerous, intersecting levels. The most extreme and overt expression of such discrimination is physical and psychological violence against women. Violence is a tool through which discriminatory structures are strengthened and the more insidious and subtle forms of discrimination experienced by women daily are reinforced. By failing to protect and promote women's civil, political, economic and social rights, Governments create situations in which trafficking flourishes.

55. Gender-based discrimination intersects with discriminations based on other forms of "otherness", such as race, ethnicity, religion and economic status, thus forcing the majority of the world's women into situations of double or triple marginalization. Not only are women discriminated against as women, but as ethnic, racial or linguistic minorities and as ethnic, racial

or linguistic minority women. Because discrimination based on ethnicity, race, religion, etc. is imbedded in State and social structures, such discrimination decreases the rights and remedies available to women and increases women's vulnerability to violence and abuse, including trafficking. For example, the Rohingya women, in northern Arakan State, Myanmar, have been rendered stateless by the fact that Myanmar denies the Rohingya citizenship. Owing to their undocumented status, they are unable to move freely across borders. For this reason, the Rohingya rely on facilitated migration. The women, in particular, become victims of traffickers who prey on their predicament.

56. The failure of the State to guarantee women's rights leads to sexual and economic exploitation of women in both the home and the community and within the local, national and global economies. Economic, political and social structures and the models of development that arise from such structures have failed women. They have failed in their attempts to provide basic economic and social rights to all people, particularly to women, and have further entrenched sex-based divisions of education, labour and migration. Basic rights, such as to food, shelter, education, employment, a sustainable living and peace have been denied to a large percentage of the world's population, of which women comprise a large portion.

57. Trafficking in women flourishes in many less developed countries because the vulnerabilities arising from women's lack of access to resources, poverty and gender discrimination are maintained through the collusion of the market, the State, the community and the family unit. Traditional family structures, which are based on the maintenance of traditional sex roles and the division of labour that derives from such roles (for women, housekeeping, care-taking and other unpaid or underpaid subsistence labour), support the system of trafficking. Further, feudal and exploitative social structures have given rise in many countries, such as Nepal and Bangladesh, to consumerism and a skewed, gender, caste and class based resource distribution system. This in turn legitimates discrimination against women at the community level, as represented by uneven division of wage labour and salaries, citizenship rights and inheritance rights; and at the family level through the high preference for male children and the resulting discriminatory practices against girls that are perpetrated throughout their life cycle.[18] The preference for male children and the culture of male privilege deprives girls and women of access to basic and higher education and, consequently, illiteracy rates among women remain high. In addition, certain religious and customary practices, reinforced by government policies, further entrench and validate discrimination and perpetuate the cycle of oppression of women.

58. Womens lack of rights and freedoms is exacerbated by external factors such as the ever-widening gap between rich and poor countries, and within those countries, between rich and poor communities. The economic, social and political inequalities that exist between rural and urban, majority and minority, and industrialized and industrializing, increasingly are leading to internal as well as international political instabilities and violent upheavals such as those that were witnessed in Albania in 1997 and in Indonesia in 1998, during which women are targeted by particularized forms of violence, such as rape. The failure of existing economic, political and social structures to provide equal and just opportunities for women to work has contributed to the feminization of poverty, which in turn has led to the feminization of migration, as women leave their homes in search of viable economic options.

59. Globalization may have dire consequences for human rights generally and women's human rights particularly, in terms of eroding civil, political, economic, social and cultural rights in the name of development and macro-level economic restructuring and stability. In the countries of the South, structural adjustment programmes have led to increased impoverishment, particularly amongst women, displacement and internal strife resulting from the political instabilities caused by devaluing national currencies, increasing debt and dependence on foreign direct investment. The crisis in ASEAN countries is an indicator that globalization policies can result in disaster if not properly managed. The economic crisis in East Asia has resulted in many women being trafficked to escape from sudden poverty. In some countries, development policies and practices have led to large-scale displacements of local populations. The Narmada Valley dam project in India, which is being protested by thousands of villagers in the Narmada Valley who will be displaced by the project, is an example of the destabilizing capacity of "development". The destabilization and displacement of populations increase their vulnerability to exploitation and abuse through trafficking and forced labour. Political instability, militarism, civil unrest, internal armed conflict and natural disasters also exacerbate women's vulnerabilities and may result in an increase in trafficking. According to reports, most recently, trafficking networks responded to the war in Kosovo and consequent exodus of refugees by increasing recruitment of Kosovars. The Special Rapporteur is particularly concerned by reports of United Nations peacekeepers involvement in violence against women and calls on the United Nations to take measures to prevent such violence and to punish it when it arises. The United Nations will loose its moral force if it fails to respond when those within the United Nations system violate human rights.

60. In the absence of strong measures to protect and promote the rights of women, trafficking thrives. When women do not have rights or when such rights are trampled upon by policies and practices of the Government, including policies that relinquish the traditional powers of the State to non-State corporate entities, socially vulnerable groups, including women, are made more vulnerable. In the absence of equal opportunities for education, shelter, food, employment, relief from unpaid domestic and reproductive labour, access to structures of formal State power, and freedom from violence, women will continue to be trafficked. Policies and practices that further curtail women's rights and freedom, such as those that restrict women's movement and limit safe and legal modes of immigration, serve only to entrench trafficking. Therefore, the responsibility for the existence and perseverance of trafficking rests squarely with the State. The State is ultimately responsible for protecting and promoting the rights and freedoms of all women.

VI. THE IMPACT OF IMMIGRATION LAWS AND POLICIES ON TRAFFICKING AND MIGRATION

61. The Special Rapporteur is concerned by the apparent link between protectionist, anti-immigration policies and the phenomenon of trafficking. Restrictive and exclusionary immigration policies, when combined with the destabilizing effects of conflict, globalization and neo-liberal development strategies which result in increasing outflows of legal and illegal migrant labour, serve as important causative factors in the persistence and prevalence of trafficking. Anti-immigration policies aid and abet traffickers. Documentation shows that inflexible policies of exclusion, which are enforced through severe punishments of a penal nature and deportation for their breach, feed directly into the hands of traffickers. The availability of legal migrant work, which is subject to government regulation and scrutiny, reduces the reliance

on third parties of those who seek to migrate for work. Trafficking economies - which arise out of a combination of supply, demand and illegality - are less likely to develop in situations in which opportunities exist for legal migrant work. Increasingly, highly industrialized countries such as those in Europe, North America and Asia have placed restrictions on legal, long-term immigration. Strong anti-immigration regimes are increasingly typical in these countries and are justified by Governments as a component of a rational policy of protectionism and deterrence arising out of economic imperatives. For example, since the end of the Cold War and the establishment of democratic rule in Eastern Europe, Western Europe has responded by tightening its external borders. European migrations from East to West are seen as both a threat to domestic security and to European unity. As a consequence, restrictions on immigration have increased, and with them, trafficking has reportedly increased.

62. Illegal border crossing is increasingly met with stiff penalties both for third parties who facilitate clandestine entries and for undocumented immigrants whose migration is facilitated through illegal means. Penalties for illegal entry range from six months' imprisonment in Denmark, the Netherlands, Norway and the United Kingdom, to one year's imprisonment in Belgium, France and Germany, to two years' imprisonment in Canada and Italy. Strict anti-immigration policies, which reduce opportunities for legal migration and thereby encourage migrants to turn to third parties for assistance in migrating and to rely on false promises of legal migration, serve to provide an ever-growing number of clients to the increasing number of underground networks of immigrant smugglers. Further, such policies impact strongly on the living and working conditions of migrant workers, increasing their vulnerability to violence, abuse and control by criminal networks.[19]

63. Increasingly, and often justified as a response to trafficking, policies that restrict the movement of women are being instituted in countries of origin. Some countries, including Myanmar and Poland, have legally prohibited exiting the country without permission. The Immigration and Manpower Act in Myanmar, for example, prohibits the leaving of that country without proper authorization. As such, persons trafficked from Myanmar or Poland face punishment on two fronts: in the destination country and, when they return or are returned, in their country of origin.

64. Overwhelmingly, migrant women are not allowed to work legally in the sex sector. Thus, migrant sex workers' immigration status is generally undocumented, making them more vulnerable to violence, abuse and control by traffickers. Many countries, including the United States, Japan, Turkey, Cyprus and Uganda, legally bar persons engaged in or living off the proceeds of prostitution from entering the country and subject such persons to arrest, detention (sometimes prolonged) and deportation if they do succeed in entering the country. While some countries, such as Switzerland, Belgium and Japan, provide special entertainers' or artists' visas for sex work, a few, including Suriname, Aruba and Curaçao, openly provide working permits for foreign sex workers.

65. As an aspect of their immigration policies, many northern countries have introduced laws to combat sham marriages between nationals and non-nationals. Such laws have resulted in higher fees and hence greater vulnerability for women seeking to enter the marriage market. The penalties associated with sham marriages increase immigrant women's vulnerability to domestic violence since their legal immigration status is often dependent on maintaining the marital

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relationship, thereby increasing the power disparity between the citizen husband and the immigrant wife. Increasingly, countries such as the United States have introduced exceptions to sponsorship requirements in cases of domestic violence against immigrant women.

66. In some countries, undocumented immigrants are required to cover the expenses associated with their deportation, and thus languish in immigration detention facilities or prisons - sometimes held in common cells with convicted criminals - until they are able to obtain sufficient funds. Thus, undocumented immigrants may be subjected to custodial violence. Cases of custodial rape and other forms of sexual violence against undocumented immigrant women detained for deportation have been reported. Due to their double marginalization, undocumented immigrant sex workers are particularly vulnerable to rape and other forms of sexual violence and sexual misconduct.[20]

67. In the overwhelming majority of countries of destination, deportation remains the primary mechanism for dealing with undocumented immigrants, including trafficked persons. Generally, government officials in the countries of destination fail to distinguish between categories of undocumented immigrants, treating victims of trafficking in the same way as perpetrators of crimes. Further, countries of destination rarely accept responsibility for their complicity in trafficking, despite the fact that they too have failed to act with due diligence to protect and promote human rights in their territory. Instead, they seek merely to rid their territory of undocumented immigrants. Some trafficked women want to return to their countries of origin to escape abuse and violence. Others, however, fear stigmatization, rejection by their families, prosecution by the Government or reprisals by their traffickers if they return. However, the trafficked woman's wishes are rarely taken into consideration. Irrespective of her wishes, deportation is the States' preferred legal solution. "Deportation implies not only returning to the conditions which the women attempted to leave in the first place, but often also intimidation and threats by the smuggling operation either because the women owe the traffickers money for their failed trip or because they testified or are perceived to have provided information against the procurers."[21]

VII. CURRENT PATTERNS OF TRAFFICKING AND MIGRATIONS

68. Trafficking routes replicate migration routes: the movement has traditionally been from South to North. However, modern trends show that trafficking also occurs within regions, as well as within regions and within States. Like migration routes, trafficking routes and countries of origin, transit and destination may change rapidly owing to political and economic changes. The Special Rapporteur would like to highlight the following countries, which have been brought to her attention as countries of origin and/or countries of destination. She would like to point out, however, that this is not an exhaustive list of countries or areas of origin or destination.

69. Countries or areas of origin: Afghanistan, Albania, Bangladesh, Belarus, Bulgaria, Cambodia, China, Colombia, Croatia, Hungary, India, Indonesia, Jamaica, Kosovo, Latvia, Lithuania, Mexico, Myanmar, Nepal, Pakistan, the Philippines, Poland, Russia, Romania, Slovakia, Thailand, Ukraine, countries of the former Soviet Union, Viet Nam

70. Countries or areas of destination: Austria, Australia, Belgium, Canada, China (including Hong Kong and Macao), Cyprus, Dubai, the Federal Republic of Yugoslavia, Greece, Germany,

Hungary, India, Israel, Italy, Japan, Malaysia, the Netherlands, Pakistan, Poland, Saudi Arabia, Singapore, Spain, Switzerland, Taiwan, Thailand, Turkey, the United Kingdom, the United States, and the United Arab Emirates.

71. Trafficking, however, does not necessarily involve the crossing of international borders. Internal trafficking occurs in most of the above countries or areas as well. Further, trafficking is not stagnant. Trafficking routes continue to change.

72. Much has been and continues to be written about trafficking and migration. Feeding off and feeding into anti-immigration sentiments of highly industrialized countries, Governments, non-governmental organizations and the media reveal increasingly growing numbers of women who are being trafficked.[22] The United States State Department recently claimed that 50,000 women are reportedly trafficked into the United States each year.[23] The International Organization for Migration has been cited as estimating that 500,000 women are trafficked into Western Europe alone. The United Nations has estimated that 4 million persons are trafficked each year. Such figures are unreliable, however. Because of the underground nature of trafficking, reliable statistics are difficult, if not impossible, to collect. Further, the lack of a clear definition of trafficking poses a further limitation in the compilation of figures or statistics. Often, both governmental and non-governmental sources treat undocumented immigrants as one category irrespective of whether such immigrants were smuggled or trafficked.

73. Although documentation suggests that trafficking is a truly global phenomenon, the governmental and non-governmental attention and resources devoted to addressing trafficking clearly vary, not only from country to country, but also from region to region. Whereas there are organizations and projects that address trafficking in South Asia, South-East Asia, North America, and Western, and increasingly Eastern Europe, little information is available from Africa and Latin America. Interestingly, in both of these regions, greater emphasis seems to be placed on women's migration than on trafficking. Likewise, the discourse appears to be focused more on economics than on violence. This could account for the difference.

74. Information on trafficking in Asia is most readily available. There are well documented trafficking routes within South Asia, from Bangladesh, Nepal and Pakistan to India, and widely within India, particularly to the cities of Calcutta and Bombay. The political situation in Myanmar has contributed to a trafficking outflow, particularly of Karen women. There is also widespread trafficking from South Asia to the Middle East, particularly for domestic labour. Likewise, trafficking within and from South-East Asia has been widely recorded. According to the Government of the Philippines, the largest source of foreign exchange has been overseas migrant labour. In 1995, there were 4.2 million Filipinos working abroad. Trafficking occurs within and to China from bordering countries largely for forced marriages. According to information, women and girls from the People's Democratic Republic of Korea are being trafficked to China for forced marriages to Chinese farmers and labourers throughout the country. Reportedly, others are being sold to karaoke halls and brothels. Increasing levels of poverty and decreasing levels of employment are said to be contributing to an increase in trafficking of women from the People's Democratic Republic of Korea to China.

75. There is a dearth of information about trafficking from, in and throughout Africa. Increasingly, however, the existence of trafficking networks within Africa is being revealed.

The Special Rapporteur notes an urgent need for research and documentation on trafficking from and within Africa. According to reports, women in Mauritania are being trafficked internally between ethnic groups.[24] As many as 25,000 Kenyans are reported to be living in inhuman and degrading conditions in the Middle East as a result of trafficking. With unemployment soaring within their own country, Kenyans increasingly are seeking to migrate for job opportunities abroad. Although many are able to secure legitimate jobs with the help of official foreign employment agencies, numerous others are turning to bogus employment agencies and ending up in slavery-like conditions of forced labour. Racial, ethnic and religious minorities in the Sudan, in particular the Nuba, are reportedly being trafficked and sold into slavery. The Special Rapporteur would like to highlight the conclusion of the Special Rapporteur on the situation of human rights in the Sudan in that the abduction of persons, mainly women and children belonging to racial, ethnic and religious minorities from southern Sudan, the Nuba Mountains and the Ingassema Hills areas, their subjection to the slave trade, including traffic in and sale of children and women, slavery, servitude, forced labour and similar practices are taking place with the knowledge of the Government of the Sudan.[25]

76. According to reports, thousands of domestic workers are being brought into the United States by foreign diplomats and employees of international organizations such as the International Monetary Fund, the United Nations and the World Bank and then exploited and subjected to abuse. Under United States immigration law, foreign diplomats, embassy employees and officials of organizations such as the World Bank, the International Monetary Fund and the United Nations may bring in personal domestic workers on A-3 or G-5 visas. Although these thousands of workers, most of whom are women, are supposed to be protected by labour laws and paid a minimum wage, there has been little oversight. As a result, some of these women are subjected to conditions of forced labour or slavery-like practices. In some cases, employers have reportedly confiscated the employee's passports, required round-the-clock services with little or no pay, restricted contact with other domestic workers, confined employee movements and physically abused the workers. Since the domestic worker's legal immigration status is dependent upon her contract, the worker may face deportation if she tries to escape the situation. In 1999, the United States Attorney General formed a "worker exploitation task force" to investigate allegations of abuse. It has been pointed out that visa programmes, that make immigrant's legal status contingent upon their employment status with a specific employer turns employees into captive workers in situations of indentured servitude. A new advocacy group in Washington D.C., Campaign for Migrant Domestic Workers' Rights, is attempting to hold the World Bank and IMF responsible, since the organizations help to facilitate the process of bringing domestic workers into the country. They are working to get the World Bank to help inform domestic workers of their rights and to sponsor a $350,000 a year monitoring programme that would require staff members to submit copies of contracts, tax forms and proof of wage payment. While the World Bank has expressed willingness to discuss the proposal, IMF has reportedly rejected the group's requests for discussion.

77. The instability of Eastern Europe after the fall of the Berlin Wall has led to an increase in trafficking from Eastern Europe and the former Soviet Union. The situation of armed conflict in the Balkans has likewise contributed to an increase in trafficking in the region. According to reports from NGOs such as the Southall Black Sisters and Keighley Women's Domestic Violence Forum, forced marriages, by which it is sought to control young women's freedom and sexuality, are on the rise in Asian communities in Britain. Such marriages should be

distinguished from consensual arranged marriages, which continue to be the norm in many sections of the Asian diaspora. In Austria, in 1998, the police uncovered a trafficking ring, which resulted in the arrest of 18 traffickers. Twenty women were reportedly freed, many of whom returned to their homes. Some victims, however, stayed in Vienna to testify against the traffickers.

VIII. REMEDIES: FROM RESCUE AND REHABILITATION, TO RIGHTS AND REDRESS

A. Governmental responses

78. "If and when we figure in political or developmental agenda, we are enmeshed in discursive practices and practical projects which aim to rescue, rehabilitate, improve, discipline, control or police us. Charity organizations are prone to rescue us and put us in 'safe' homes, developmental organizations are likely to 'rehabilitate' us through meagre income generation activities, and the police seem bent upon to regularly raid our quarters in the name of controlling 'immoral' trafficking. Even when we are inscribed less negatively or even sympathetically within dominant discourses we are not exempt from stigmatization or social exclusion. As powerless, abused victims with no resources, we are seen as objects of pity. Otherwise we appear as self-sacrificing and nurturing supporting cast of characters in popular literature and cinema, ceaselessly ready to give up our hard earned income, our clients, our 'sinful' ways and finally our lives to ensure the well-being of the hero or the society he represents. In either case we are refused enfranchisement as legitimate citizens or workers, and are banished to the margins of society and history."[26]

79. The international community has, since the early 1900s, classified trafficking of women as a serious abuse of women. Over time, thinking about trafficking has changed, as have the strategies through which trafficking is addressed. Punitive measures, prevention, rescue and rehabilitation have all been employed to combat trafficking. Irrespective of the means of redress, however, one thing has remained constant - the lack of political will in terms of guaranteeing the human rights of trafficked women. The Special Rapporteur would like to note her concern at the apparent lack of political will, in countries of origin, transit and destination, to provide legal protection to trafficked women. Not only have States failed to develop appropriate mechanisms of prevention and redress for victims of trafficking, but they have also failed to employ existing laws - such as laws against assault, rape, kidnapping and extortion - to prosecute traffickers.[27]

80. Any remedy or strategy proposed to combat trafficking and provide assistance to victims of trafficking must be assessed in terms of whether and how it promotes and provides protection for the human rights of women. It has been pointed out that even seemingly harmless mechanisms of prevention, such as education campaigns, may be problematic if they aid in the immobilization of women or the entrenchment of harmful or disempowering stereotypes. While anti-trafficking campaigns may merely seek to warn women of the potential dangers of trafficking, they may also serve to further restrict women's free movement.

81. Methods of forcible rescue and rehabilitation of sex workers, such as those reportedly undertaken in India and Bangladesh, have been severely criticized by women's human rights

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advocates, who report that such practices are coercive, often violent and, thus, in some cases violate the human rights of women. In July 1999, the police in Bangladesh cracked down on the sex industry, forcibly evicting women working in the red light districts of Tan Bazar and Nimtali in Dhaka. According to reports, the women have been given the option of either voluntarily submitting to government "rehabilitation" or being barred from continuing their business in Tan Bazar and Nimtali. After a pre-dawn police swoop on 24 July, many of the women fled . Others were forcibly taken to a home for vagrants, where they have reportedly been subjected to physical and sexual abuse. According to reports, the crackdown was initiated after a 22-year-old sex worker, Jesmin, was murdered on 1 July 1999. On 30 July, a group of unidentified youths opened fire at protestors who were demonstrating against the violation of human rights of the women of Tan Bazar and Nimtali. According to observers, the police failed to intervene.

82. One group in India queries where, in a country with unemployment of such gigantic proportions, the compulsion to displace millions of women and men who are already engaged in an income earning occupation which supports themselves and their extended families, comes from. If other workers in similarly exploitative occupations can work within the structures of their profession to improve their working conditions, why cannot sex workers remain in the sex industry and demand a better deal in their life and work?[28]

83. One of the responses increasingly employed by countries of destination is to place restrictions on previously open policies of immigration. For example, a State that has granted visas to dancers, models and strippers, who are perceived to be at high risk of being forced into sex work, may introduce the requirement that such women should be professional strippers. Such a requirement restricts the pool of women eligible to apply for such visas. It does nothing, however, to reduce the number of women seeking to migrate and thus may feed women who are willing to work as strippers, but who are not professional strippers, into the hands of traffickers. In this way, some legal reforms may create new opportunities for trafficking and may be counterproductive for women.

84. "Protective measures are not only problematic because of the reaction of traffickers, but also because of the measures' paternalistic nature that causes women to be further disadvantaged. For example, abolishing the visa category for dancers would further limit women's opportunities for legal migration, and drive yet more of them into the arms of traffickers. Finally, Governments may feel that entry restrictions absolve them of responsibility for persons trafficked into other States."[29] Reportedly, in Germany, special visa requirements were adopted for citizens of the Philippines and Thailand, owing to the disproportionate number of women entrants. Such restrictions generally do not limit trafficking or forced labour. Rather, they increase women's reliance on extra-legal means of migration, and the costs associated with such migration. Responses that target specific nationalities also serve to stigmatize women from certain countries as potential sex workers or undocumented migrants and increase patterns of discrimination against migrant women. According to reports, Thai women between the ages of 18 and 40 arriving in Hong Kong for the first time are routinely stopped by immigration for questioning in respect to their involvement in prostitution.

85. Although the clandestine nature of trafficking limits the capacity of victims to seek assistance when needed, the mere discovery by the State of the trafficked woman does not ensure that the woman's rights will be protected. Even when the State pursues a criminal case, there is

no guarantee of legal protection or prosecution. As in rape cases, women who are trafficked for sexual labour may be forced to prove they did not consent to sex work. Thus, women who worked as sex workers prior to being trafficked may be denied protection. Overwhelmingly, the law continues to be fuelled by moral considerations. As such, it may be that the only trafficked women who will be provided protection are those who fit into the stereotype of the young virgin "who was snatched off the streets by unscrupulous criminals, drugged, taken across an international border, raped and then chained to a bed or at least severely beaten to engage in sex for money, paid to her captors".[30] Both local and international media tend to feed into this portrayal of the appropriate trafficking victim as a young, virginal girl subjected to extreme violence and cruelty.

86. Once detected by the State, it is rare for trafficked men and women to be allowed to remain in the receiving State either for their own protection or to pursue legal redress. Deportation continues to be encouraged by both countries of destination and countries of origin as a response to trafficking. Deportation is often undertaken without coordination and without any attempt to ensure the protection of the women's human rights. For example, according to reports, in September 1997 Canadian police, with the cooperation of the United States police, raided brothels in San José, California and Toronto. The women who were being held there and who were being forced to work in situations of debt bondage were charged by Canadian officials with engaging in sex work and living in a bawdy house. At the urging of a Thai embassy official, two of the women confessed, so that they could return to Thailand. Those who did not confess stayed in Canada awaiting trail. Although the Thai Embassy in Ottawa issued the women Certificates of Identity, upon arrival in Bangkok, the women were reportedly arrested by Thai immigration officials because their Certificates of Identity indicated that they had arrived in Canada with false passports.

87. Reportedly, in 1997, more than 200 women were deported to Lithuania from Western countries for their undocumented status or illegal work. Of these, 28 reported that they had been forced to work as prostitutes. According to reports, Israel is a destination for trafficking from countries of the former Soviet Union, in particular Russia. Although some of the women knowingly seek to migrate for the sex trade, at the point of recruitment, they are reportedly deceived about the conditions and terms of work. Once in Israel, they are allegedly kept in virtual slavery. Many women linger in Israeli jails, after they are picked up in raids, since they cannot afford to pay for their deportation. Israel will not pay the cost of deporting undocumented workers. The women also reportedly live in fear of the leaders of the trafficking rings. It is this fear that enables the rings to maintain complete control over the women, who are afraid to turn to the police for help. Further, it has been reported that, while trafficked women are often arrested as illegal workers, the traffickers are rarely arrested. According to information received, Israel has no laws specifically to address trafficking or the sale of human beings. According to reports, in a three-year period, Israel deported approximately 1,500 Russian and Ukrainian trafficked women.

88. There is a need to move from a paradigm of rescue, rehabilitation and deportation to an approach which is designed to protect and promote women's human rights, in both countries of origin and countries of destination. Although some women may be traumatized by their experiences and may, on a case-by-case basis, desire counselling and support services, overwhelmingly it is not "rehabilitation" that women need. Rather, they may need support and

sustainable incomes. The Special Rapporteur calls on Governments to move away from paternalistic approaches that seek to "protect" innocent women to more holistic approaches that seek to protect and promote the human rights of all women, including their civil, political, economic and social rights.

1. Governmental responses: some examples

89. Programmes to combat trafficking and respond to the needs of trafficked persons are often confined to providing information to women about the risks of illegal migration. Sometimes special stamps are used in passports to denote that the woman has worked as a domestic worker or in prostitution. This may then be used against her when she seeks to exercise her freedom of movement and travel to another country. Other protective measures include: selective deployment to countries of destination with special laws and mechanisms of protection for foreign workers, bilateral or multilateral agreements on migrant workers; blacklisting of foreign employers who default on their contractual obligations; training; pre-qualification screening; and the posting of escrow deposits by foreign employers in the currency of the country of origin to cover claims against the employer or promoter.

90. Some national laws continue to define trafficking solely in terms of prostitution. Others fail to distinguish been consensual and non-consensual movement, despite the fact that these two forms of movement exist simultaneously. In Paraguay, for example, according to information submitted to the Division for the Advancement of Women by the Permanent Mission of Paraguay to the United Nations in 1997, "in cases of commerce, traffic and transfer from one country to another of an adult woman to practise prostitution, *even with her consent*, and of recruitment with this aim the penalty will be imprisonment from four to eight years" (emphasis added). Similarly, article IX, paragraph 1 of Poland's Criminal Code dismisses the issue of consent. However, some Governments are moving towards recognition of trafficking in all its forms. The Special Rapporteur is encouraged to note that Austria, in 1996, amended its Penal Code, extending its provisions to cover trafficking in persons for purposes other than sexual exploitation. According to section 104a of the Penal Code, "anyone who by false representation as to the possibility of residing as an alien in a country or performing a lawful activity therein, induces another person to enter a country illegally and to pay or commit himself/herself to pay him for the passage, shall be liable to a prison sentence of up to three years". Additionally, paragraph 2 of the same section legally proscribes enabling a person to enter another country illegally for the purpose of his or her exploitation. The provisions allow for enhanced penalties when the crimes are committed professionally or by a criminal organization.[31]

91. Reportedly, in the United States a battle is being waged between the various sides of the trafficking debate in the context of a new law on trafficking. Two bills - the Wellstone resolution and the Smith-Gejdeson bill - are both working their way through the legislative process. One of the major differences between the two is the definition of trafficking. The Wellstone resolution defines trafficking broadly to include forced labour, whereas the Smith-Gejdeson bill defines trafficking solely in terms of sex work. In 1998, President Clinton issued an Executive Memorandum on Steps to Combat Trafficking. Such steps include public-awareness campaigns, the production and distribution to visa seekers of brochures in Russian, Polish and Ukrainian about trafficking, and the sponsoring of conferences abroad. Although protection, legal counselling and other services for victims of trafficking were

envisioned in the strategy to combat trafficking, according to reports, such programmes have not been implemented. In many cases, trafficking victims have been caught in raids by the Immigration and Naturalization Service (INS). In such cases, and contrary to policy statements, victims are often deported or detained in INS detention facilities or local jails.

92. The Government of Canada, in its submission to the Secretary-General in respect to resolution 51/66 on traffic in women and girls, stated that "the selective use of visitor visas remains a primary means of preventing illegal entry", which suggests an anti-immigration approach to trafficking. Further, although specifying that there is a lack of provisions on trafficking, the Government points to its Immigration Act's prohibitions on illegal entry and assisting persons to enter illegally as useful in combating trafficking. According to its submission, Canada may delay the removal of persons who assist in prosecuting "a people smuggler". While emphasizing the seriousness of trafficking as a form of violence against women and as a violation of human rights, Canada simultaneously seems to rely on an anti-immigration approach that confuses alien smuggling with trafficking.

93. According to information received by the Division for the Advancement of Women from the Government of Cyprus, officers of the Aliens and Immigration Department of Police are responsible for informing women entering the country as performers or maids of their rights and obligations, as well as for providing information about mechanisms of protection against abuse, exploitation and procurement into prostitution.

94. In Belgium, trafficked persons are given a 45-day "rest period" during which they can decide whether to press charges against the traffickers. A three-month temporary residence permit, which entitles trafficking victims to social benefits if they are unable to find employment, is issued to women who decide to proceed with a case. This permit is renewable for an additional six months if the trial continues beyond three months. Additionally, the Government of Belgium has funded the establishment of shelters in Brussels and Liège for victims of trafficking.

95. Ireland has instituted a programme that allows asylum-seekers to obtain permits to work legally while their case is pending. The permits may be issued to asylum-seekers, as well as to people coming to Ireland from non-EU countries and Eastern Europe to work. The Justice Minister reportedly said that the Government is considering anti-trafficking measures similar to the work permits for asylum-seekers.

96. In Denmark, a new law legalizing adult prostitution came into effect on 1 July 1999. This law makes it illegal to purchase sex from anyone under the age of 18; contravention is punishable by a maximum of two years in prison. Reportedly, Demark has simultaneously increased its efforts to prevent the sexual exploitation of minors, to help women who want to leave the sex trade and to stop trafficking of women for the purpose of forced sexual labour.

97. Countries of origin, such as the Philippines, increasingly are formulating measures that seek to ensure migrant women are better equipped to migrate internationally through skills development. Requirements that migrant workers should speak, write and read English, minimum age requirements and registration are being employed by countries of origin in their anti-trafficking strategies. In the Philippines, such requirements depend on the type of work and

the country to which the woman is travelling. For domestic workers, the minimum age is usually 25 years, except for those going to Saudi Arabia and Bahrain, who must be 30 years old. The minimum age for entertainers, however, is 21. In many cases, such policies are being enforced through a specific government agency set up to work with migrants. In other cases, Governments are using a multi-agency response to trafficking. Mexico, the Philippines, Austria, Cyprus, Colombia and Germany, for example, have all adopted an inter-agency response to combat trafficking.

2. Bilateral, multilateral and regional responses

98. The Special Rapporteur would like to commend the European Union for its efforts to combat trafficking through a victim-sensitive, regional programme of action that combines a European judicial policy and European equal opportunity policy in the "Hague Declaration on the Question of Trafficking in Women". The Declaration reportedly serves as a common political statement of the European Union member States and is intended to be followed up with European guidelines for effective measures to prevent and combat trafficking in women. The Declaration, which was adopted by consensus, calls on member States to, inter alia: (i) provide or explore the possibility of providing national rapporteurs who will gather, report to Governments and exchange information on the scale of trafficking, as well as measures taken to prevent or combat trafficking; (ii) undertake information campaigns in countries of origin and destination focusing on preventing trafficking in women; (iii) acknowledge that trafficked women are victims of a crime so that they are not treated solely as illegal immigrants and deported; (iv) provide victims of trafficking with time to reflect and with support before they report the crime or agree to serve as witnesses in the prosecution of the crime, and to facilitate this process by providing trafficked women with legal, financial and medical assistance; (v) provide trafficked women with temporary residence status and protection during criminal proceedings, when necessary; (vi) train the police and judiciary on the nature and characteristics of trafficking; and (vii) work, within the framework of development cooperation, to improve the economic and social status of women in countries of origin.

99. In 1998, the United States Government and the European Union undertook an information campaign to combat trafficking in women through central Europe and the newly independent states of the former Soviet Union, in particular Ukraine and Poland. This campaign targeted potential victims in order to warn them of methods used by traffickers and provided information to local border and consular officials to help them recognize and deter trafficking in women from third countries to their region through group discussions, public service messages, poster and pamphlet distributions and magazine and newspaper articles.

100. The Special Rapporteur is encouraged to note the formation of the Regional Consulting Group on Migration, comprised of Belize, Canada, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and the United States, and encourages the respective Governments to ensure that the section of their action plan on human rights, as well as international human rights instruments, are given full effect in respect of migrants generally, of whom women comprise a large percentage. The Special Rapporteur also encourages the respective Governments to ensure gender-specific protections are in place to protect the human rights of both migrant women and trafficked women.

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B. Non-governmental responses

101. Women's migration and trafficking in women have been priorities for international women's movements worldwide. Women's organizations have been at the forefront in lobbying and policy development relating to migration and trafficking. They have also developed programmes to meet the needs of returning or returned women, to assist them to reintegrate into society. In some cases, however, women's organizations ascribe to the same perceptions and stereotypes as those that tend to misinform governmental policy in regard to more and less deserving victims, particularly in the case of trafficking. Likewise, some women's organizations are fuelled by a moral imperative of "saving" innocent women. Thus, some programmes derive from the perception that women need to be "rescued and rehabilitated", rather than supported and granted rights. Other organizations, however, take a more obvious pro-rights approach that seeks to assist women in a process of empowerment and independence.

102. For example, the Foundation for Women and the Global Alliance against Trafficking in Women helped facilitate the voluntary repatriation of 23 Myanmar and Thai women and girls who had been trafficked to Bangkok. The effort entailed coordinating with many authorities, governmental and non-governmental, to ensure that the women and girls were treated as trafficked persons rather than illegal immigrants. Reportedly, the women and girls have been reintegrated into their villages and are developing income-generating projects.

103. The Special Rapporteur is encouraged to note a trend towards the establishment of shelters specifically geared to work with trafficked persons. The Salamon Alapitvany and Ildikok Memorial Civil Rights Institute set up an emergency respite centre in Hungary for "sex workers seeking relocation and diversion from coerced labour or trafficking". Women referred to the centre have an immediate 30-day respite, during which they can apply for a further 90-day stay in Hungary. Reportedly, the first shelter for trafficked women was recently opened in the United States by the Coalition against Slavery and Trafficking. It provides shelter and services to trafficked persons.

104. The GABRIELA Network - a United States-based, multiracial, multi-ethnic United States-Philippine women's solidarity organization - has been working on the issue of trafficking for a long time. It has recently launched its Purple Rose Campaign. This campaign seeks to raise awareness about sexual violence and human rights abuses against women by asking individuals, in particular men, to make a commitment to opposing the traffic in women and avoiding patronizing the sex trade: people are asked to sign a card stating the above and are given a purple rose pin to symbolize this pledge.

105. In challenging abusive practices associated with migration and forced labour, NGOs have used the law in innovative ways. In January 1999, three lawsuits - the first of their kind - attempting to hold United States companies legally responsible for mistreatment of workers in foreign-owned factories operating on United States soil, were filed. According to reports, the companies, which include The Gap, Tommy Hilfiger, The Limited, J.C. Penny, May Company, Sears and Wal-Mart, are alleged to have engaged in a racketeering conspiracy and to have used indentured labour, mostly young Asian women, to produce clothing on the island of Saipan, which is part of the United States Commonwealth of the Northern Mariana Islands. Two class action lawsuits were filed in a federal court on behalf of 50,000 workers from China, the

Philippines, Bangladesh and Thailand and one lawsuit was filed in a California state court by four labour and human rights groups, Sweatshop Watch, Global Exchange, Asian Law Caucus and UNITE, accusing the retailers and manufacturers of using misleading advertising and of trafficking in "hot goods" manufactured in violation of United States labour laws. The lawsuits seek more than $1 billion in damages, disgorgement of profits and unpaid wages.

106. Non-governmental organizations have been instrumental in efforts to create new national and international standards on migration and trafficking. One of the most noteworthy products of a collaborative process by the Global Alliance against Traffic in Women, the Foundation against Trafficking in Women and the International Human Rights Law Group is the Human Rights Standards for the Treatment of Trafficked Persons (January 1999). "The Standards are drawn from international human rights instruments and formally-recognized international legal norms. They aim to protect and promote respect for the human rights of individuals who have been victims of trafficking, including those who have been subjected to involuntary servitude, forced labour and/or slavery-like practices."[32] The Special Rapporteur would encourage Governments to utilize the Human Rights Standards in creating new policies and laws. She would encourage the international community to do the same.

IX. RECOMMENDATIONS

A. At the international level

107. The protocol on trafficking to the draft international convention against transnational organized crime should ensure an unequivocal human rights standard on trafficking in women, since it is impossible to combat trafficking without providing protection to victims of trafficking.

108. States should seek to adopt bilateral and multilateral agreements providing for the legal labour migration of women.

109. States should ensure support for the institutionalization of the rule of law in countries currently in transition, in situations of armed conflict or under military regimes.

110. Non-governmental organizations should be granted observer status at the meetings of Heads of State of regional forums, such as SAARC, ASEAN, OAU and OAS.

B. At the national level

111. Measures designed to limit women's legal entry into countries of destination should be carefully weighed against their disadvantages as they pertain to potential immigrants and women. In particular, measures that are designed to protect women by limiting their access to legal migration or increasing the requirements associated with such migration should be assessed in terms of the potential for discriminatory impact and the potential for increasing the likelihood that women consequently may be subjected to trafficking.

112. Government programmes and international efforts relating to trafficking should be developed in cooperation with non-governmental organizations. Further, governmental

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organizations and international donor institutions should provide financial support to non-governmental organizations working on the issue of trafficking.

113. Governmental measures and international efforts to address trafficking must focus on the human rights abuses and labour rights abuses of the women involved, rather than treating trafficking victims as criminals or as illegal migrants.

114. Government measures to address trafficking must focus on the promotion of the human rights of the women concerned and must not further marginalize, criminalize, stigmatize or isolate them, thus making them more vulnerable to violence and abuse.

115. Relevant governmental bodies must collect and publish data on:

(a) Government efforts to address instances of trafficking into, out of, and within their countries;

(b) The successes or difficulties experienced in promoting inter-agency cooperation, cooperation between local and national authorities, and cooperation with non-governmental organizations;

(c) The treatment and services provided to trafficking victims;

(d) The disposition of trafficking cases in the criminal justice system;

(e) The effects of governmental legal and administrative measures on the victims of trafficking and on the reduction of trafficking.

116. Trafficking victims must be guaranteed:

(a) Freedom from persecution or harassment by those in positions of authority;

(b) Adequate, confidential and affordable medical and psychological care by the State or, if no adequate State agency exists, by a private agency funded by the State;

(c) Strictly confidential HIV testing services should be provided only if requested by the person concerned, and any and all HIV testing must be accompanied by appropriate pre- and post-test counselling;

(d) Access to a competent, qualified translator during all proceedings, and provision of all documents and records pursuant to having been victims of trafficking and/or forced labour or slavery-like practices;

(e) Free legal assistance;

(f) Legal possibilities of compensation and redress for economic, physical and psychological damage caused to them by trafficking and related offences.

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117. The personal history, the alleged "character" or the current or previous occupation of the victim must not be used against the victim, nor serve as a reason to disqualify the victim's complaint or to decide not to prosecute the offenders. For example, the offenders must be prohibited from using as a defence the fact that the person is, or was at any time, a sex worker or a domestic worker.

118. The victim's history of being trafficked and/or being subjected to forced labour and slavery-like practices must not be a matter of public or private record and must not be used against the victim, their family or friends in any way whatsoever, particularly with regard to the right to freedom of travel, marriage and seeking gainful employment.

119. States under whose jurisdiction the trafficking and/or forced labour and slavery-like practices took place must take all necessary steps to ensure that victims may press criminal charges and/or take civil action for compensation against the perpetrators, if they choose to do so.

120. Governments must implement stays of deportation and provide an opportunity to apply for permanent residency, witness protection and relocation assistance for trafficking victims.

121. Governments should implement assessed forfeiture from criminal operations that profit from trafficking, setting aside funds to provide compensation due to victims of trafficking.

122. In consultation with relevant non-governmental organizations, relevant government bodies must:

(a) Develop curricula and conduct training for relevant government authorities, including officials of immigration and consular affairs offices, customs services, border guard and migration services, and representatives of the Ministry of Foreign Affairs, regarding the prevalence and risks of being trafficked, and the rights of victims. The training of such officials must not result in the creation of "profiles" which prevent women from receiving visas to go abroad;

(b) Develop awareness and education campaigns regarding trafficking to be conducted through the mass media and community education programmes;

(c) Distribute materials describing the potential risks of being trafficked, including: information on the rights of victims in foreign countries, including legal and civil rights in the areas of labour and marriage and for crime victims, and the names of support and advocacy organizations in the countries of origin, destination and transit;

(d) Take measures to ensure that women have viable economic opportunities to support themselves and their dependent families in their home countries;

(e) Abide by the United Nations General Assembly resolution 49/165 on violence against women migrant workers, of 23 December 1994, and should sign, ratify and enforce the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

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(f) Adopt and implement guidelines recognizing gender-related persecution as a basis for women to claim refugee status, in addition to signing and ratifying the 1951 Convention on the Status of Refugees and the 1967 Protocol thereto, and implement the 1991 UNHCR Guidelines on the Protection of Refugee Women;

(g) Ensure that all trafficking legislation is gender sensitive and provides protection for the human rights of women and against the particular abuses committed against women;

(h) Provide training for diplomats and foreign service employees about trafficking and the human rights abuses committed in the course of trafficking;

(i) Establish labour information centres to provide up-to-date, practical information on all aspects of labour migration.

Notes

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[16] Cerone, p. 59, citing Velásquez-Rodriquez case, para. 175.

[17] Ibid., p. 58, citing Atico v. Italy, series A, 37 ECTHR 16.

[18] See the Report of the Special Rapporteur on violence against women, E/CN.4/1996/53, 5 February 1996, for a more detailed life-cycle analysis of violence against women.

[19] Wijers and Lap Chew, op cit., p. 143

[20] See, Report of the Special Rapporteur on violence against women, E/CN.4/1998/54, 26 January 1998, paras. 115-159, for a discussion of custodial violence.

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UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, CONTEMPORARY FORMS OF SLAVERY FINAL REPORT SUBMITTED BY GAY J McDOUGALL

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CONTEMPORARY FORMS OF SLAVERY

Systematic rape, sexual slavery and slavery-like practices during armed conflict

Final report submitted by Ms. Gay J. McDougall, Special Rapporteur

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Introduction

1. At its forty-fifth session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, noting the information transmitted to the Sub-Commission by its Working Group on Contemporary Forms of Slavery concerning the sexual exploitation of women, as well as other forms of forced labour, during wartime, decided to entrust Ms. Linda Chavez, as Special Rapporteur, with the task of undertaking an in-depth study on the situation of systematic rape, sexual slavery and slavery-like practices during wartime, including internal armed conflict. The Sub-Commission requested the Special Rapporteur to submit her preliminary report at the forty-sixth session and her final report at the forty-seventh session.

2. At its forty-sixth session the Sub-Commission, considering Commission on Human Rights resolution 1994/103 in which it requested the Sub-Commission to reconsider its decisions to recommend a number of studies, decided to request Ms. Chavez to submit, without financial implications, a working paper on the situation of systematic rape, sexual slavery and slavery-like practices during wartime at its forty-seventh session.

3. Ms. Chavez duly presented her working paper (E/CN.4/Sub.2/1995/38) and the Sub-Commission, in resolution 1995/14, welcomed the paper. The Special Rapporteur submitted her preliminary report at the forty-eighth session (E/CN.4/Sub.2/1996/26), summarizing the purpose and scope of the study, the history of systematic rape as an instrument of policy, relevant international norms, issues of

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responsibility and liability, forms with jurisdiction to try perpetrators, possible sanctions against violators and possible forms of reparation.

4. In May 1997, Ms. Chavez informed the High Commissioner/Centre for Human Rights that she was not able to submit a final report at the forty-ninth session of the Sub-Commission and expressed her wish that the study be continued by another member of the Sub-Commission (E/CN.4/Sub.2/1997/12). At its forty-ninth session, the Sub-Commission, in its decision 1997/114, appointed Ms. Gay J. McDougall as Special Rapporteur to prepare a final report on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict. [The Special Rapporteur would like to thank the following individuals for their assistance in producing this report: Stephen Bowen, Mark Bromley, Alice M. Miller and Alison N. Stewart. In addition, the Special Rapporteur would also like to thank the following individuals who provided expert guidance during the course of this study: Kelly Askin, M. Cherif Bassiouni, Diane Orentlicher, Patricia Viseur Sellers, and David Weissbrodt.]

5. The use of sexual slavery and sexual violence as tactics and weapons of war is an all too common yet often overlooked atrocity that demands consistent and committed action on the part of the global community. Although a wide range of responses is needed, this final report focuses primarily on the development of international criminal law as a fruitful area for effective action at the national and international levels to end the cycle of impunity for slavery, including sexual slavery, and for sexual violence, including rape. This report also advances policy and practical recommendations that may guide the investigation, prosecution and prevention of sexual slavery and sexual violence in armed conflicts.

6. One significant impetus for the Sub-Commission's decision to commission this study was the increasing international recognition of the true scope and character of the harms perpetrated against the more than 200,000 women enslaved by the Japanese military in"comfort stations" during the Second World War. Recognizing the need to address past, unremedied human rights, humanitarian law and international criminal law violations involving sexual slavery and sexual violence, a full analysis of the continuing legal liability for these crimes against humanity is contained in the appendix to the present reports.

I. PURPOSE AND CONTEXT OF THE REPORT

7. Parties to contemporary armed conflicts, both international and internal, increasingly target civilian populations when waging hostilities. Women, including girl children, comprise a large segment of these targeted and at-risk populations. They are exposed not only to the violence and devastation that accompany any war but also to forms of violence directed specifically at women on account of their gender. Recognizing the historic lack of protection of women's fundamental rights, the World Conference on Human Rights, in the Vienna Declaration and Programme of Action, emphasized that"[v]iolations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law [and] require a particularly effective response".

8. An effective response requires that acts of sexual violence and slavery must be properly documented, the perpetrators brought to justice, and the victims provided with full and effective redress. The appropriate characterizations of these acts as international crimes of slavery, crimes against humanity, genocide, grave breaches of the Geneva Conventions, war crimes or torture is also essential. These crimes have particular legal consequences as *jus cogens* crimes that are prohibited at all times and in all

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situations. In addition, this report emphasizes that practices such as the detention of women in"rape camps" or"comfort stations"; forced, temporary"marriages" to soldiers; and other practices involving the treatment of women as chattel, are both in fact and in law forms of slavery and, as such, violations of the peremptory norm prohibiting slavery.

A. Purpose

9. The first purpose of this report is to reiterate the call for a response to the use of sexual violence and sexual slavery during armed conflict. It is imperative to acknowledge the immeasurable injury to body, mind and spirit that is inflicted by these acts. During times of peace, women are subjected to all forms of gender-based persecution, discrimination and oppression, including acts of sexual violence and slavery which often go unpunished even in functional criminal justice systems. The horrors that women face greatly expand in number, frequency and severity during armed conflicts, and are not confined to gender-specific abuses. However, it is clear that women do experience a significantly increased risk of violence and slavery of a sexual nature during armed conflict situations - a risk that must not be accepted or tolerated. In addition, at the same time that abuses directed at women increase during armed conflicts, the degree of impunity with which such violence is committed may also increase. This overall deterioration in the conditions of women in armed conflict situations is due not only to the collapse of social restraints and the general mayhem that armed conflict causes, but also in many cases to a deliberate and strategic decision on the part of combatants to intimidate and destroy"the enemy" as a whole by raping and enslaving women who are identified as members of the opposition group.

10. The second purpose of this report is to emphasize the true nature and extent of the harms suffered by women who are raped, sexually abused and enslaved by parties to an armed conflict. There are legions of documented reports of sexual violence committed against women in armed conflict. Such documentation reveals examples of women being gang-raped in their homes and in front of their family members; women being held in detention centres or military stations and raped numerous times every day for weeks or even months; women being repeatedly raped by soldiers under the guise of"marriage"; women being held captive in situations involving both forced labour (as cooks, porters, minefield sweepers) and forced sex; and reports of women being mutilated, humiliated and tortured sexually before being killed or left to die from their injuries. The veil of silence that surrounds this violence must be lifted through prosecutions and other forms of redress, including compensation, to ensure that justice is done, dignity is repaired and future violations are prevented.

11. The third purpose of this report is to examine prosecutorial strategies for penalizing and preventing international crimes committed against women during armed conflict. This study invents no new crimes or penalties and it proposes no new standards of liability for State or non-State actors. The report primarily restates and reinforces the established law that is already applicable, although not always applied. In addition, the report identifies those areas where further elaboration and development of the existing legal framework would facilitate more effective prosecutions.

12. Notwithstanding the repeated failure of States and international legal bodies to fulfil their obligations to bring the perpetrators of rape and slavery during armed conflict to justice in accordance with international norms and standards that already exist, there is cause for optimism. Advances are being made to end the cycle of impunity. In the aftermath of the Second World War, there were very few prosecutions for slavery and even fewer for rape. At the time of writing of this report, the International Criminal Tribunal for the Former Yugoslavia has issued numerous indictments charging crimes based on sexual violence, and the International Tribunal for Rwanda is under increasing pressure to step up its investigations and prosecutions of sexual violence. In the very period of time during which this report was commissioned and completed, great strides have also been made to address gender-based violence in armed conflict not only in the context of the ad hoc international criminal tribunals, but also with respect to the proposed permanent International Criminal Court. This study, therefore, is offered at a

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particularly timely juncture in the development of international criminal law and is intended to advance ongoing discussions over proper venues, rules and procedures that may usefully advance prosecutions of sexual violence and slavery by domestic courts, the ad hoc international criminal tribunals and the proposed permanent International Criminal Court. To this end, the definitions of the crimes are set forth in this report with a level of specificity that is intended to assist in identifying the elements of an offence and the level of legal responsibility of each relevant State or non-State actor, including those individuals within a given command hierarchy and those who through their complicitous acts make the offence possible.

B. Context

13. As has been noted by many international legal commentators, the development of international law, including international humanitarian, human rights and criminal law, was based on the paradigm of male lives, particularly the lives of men in the public sphere. [For a discussion, see Hilary Charlesworth, Christine Chinkin and Shelley Wright,"Feminist approaches to international law", American Journal of International Law, vol. 85, 1991.] The failure to consider the experience of women resulted in a human rights legal framework which failed to recognize forms of violence directed against women as worthy of international State accountability. However, this legacy of marginalization has begun to shift, as evidenced by the adoption of General Assembly resolution 48/104 of 20 December 1990 in which the Assembly, recalling that the Economic and Social Council had recognized"that violence against women ... had to be matched by urgent and effective steps to eliminate its incidence", proclaimed the Declaration on the Elimination of Violence against Women. Similarly, humanitarian law has inconsistently and inadequately addressed violence against women during times of armed conflict, for example by failing to explicitly articulate rape as a grave breach of the Geneva Conventions. This deficiency has also begun to change as the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, and hopefully too the proposed permanent International Criminal Court, give more attention and redress to violence directed against women.

14. While this report considers the many instances and forms of sexual violence and sexual slavery that may arise in armed conflict situations, the specific mandate of this study concerns the implications of"systematic rape, sexual slavery and slavery-like practices committed during armed conflict, including internal armed conflict". This focus requires an understanding of the following key points.

15. Firstly, it is the internationally accepted view that regardless of whether sexual violence committed in armed conflict occurs on an apparently sporadic basis by marauding soldiers or as part of a comprehensive plan to systematically attack and terrorize a targeted population, all acts of sexual violence, including rape, must be recognized, condemned and prosecuted. Sexual violence and slavery have been used pervasively and consistently in times of war because they are clearly an effective means of demoralizing the opposition. [Madeline Morris."By force of arms: rape, war, and military culture", Duke Law Journal, vol. 45, 1996.] To undercut the effectiveness of these barbaric acts and practices, the international community must hold those responsible liable for all such violations.

16. Secondly, international humanitarian law as well as municipal laws have often contained provisions for the protection of women's"honour", implying that the survivor of sexual violence is somehow"dishonoured" in the attack. The present report maintains that such characterizations are incorrect, as the only party without honour in any rape or in any situation of sexual violence is the perpetrator. While rape is indeed an assault on human dignity and bodily integrity, it is first and foremost a crime of violence.

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17. Thirdly, with respect to the title of this report, the term"systematic" is used as an adjective to describe certain forms of rapes, not to denote the invention of a new crime or a new burden of proof that must be established to prosecute an act of rape. Similarly, the term"sexual" is used in this report as an adjective to describe a form of slavery, not to denote a separate offence. In this context, the use of the descriptive term"sexual" highlights the historic and contemporary reality that slavery amounts to the treatment of a person as chattel, which often includes sexual access and forced sexual activity. The link between rape and slavery in the mandate for this report is not accidental; many cases of sexual violence committed during armed conflict are most appropriately prosecutable as slavery.

18. Fourthly, this report also recognizes that there is a crucial need to present a comprehensive analysis of the nature and consequences of sexual violence directed against both women and men, with a clear understanding of the gender implications of sexual violence. As noted in the Beijing Declaration and Platform for Action, women are undoubtedly at greater risk of sexual violence and face gender-related obstacles in seeking redress for these violations at all levels and in all legal systems. In addition to the physical and psychological wounds caused by sexual violence, women survivors of sexual violence also encounter gender-specific discrimination and ill-treatment within the family and the community due to the subordination and devaluation of women and girls and of their roles in society. The obstacles that often prevent women from asserting their rights to be free from sexual violence are further compounded by the unwillingness of society to engage in constructive and earnest dialogue on the issues of sex and sexuality in general, and sexual violence in particular. In addition, even more damaging than the veil of silence that surrounds rape and sexual violation is the tendency to marginalize acts of violence when committed against women. By incorporating an understanding of gender, ["The term 'gender' refers to the socially constructed roles of women and men in public and private life. Gender is distinct from 'sex', which is biologically determined." Donna Sullivan, Integration of Women's Human Rights into the Work of the Special Rapporteurs (New York: UNIFEM, 1996).] into the legal framework for responding to systematic rape and sexual slavery, the full range of obligations and legal accountability of all parties to a conflict may be carefully articulated and concrete steps may be outlined to ensure adequate prevention, investigation, and criminal and civil redress, including compensation of victims. [See Beijing Declaration and Platform for Action (A/CONF.177/20), paras. 131-149; Radhika Coomaraswamy, Report of the Special Rapporteur on violence against women, its causes and consequences (E/CN.4/1998/54), paras. 8-18.]

19. The present report exposes the paradox that while the prosecutorial framework exists, and has existed since before the Second World War, there has been a troubling scarcity of prosecutions with respect to acts of sexual violence committed in armed conflict. Some Governments, citing this dearth of prosecutions, claim that the law is new or does not exist. This lack of precedent, however, is more accurately attributable to the failure to respond to acts of violence committed against women, particularly sexual violence, as grievous crimes that must be reported, investigated, prosecuted and compensated to the full extent of the law.

II. DEFINITIONS OF CRIMES

20. The definitions of the crimes of"sexual violence", including"rape", and of"slavery", including"sexual slavery", contained in this report incorporate both the acts themselves and other related forms such as"attempt" and"conspiracy" to commit the offence;"inciting" and"soliciting" others to commit the offence; and"aiding and abetting" the commission of the offence.

A. Sexual violence, including rape

21. Rape falls within the broader category of"sexual violence", which this report defines as any violence,

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physical or psychological, carried out through sexual means or by targeting sexuality. [M. Cherif Bassiouni, Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia, Occasional Paper No. 1, International Human Rights Law Institute, DePaul University College of Law (1996), p. 3.] Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or slicing off a woman's breasts. [Human Rights Watch, Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath, New York, (1996) p. 62.]

22. Sexual violence also characterizes situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner. Such crimes are often intended to inflict severe humiliation on the victims and when others are forced to watch acts of sexual violence, it is often intended to intimidate the larger community. For example, the Office of the Prosecutor to the International Criminal Tribunal for the Former Yugoslavia brought charges for violations of the laws of war and crimes against humanity in a case in which a prisoner in a Bosnian Serb prison camp was forced by a guard to bite off the testicle of another prisoner in the presence of a group of other prisoners. [See International Criminal Tribunal for the Former Yugoslavia (ICTFY), Prosecutor v. Tadic, Case IT-94-1-T (Trial Chamber Judgment of 7 May 1997).] In another case in a different detention facility, a Bosnian Serb police chief was indicted for forcing two detainees to"perform sexual acts upon each other in the presence of several other prisoners and guards." [ICTFY, Indictment of Miljkovic and Others, Case IT-95-9-I (21 July 1995) para. 31.]

23. There is no explicit definition of rape in international humanitarian or human rights law, although there are numerous, different formulations of rape in municipal legal systems. [Rape and Sexual Assault: A Legal Study. Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (S/1994/674/Add.2 (Vol. I), annex II), para. 2.] The definition of rape that is advanced in the present study reflects current international elaborations, modern applications, examples derived from municipal law and practice, working definitions of rape that have been submitted by the Office of the Prosecutor to the International Criminal Tribunal for the Former Yugoslavia and to the International Tribunal for Rwanda, and definitions that have been adopted by various international human rights non-governmental organizations.

24. "Rape" should be understood to be the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim's vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim. Rape is defined in gender-neutral terms, as both men and women are victims of rape. [Ibid., note 4 (stating that"[v]iolent crimes of a homosexual nature are not explicitly mentioned in international humanitarian law... That international humanitarian law, insofar as it provides protection against rape and other sexual assaults, is applicable to men as well as women is beyond any doubt as the international human right not to be discriminated against (in this case on the basis of sex) does not allow derogation.").] However, it must be noted that women are more at risk of being victims of sexually violent crimes and face gender-specific obstacles in seeking redress. Although this report retains"penetration" in the definition of rape, it is clear that the historic focus on the act of penetration largely derives from a male preoccupation with assuring women's chastity and ascertaining paternity of children. It is important, nevertheless, to emphasize that all forms of sexual violence, including but not limited to rape, must be condemned and prevented.

25. Lack of consent or the lack of capacity to consent due, for example, to coercive circumstances or the victim's age, can distinguish lawful sexual activity from unlawful sexual activity under municipal law. The manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime. In addition, consent is not an issue as a legal or factual matter when considering the command

responsibility of superior officers who ordered or otherwise facilitated the commission of crimes such as rape in armed conflict situations. The issue of consent may, however, be raised as an affirmative defense as provided for in the general rules and practices established by the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda. [ICTFY, Rules of procedure and evidence, (as amended on 25 July 1997), rule 96 (Evidence in cases of Sexual Assault); International Tribunal for Rwanda, Rules of procedure and evidence, entered into force 29 June 1995.] The defense in such cases must initially satisfy the judicial body hearing the case that the evidence of consent is"relevant and credible". [Ibid.]

26. The term"systematic" is used in this report as an adjective to describe certain forms of rapes, not to denote the invention of a new crime or a new burden of proof that must be established to prosecute an act of rape. An act of rape, in addition to being a crime in its own right, may fall within a larger pattern of widespread or policy-based attacks on a targeted group, thereby establishing the elements of crimes against humanity, as discussed in section III.A. of this report. It is not necessary, however, to prove the occurrence of"systematic rape" in order to prosecute a single act of rape under the rubric of crimes against humanity, just as it is not necessary to prove"systematic murder" or"systematic torture" to establish a claim under crimes against humanity.

B. Slavery, including sexual slavery

27. The 1926 Slavery Convention sets out the first comprehensive and now the most widely recognized definition of slavery. As adapted from the 1926 Slavery Convention,"slavery" should be understood to be the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence.

28. In addition to treaty law, the prohibition of slavery is a *jus cogens* norm in customary international law. The crime of slavery does not require government involvement or State action, and constitutes an international crime whether committed by State actors or private individuals. Further, while slavery requires the treatment of a person as chattel, the fact that a person was not bought, sold or traded does not in any way defeat a claim of slavery.

29. Implicit in the definition of slavery are notions concerning limitations on autonomy, freedom of movement and power to decide matters relating to one's sexual activity. [M. Cherif Bassiouni,"Enslavement as an International Crime", New York University Journal of International Law and Politics vol. 23 (1991) p. 458.] The mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery should not be interpreted as nullifying a claim of slavery. In all cases, a subjective, gender-conscious analysis must also be applied in interpreting an enslaved person's reasonable fear of harm or perception of coercion. This is particularly true when the victim is in a combat zone during an armed conflict, whether internal or international in character, and has been identified as a member of the opposing group or faction.

30. The term"sexual" is used in this report as an adjective to describe a form of slavery, not to denote a separate crime. In all respects and in all circumstances, sexual slavery is slavery and its prohibition is a *jus cogens* norm. The"comfort stations" that were maintained by the Japanese military during the Second World War (see appendix) and the"rape camps" that have been well documented in the former Yugoslavia [For example, see ICTFY, Indictment of Gagovic and Others, case IT-96-23-I (26 June 1996) [hereinafter Foca Indictment]. are particularly egregious examples of sexual slavery. Sexual slavery also encompasses situations where women and girls are forced into"marriage", domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors. For instance, in addition to the cases documented in Rwanda and the former Yugoslavia, there

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are reports from Myanmar of women and girls who have been raped and otherwise sexually abused after being forced into"marriages" or forced to work as porters or minefield sweepers for the military. [See for example, Betsy Apple, School for Rape: The Burmese Military and Sexual Violence (1998), p. 49.] In Liberia, there are similar reports of women and girls who have been forced by combatants into working as cooks and who are also held as sexual slaves. [Coomaraswamy, (E/CN.4/1998/54, para. 42). It is clear that many victims of sexual slavery and sexual violence during armed conflict are children. Ms. Graça Machel, the expert appointed by the Secretary-General to undertake a study on the impact of armed conflict on children, stated in her final report (A/51/306 of 26 August 1996, para. 45):

"In Guatemala, rebel groups use girls to prepare food, attend to the wounded and wash clothes. Girls may also be forced to provide sexual services. In Uganda, girls who are abducted by the Lord's Resistance Army are 'married off' to rebel leaders. If the man dies, the girl is put aside for ritual cleansing and then married off to another rebel."]

31. Sexual slavery also encompasses most, if not all forms of forced prostitution. The terms"forced prostitution" or"enforced prostitution" appear in international and humanitarian conventions but have been insufficiently understood and inconsistently applied. "Forced prostitution" generally refers to conditions of control over a person who is coerced by another to engage in sexual activity.

32. Older definitions of forced prostitution focus either in vague terms on"immoral" attacks on a woman's"honour", or else they are nearly indistinct from definitions that seem more accurately to describe the condition of slavery. Despite these limitations, as the crime is clearly criminalized within the Geneva Conventions and the Additional Protocols thereto, it remains a potential, albeit limited alternative tool for future prosecutions of sexual violence in armed conflict situations.

33. As a general principle it would appear that in situations of armed conflict, most factual scenarios that could be described as forced prostitution would also amount to sexual slavery and could more appropriately and more easily be characterized and prosecuted as slavery.

III. THE LEGAL FRAMEWORK FOR PROSECUTING SEXUAL SLAVERY AND SEXUAL VIOLENCE, INCLUDING RAPE, UNDER INTERNATIONAL LAW

34. The legal framework for prosecuting sexual slavery and sexual violence has evolved from at least three different sources of law, including human rights, humanitarian and international criminal law, each with different customary and treaty-based origins and historic precedents. Because of the subordination of women in societies worldwide, acts of sexual slavery and sexual violence are not always sufficiently reflected in the explicit language of international criminal provisions, including those prohibiting slavery, crimes against humanity, genocide, torture and war crimes. [Machel, Ibid., para. 91. "While abuses such as murder and torture have long been denounced as war crimes, rape has been downplayed as an unfortunate but inevitable side effect of war."] This report examines the multiple sources of authority which do exist to ground international and national prosecutions of sexual slavery and sexual violence committed during armed conflict.

35. The framework for prosecuting international crimes often borrows and builds upon practices at the municipal level. In some cases, the policy concerns for prosecuting international crimes are similar to the concerns underlying national prosecutions. However, in many cases, international criminal law seeks to advance policy goals which are specific to the needs of international or transnational action. Thus, it is not always appropriate to extrapolate international standards from municipal legal systems. The present report focuses on crimes arising in the context of armed conflict and while many of them are prosecutable as peacetime offences under municipal laws, the legal analysis required to prevent, investigate and prosecute sexual slavery and sexual violence during armed conflict is motivated by

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policy concerns particular to the international legal context.

36. Sexual slavery and sexual violence when committed during armed conflict may be characterized under certain conditions as customary violations of *jus cogens* norms. The Vienna Convention on the Law of Treaties in article 53, defines *jus cogens* norms as those standards that are"accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". In addition, *jus cogens* norms are recognized as delicts of universal concern, so that any State may properly prosecute *jus cogens* offences, even if the prosecuting State lacks any link to the nationality of the offender or the victim or any territorial connection to the commission of the crime and could not otherwise properly assert jurisdiction.

37. The various international crimes that correspond to violations of these *jus cogens* norms include slavery, crimes against humanity, genocide, certain war crimes and torture. [M. Cherif Bassiouni, International Crimes: *Jus Cogens* and Obligations *Erga Omnes*, in Bassiouni and Madeline H. Morris, (eds.), Accountability for International Crimes and Serious Violations of Fundamental Human Rights, 1996, p. 68.] These crimes are subject under customary international law to universal jurisdiction and they are exempt in most cases from the effect of any statute of limitations to prosecutions. [Ibid., pp. 65-66.] States, including successor Governments, have an obligation to ensure that those who violate such norms do not do so with impunity and are brought to justice, either by prosecution within the State or extradition for prosecution in another State.[Ibid.] Although war crimes by definition require a nexus to armed conflict, the prohibitions against slavery, crimes against humanity, genocide and torture apply in all situations, including in all armed conflicts, internal strife and peacetime.

A. Crimes against humanity

38. A widespread or systematic [See ICTFY, Tadic case, sect. VI.D.2.ii.a. A Trial Chamber of the ICTFY noted that"it is now well established that the requirement that the acts be directed against a civilian 'population' can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts".] attack against a civilian population -including widespread or systematic persecution based on racial, ethnic, religious, political or other grounds - may be prosecuted as a crime against humanity. [Article 6 (c) of the Charter of the International Military Tribunal, Nürnberg (1945) defines crimes against humanity as"murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated". See also the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1994) (S/1994/674), para. 83.] It is significant to note that although crimes against humanity have most often been charged in armed conflict situations, they do not require a nexus to any armed conflict. [ICTFY, Tadic case, Appeals Chamber Decision on Jurisdiction of 2 October 1995, para. 141 (stating that it was a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict).] In addition, both State and non-State actors can be prosecuted for crimes against humanity.

39. Proof of policy, plan or design is generally considered to be a necessary element of a prosecution for crimes against humanity. [Theodor Meron,"Rape as a Crime under international humanitarian law", American Journal of International Law, vol. 87, 1993, p. 428.] The failure to take action to address widespread or systematic attacks against a civilian population can be sufficient to establish the requisite element of policy, plan or design.

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40. In order to more effectively and responsively address widespread or systematic attacks on a population in which sexual slavery and sexual violence are used as tactics, gender should be recognized as one of the grounds of persecution under crimes against humanity. Excluding any group capable of being targeted from the protection of international norms because some aspect of their individual or collective identity has not been formally or explicitly recognized is inexcusable under fundamental principles of justice. [M. Cherif Bassiouni, Crimes against Humanity in International Criminal Law, (Dordrecht, Boston: M. Nijhoff, 1992) p. 251. The author states:

"[I]t is inconceivable that any targeted group, no matter what its affinity may be, should be excluded [from grounds of protection under crimes against humanity]. The element of discrimination evidences the collective nature of the crime and its scope should have no limits and no quantitative or numerical standards for the persons to be included in the discriminated group."/ Thus, current enumerations of prohibited grounds of persecution should be considered illustrative rather than exclusive, and gender, along with other targeted group identities, should be considered protected under crimes against humanity.

41. Sexual violence, including rape, falls within the general prohibition of"inhumane acts" [Ibid. See also Commission of Experts Report (S/1994/674), para. 107.] in the traditional formulation of crimes against humanity, as taken from the Charter of the International Military Tribunal at Nürnberg (Nürnberg Charter), Control Council Law No. 10, and the Charter of the International Military Tribunal for the Far East (Tokyo Charter). [Charter of the International Military Tribunal, Nürnberg, art. 6 (c); Charter of the International Military Tribunal for the Far East, art. 5 (c); Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes against Peace and against Humanity, art. 1 (c).] Unfortunately, sexual violence was rarely prosecuted as a crime against humanity following the Second World War.

42. In more recent codifications, rather than relying on residual provisions prohibiting inhumane acts, rape has been listed explicitly as a crime against humanity when committed in the course of either an internal or an international armed conflict and directed against any civilian population, even though it is now well established that crimes against humanity do not require any nexus to armed conflict at all. In particular, the statutes of both ad hoc international criminal tribunals established in 1993 and 1994 to prosecute international crimes occurring in the former Yugoslavia and in Rwanda list rape independently as a separate qualifying offence under the definition of crimes against humanity. Both tribunals, moreover, have brought charges for crimes against humanity based on sexual violence.

43. A single case of serious sexual violence, including rape, may be grounds for prosecution for crimes against humanity, so long as prosecutors link that single violation to a larger series of violations of fundamental human rights or humanitarian law that evidence a widespread or systematic attack against a civilian population.

44. Slavery has long been recognized as a crime against humanity. The Nürnberg Charter and Control Council Law No. 10, which was established to facilitate national prosecutions of war criminals in Germany following the Second World War, both listed enslavement under the sections addressing crimes against humanity. Similarly, article 5 of the Tokyo Charter also listed enslavement and other inhumane acts committed against any civilian population as crimes against humanity. More recent codifications of crimes against humanity include article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia [Security Council resolution 827 (1993), annex.] and article 3 of the Statute of the International Tribunal for Rwanda, [Security Council resolution 955 (1994), annex.] both of which explicitly list enslavement as constituent offences of crimes against humanity.

45. The International Criminal Tribunal for the Former Yugoslavia has recently brought an indictment

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characterized as constituent acts of the crime of genocide as defined in article II of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). The key element of the crime of genocide is the specific intent on the part of the perpetrator to physically destroy, in whole or in part, a protected group, namely a national, ethnic, racial, or religious group. Gender is not listed as a protected group under the Genocide Convention. Nonetheless, targeting a protected group through attacks against its female members is sufficient to establish the crime of genocide.

49. The prosecution need not establish an intent to destroy the entire group on a national or an international basis. The intent to destroy a substantial portion or an important subsection of a protected group or the existence of a protected group within a limited region of a country is sufficient grounds for prosecution for genocide. Moreover, as national borders may be fluid during periods of conflict, it is apparent that nearly all localized campaigns of genocide will likely emphasize the total or eventual elimination of the group as a whole and will often be linked to a larger national campaign to accomplish this goal of annihilation.

50. It is also important to note that the necessary genocidal intent may be inferred from the perpetrator's actions. The Commission of Experts established pursuant to Security Council resolution 780 (1982) to examine violations of humanitarian law in the conflict in the territory of the former Yugoslavia found that in some cases of genocide"there will be evidence of actions or omissions of such a degree that the defendant may reasonably be assumed to have been aware of the consequences of his or her conduct, which goes to the establishment of intent". [Commission of Experts Report (S/1994/674), para. 313.]

51. The Office of the Prosecutor for both the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda has filed charges based on sexual violence and rape as constituent acts of the crime of genocide. These charges have been brought against persons accused of actually committing the acts as well as against superior authorities in the same chain of command.

52. With the necessary intent element, even a single act of rape may theoretically be grounds for a prosecution for the crime of genocide, provided the act was related to a larger series of acts, all of which were designed to bring about the destruction of a targeted group.[Yoram Dinstein,"International Criminal Law", Israel Yearbook on Human Rights, vol. 5, 1975, reprinted in Henry J. Steiner and Philip Alston, International Human Rights in Context, Law, Politics, Morals (Oxford: Clarendon Press, 1996), pp. 1025, 1028 (noting that"the murder of a single individual may be categorized as genocide if it constitutes a part of a series of acts designed to attain the destruction of the group to which the victim belonged").] In addition, the crime of genocide does not require any nexus to armed conflict or to State action.

D. Torture

53. Prohibitions against torture have also emerged as *jus cogens* norms from which no derogation is permitted. As prohibited by customary norms, the crime of torture requires the intentional infliction of severe mental or physical pain or suffering, and a nexus to government action or inaction. In most, if not all cases described in this report, rape and serious sexual violence during armed conflict may also be prosecuted as torture. [Report of the Special Rapporteur on the question of torture to the Commission on Human Rights at its forty-second session (E/CN.4/1985/15, para. 119); International Human Rights Law Group, Token Gestures: Women's Human Rights and UN Reporting, 1993, pp. 6-11.] In addition, the European Court of Human Rights, the Inter-American Commission on Human Rights and numerous domestic courts have also found acts of custodial rape to constitute torture.

54. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

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nationals". The grave breaches provisions are also intended to apply during international armed conflicts involving one or more Contracting Parties to the Conventions. Article 3 common to the Conventions and Protocol II additional to the Conventions offer more limited protections in conflicts of a non-international character.

The Appeals Chamber of the ICTFY has ruled (in the *Tadic* case) that even as customary international law, the grave breaches provisions of the Geneva Conventions apply only in the context of international armed conflicts. However, commentators have criticized this decision as being under-inclusive. Theodor Meron,"The continuing role of custom in the formation of international humanitarian law", American Journal of International Law, vol. 90, p. 243./ may constitute grave breaches of the Geneva Conventions. [A single act of rape is sufficient to constitute a war crime. Commission of Experts Report (S/1994/674), para. 105 and Rape and Sexual Assault (S/1994/674/Add.2) (vol. I), annex II, para. 16.] The International Committee of the Red Cross has noted that rape is"obviously" covered by the grave breaches provision of article 147 of the Fourth Geneva Convention, which prohibits"wilfully causing great suffering or serious injury to body or health". [International Committee of the Red Cross, Aide-Mémoire, 3 December 1992. See also Meron, supra note 25, p. 26.] In addition, rape is prohibited by the grave breaches provisions concerning torture or inhuman treatment. [Ibid. See also Amnesty International, Bosnia and Herzegovina: Rape and Sexual Abuses by Armed Forces, 1993.]

59. Rape is also explicitly prohibited in article 27 of the Fourth Geneva Convention, which states that"Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault", and in article 76 (1) of Additional Protocol I which states that"Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault".

60. In addition to provisions addressing rape in the Geneva Conventions, the 1907 Hague Convention No. IV concerning the Laws and Customs of War on Land, which clearly is considered to have attained the status of customary international law, [The Regulations annexed to the Hague Convention No. IV of 1907 should be viewed as having attained the status of customary international law by at least 1939. Judgement of the Nürnberg Tribunal, in American Journal of International Law, vol. 41, 1947.] ensures in article 46 of its annexed Regulations protection for"family honour and rights" and should be read to cover the crime of rape. It is important to note, however, that the notion of rape as a violation of honour, rather than as an act of violence, obscures the violent nature of the crime and inappropriately shifts the focus toward the imputed shame of the victim and away from the intent of the perpetrator to violate, degrade and injure. Article 46 of the Hague Regulations, moreover, is neutral as to gender and applies to both female and male victims of sexual violence committed during armed conflict.

61. The International Military Tribunal at Nürnberg, countering arguments that the Hague Convention should not be applied by the Nürnberg Tribunal as several of the belligerents in the war were not parties to the Convention, found that the prohibitions in the Hague Regulations were"recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in article 6 (b) of the [Nürnberg] Charter". [Ibid.]

62. Following the Second World War, a Netherlands court in Batavia found Japanese military defendants who had participated in enslaving 35 Dutch women and girls in"comfort stations" during the Second World War guilty of war crimes for acts including rape, coercion to prostitution, abduction of women and girls for forced prostitution, and ill-treatment of prisoners. [U. Dolgopol and S. Paranjape, Comfort Women: An Unfinished Ordeal, International Commission of Jurists, 1993, pp. 135-36.] In a more modern context, as noted above both the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda have issued a number of indictments charging persons with war crimes based on sexual violence.

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67. The majority of the world's contemporary armed conflicts are non-international, or internal, in character. [The present report recognized the current efforts to identify and rectify any limits that do exist to the application of existing norms to situations of internal violence. The analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21 endeavours to establish a framework for minimum humanitarian standards and groups the limitations and failings of human rights law under three broad categories: (1) concern for derogations; (2) questions concerning the accountability of armed groups under the human rights standards; and (3) the lack of specificity in human rights standards that prevent their effective application in situations of international violence (E/CN.4/1998/87, para. 40).] Recent examples of sexual violence committed during internal conflicts include numerous reports of sexual violence committed following the military coup against the Government of President Aristide in Haiti; sexual violence during the 15-year conflict in Peru between government forces and the Shining Path rebels; and sexual violence in the ongoing hostilities in Algeria, Myanmar, Uganda and southern Sudan. In Algeria, reports suggest that armed groups have abducted women and girls for forced, temporary"marriages" in which the captive women and girls are raped, sexually abused and often mutilated and killed. In Uganda, there are reports that the Lord's Resistance Army abducts children as soldiers and labourers and forces young girls into sexual slavery. These egregious examples of sexual slavery and sexual violence illustrate the need for protection of civilians and combatants during conflicts not of an international character.

68. Since at least 1907, with the adoption of the Martens clause in the preamble to the Hague Convention No. IV, the international community has recognized that even in those conflicts or situations that are not covered by humanitarian treaty provisions, both combatants and civilians"remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience". In particular, Common article 3 of the Geneva Conventions, which constitutes customary international law, sets out those protections that all parties to a conflict must respect, including all parties to internal conflicts that are not otherwise covered by the Geneva Conventions. The provisions of Common article 3 are significant, as they regulate the conduct of both State and non-State actors in internal conflicts. As noted in an analytical report of the Secretary-General on the subject of minimum humanitarian standards, the importance of the basic protections contained in both the Martens clause and in Common article 3"should not be underestimated" (E/CN.4/1998/87, paras. 74, 85).

69. Article 27 of the Hague Convention No. IV and Common article 3 of the Geneva Conventions clearly prohibit as a matter of customary international law acts of sexual violence and rape by State and non-State actors when committed in internal or international armed conflict. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has recently confirmed this position, ruling that Common article 3 as well as all of the provisions of the Hague Convention apply broadly as customary law in all international as well as internal armed conflicts. [ICFTY, *Tadic* case, Appeals Chamber decision, paras. 84, 89.] This position is also supported by an important decision in a case before the International Court of Justice in which the Court found that the prohibitions contained in Common article 3 constitute"elementary considerations of humanity" that must be respected in all armed conflicts. [Nicaragua v. United States, supra note 39, p. 14.]

70. Despite the broad coverage of Common article 3, there has been some concern that the application of Common article 3 to internal conflicts may be complicated by restrictive interpretations of the general reach of the Geneva Conventions. There is no doubt that in the context of the Geneva Conventions, both Common article 3, which lists protections that must be afforded in armed conflicts that are"not of an international character", and Additional Protocol II, which"develops and supplements" Common article 3, cover acts of sexual violence and rape committed in internal conflict. [See also article 4 (2) (e) of Additional Protocol II (prohibiting"outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault").] The problem,

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proving the elements of the offence, including the necessary mens rea such as specific intent. Liability can also be found for related forms of the international crimes, such as attempt or conspiracy to commit the offence, or inciting, soliciting or aiding and abetting the commission of the offence. Importantly, the fact that a perpetrator acted under superior orders is not a defence to the crime, though it may be considered in mitigating punishment. [ICTFY Statute, art. 7; ITR Statute, art. 6.]

76. Under the legal doctrine of command responsibility, commanders, superiors and other authorities are liable for crimes perpetrated by their subordinates. Any commander or other responsible authority who orders a subordinate to commit acts of sexual slavery or sexual violence, or who otherwise knew or should have known that such acts were likely to be committed and failed to take steps to prevent them, may be held fully responsible for the commission of the international crimes which those acts constitute, including war crimes, crimes against humanity, slavery, genocide or torture. [Commission of Experts Report (S/1994/674), para. 55.] The law of command responsibility relates to acts of rape and sexual violence as it does to all other serious violations of international criminal law. For example, with respect to violations committed by warring parties in the former Yugoslavia, a United Nations Commission of Experts that was charged with investigating violations of humanitarian law in the region specifically concluded that:

"The practices of 'ethnic cleansing', sexual assault and rape have been carried out by some of the parties so systematically that they strongly appear to be the product of a policy. The consistent failure to prevent the commission of such crimes and the consistent failure to prosecute and punish the perpetrators of these crimes, clearly evidences the existence of a policy by omission. The consequence of this conclusion is that command responsibility can be established." [Ibid., para. 313.]

77. The level of formality or organization of the command hierarchy is irrelevant so long as there is some chain of command for the transmittal of orders and the supervision of subordinates. Further, notions of command responsibility are not limited to military or paramilitary structures and many of the persons found to be in command positions are political leaders, government officials and civilian authorities.

78. For example, the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia indicted the highest-ranking civilian officer in a municipality in Bosnia and Herzegovina who "knew or had reason to know" that the Chief of Police in the area was about to force others to commit acts of sexual assault or had done so and failed to take "necessary and reasonable measures" to prevent such acts or to punish the Chief of Police after the acts came to his attention. [ICTFY, Miljkovic Indictment, paras. 31, 33, 34.] In that case, the civilian administrator was charged with responsibility for the acts or the omissions of the Chief of Police, including crimes against humanity for acts of rape and other forms of sexual assault, including male sexual assault. [Ibid.]

79. Thus, the law of command responsibility fully applies to all those in high-level positions with the authority to make decisions, formulate policy and influence the issuance of directives within the State, region or locale where international crimes are being committed. Holding commanders, superiors and other authorities to a "knew or should have known" standard is appropriate for assessing liability at this level, and where acts of sexual slavery or sexual violence are occurring on a widespread or notorious basis, such defendants will be presumed to have knowledge of the acts and of their international prohibition. Of course, a commander who participates in or is present during the commission of acts of sexual violence is directly liable as a perpetrator, or may be charged with aiding and abetting the commission of the crime.

80. The customary international law of command responsibility is also reflected in the grave breaches provisions of the Geneva Conventions and article 86 (1) of Additional Protocol I which requires all

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85. States, including successor Governments, have an obligation to prosecute slavery, crimes against humanity, genocide, torture and certain war crimes before domestic courts or, as requested by another State or a duly constituted international criminal tribunal, to surrender defendants for trial, regardless of the defendant's civil or military position. As noted in previous sections of this report, these crimes all entail universal jurisdiction and perpetrators may properly be tried before any competent national or international tribunal.

86. To the extent that the violations described in this report may constitute grave breaches of the Geneva Conventions, a Contracting Party to the Conventions is under an additional obligation, according to article 146 of the Fourth Geneva Convention, to "search for persons alleged to have committed, or to have ordered to be committed, ... grave breaches" and to "bring such persons, regardless of their nationality, before its own courts." This obligation may also be applied to States that are not parties to the Geneva Conventions to the extent that it now reflects customary international law applicable at least to all international armed conflicts. The apprehension and prosecution of criminals is one aspect of the general obligation to bring perpetrators of international crimes to justice, and other aspects may include compensation of victims and other forms of redress, as discussed in section VI below. By fulfilling the obligation to bring perpetrators of international crimes to justice, States take an important and necessary step towards eradicating sexual slavery and sexual violence during armed conflict.

87. It is well established that there are no statute of limitation barriers to prosecutions for serious crimes under international law. The Special Rapporteur of the Sub-Commission on impunity of perpetrators of violations of civil and political rights, Mr. Louis Joinet, noted in his final report to the Sub-Commission that "[p]rescription is without effect in the case of serious crimes under international law ... [and] it cannot run in respect of any violation while no effective remedy is available" (E/CN.4/Sub.2/1997/20/Rev.1, para. 31). This modern position is a natural extension of the Nürnberg Tribunal precedent and is reaffirmed in international treaties addressing the subject and prohibiting the application of statutory limitations to certain war crimes and crimes against humanity, such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (1974). A number of domestic courts have in fact continued to convict Nazi war criminals for international crimes committed nearly 50 years ago during the Second World War despite defence arguments based on statute of limitations concerns. [For example, the French courts in 1987 upheld the conviction of Nazi war criminal Klaus Barbie for crimes against humanity. International Law Review, vol. 78, 1988.] Similar reasoning prevents statute of limitations barriers to claims for compensation for gross violations, as discussed below.

VI. THE RIGHT TO AN EFFECTIVE REMEDY AND THE DUTY TO COMPENSATE

88. The Special Rapporteur of the Sub-Commission on the right to reparation for victims of gross violations of human rights and humanitarian law, Mr. Theo van Boven, noted in his revised set of basic principles and guidelines that all victims of serious violations of international law have a right to fair and adequate reparations, which "shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations" (E/CN.4/Sub.2/1996/17, para. 7). Reparations, as defined in international law and as used throughout the present report, refers to all measures expected to be taken by a State which has violated international law, including payment of monetary compensation to victims, punishment of wrongdoers, apology or atonement, assurances of non-repetition, and other forms of satisfaction proportionate to the gravity of the violations. [Ian Brownlie,

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the global community. This is particularly true with respect to proceedings against senior political or military leaders who stand accused of having committed or having ordered the commission of crimes on a massive scale in violation of *jus cogens* norms, including acts of sexual slavery and sexual violence. As matters of universal concern that may be tried properly in any forum, massive criminal violations of peremptory norms of customary international law are properly a focus of the international community as a whole and should, in these most extreme cases, be addressed in international criminal proceedings.

94. In cases involving claims of sexual slavery or sexual violence, local prosecutions may be more effective in preventing future violations, while facilitating the return of victims to their pre-war communities by removing some of the stigma that may often be attached, however improperly, to victims of sexual violence. However, because of culturally maintained gender stereotypes, it is not self-evident that all survivors of such violations will be willing or able to come forward, either because they fear exposing themselves to further stigma or because they fear retaliation. Thus, local tribunals in post-conflict proceedings must be evaluated based on their ability to ensure the rights of both victims and defendants to obtain justice before an independent and impartial tribunal.

B. Common failings of municipal law and procedure

95. A crucial concern in evaluating the competence of national judicial systems to try international crimes is the extent to which the municipal legal system in question adequately protects as a matter of general concern the rights of women to present and argue their legal claims on an equal basis with men in a court of law. In national prosecutions, crimes of sexual slavery and sexual violence committed during armed conflict should generally be tried as international crimes rather than municipal crimes, with the application, therefore, of international procedural rules involving such issues as the admissibility of evidence. Nonetheless, to the extent that some municipal rules of criminal procedure or evidence may still be applied, the existence of gender-based stereotypes and biases in municipal laws or procedures must be taken into account when assessing the general competence of domestic courts to adjudicate violations of human rights and humanitarian law that are directed against women. For example, in some legal systems the crime of rape is not adequately defined as a crime of violence against the person. In other legal systems, evidentiary rules diminish the legal weight that is afforded to the testimony of a woman in a court of law, creating a legal barrier that would necessarily impede the adequate prosecution of crimes committed against women. Also, the general approach that a legal system takes to crimes of sexual violence, including rape and sexual slavery, may be an additional and equally important factor to consider in evaluating the overall utility of national rather than international prosecutions for acts of rape and sexual slavery committed during armed conflict. For instance, some legal systems emphasize the immoral status of the rape survivors rather than the violent nature of the offence committed by the perpetrator.

96. A general survey of municipal legal systems reveals the following examples of gender-based discrimination codified in criminal laws and justice systems around the world: rape and other forms of sexual assaults that are defined as crimes against the community and not against the individual victim, even though non-sexual assaults are defined as crimes against the individual victim; rape being defined as acts committed by a man against a woman (not his wife), even though men are also victims of sexual violence; procedural laws requiring women to take independent action to initiate prosecutions of rape by the prosecutor's office; evidentiary laws which accord less weight to evidence if presented by a woman; evidentiary laws in rape and sexual assault cases which require women to provide corroborating testimony from men; substantive laws which provide that a married woman who is unsuccessful in proving that she was raped can then be charged with adultery; penalties for sexual violence which allow a man convicted of rape to avoid punishment if he marries the victim; laws which prevent women from serving as judges or as fact-finders; laws which restrict women's access to abortions, contraception or

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genocide. Military regulations, codes of conduct, and training materials for the uniformed and armed services must explicitly address the prohibition of sexual violence and sexual slavery during armed conflict. States should search for and bring to justice all perpetrators of grave breaches of the Geneva Conventions, pursuant to article 146 of the Fourth Geneva Convention. States should, for example, follow the examples of Belgium and Canada and enact legislation providing universal jurisdiction for violations of *jus cogens* norms and other international crimes including sexual slavery and sexual and gender violence committed by State and non-State actors, including armed groups not under State authority. The Sub-Commission, in consultation with other relevant United Nations bodies, should facilitate public reporting by the Secretary-General on steps that have been taken to incorporate humanitarian law into national legal systems and the extent to which national laws provide jurisdiction to prosecute persons who are within the territory or jurisdiction of the State and are accused of having committed grave breaches of the Geneva Conventions, crimes against humanity, slavery, genocide or torture in other countries. The Sub-Commission may wish to request the author of the present report to facilitate the convening of an expert meeting comprised of representatives of Attorneys General, Ministries of Justice, national prosecutors from various legal systems, the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia and for the International Tribunal for Rwanda, the Office of the United Nations High Commissioner for Human Rights and other relevant United Nations programmes, agencies and experts such as the Commission on Crime Prevention and Criminal Justice or the Special Rapporteur of the Commission on violence against women, and other relevant international, governmental and non-governmental organizations to prepare and disseminate guidelines for the effective prosecution of international crimes of sexual violence in proceedings at the national level.

103. **Removal of gender bias in municipal law and procedure.** States must ensure that their legal systems at all levels conform to internationally accepted norms and are capable of adjudicating international crimes and administering justice without gender bias. Municipal courts and formal and customary laws and practices must not discriminate against women in substantive legal definitions or in matters of evidence or procedure. States should review and revise their domestic law and practices to ensure that they promote equal access to justice for women and men and that all levels and branches of their legal systems, including, where relevant, military or religious courts, provide effective remedies and forms of redress for violations of international law, including prosecution of perpetrators and compensation of victims. In furtherance of efforts begun by the various agencies and entities of the United Nations, notably the Special Rapporteur on violence against women, and as reaffirmed in the Beijing Platform for Action, the Sub-Commission, along with other relevant bodies and programmes of the United Nations, should facilitate the publication, on a regular basis, of information on the substantive, evidentiary and procedural barriers at all levels in municipal legal systems to prosecuting violence against women, including sexual violence, highlighting the steps taken to remove these obstacles in conformity with international human rights standards.

104. **Adequate protection for victims and witnesses.** In prosecutions of international crimes at the international or national levels, including those crimes involving sexual violence, it is important to protect victims and witnesses from intimidation, retaliation and reprisals at all stages of the proceedings and thereafter. This is particularly the case when the crimes being prosecuted are international crimes involving allegations of sexual violence and the assailants remain at large in the community. Such protection may require witness relocation programmes or confidentiality of witnesses' identities. Appropriate resources, structures and personnel must be identified for witness protection programmes and support services, including female translators, for victims and witnesses in prosecutions at the national and international level and at all stages of the proceedings (including necessary periods thereafter).

105. **Appropriate support services for victims.** In addition to having their cases investigated and

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observe international human rights instruments and principles. The prosecution of perpetrators and compensation of victims of international crimes committed during armed conflict are generally not contemplated in the peace negotiations and agreements. In fact, amnesty is often granted to those who have committed crimes such as grave breaches of the Geneva Conventions and other war crimes, crimes against humanity, slavery, genocide and torture. Following an armed conflict or other hostilities or circumstances resulting in the transfer of State power, States should explicitly include in peace treaties provisions designed to break the cycle of impunity and to ensure the effective investigation and redress of sexual slavery and acts of sexual violence, including rape, committed during the armed conflict. In addition, peace treaties must not seek to extinguish the rights of victims of human rights violations with respect to claims of compensation and other forms of legal redress unless appropriate administrative schemes for compensation and prosecution are incorporated into the substantive peace agreement. The international community, including the United Nations, must give maximum support to rebuilding effective, accessible and non-discriminatory municipal legal systems following the cessation of hostilities and ensure adequate prosecutions of international crimes committed during the conflict, particularly those involving sexual violence.

109. **The need for an effective, gender-sensitive response.** While international human rights and humanitarian law are largely applicable to all perpetrators of sexual violence and slavery, male or female, the nature and consequences of these crimes as they relate specifically to gender must be incorporated into all legal and extralegal responses, including prevention, investigation, prosecutions, compensation, and the training of persons taking part in armed conflicts. This gender integration is to ensure that no sexual violence is committed with impunity. Clearly, women are often at great risk of sexual violence. This risk is further exacerbated by gender discrimination found within all legal systems and within societies in general, although to varying degrees. This discrimination is particularly likely when the fact of being female is coupled with minority status in terms of ethnicity, race or religion. At the same time, in the context of armed conflict, it is crucial not to overlook the fact that victims of sexual violence most likely will have also suffered violence of a non-sexual nature. Women who have been raped, for instance, should not be characterized solely as "the rape victims" as this ignores the totality of the violations they may have endured. By incorporating an understanding of gender into the legal framework for responding to systematic rape and sexual slavery, the full range of the obligations and legal accountability of all parties to a conflict may be carefully articulated and concrete steps may be outlined to ensure adequate prevention, investigation and criminal and civil redress, including compensation of victims.

IX. CONCLUSIONS

110. As Ms. Machel noted in her final report, "While abuses such as murder and torture have long been denounced as war crimes, rape has been downplayed as an unfortunate but inevitable side effect of war" (A/51/306, para. 91). However, a new attitude is evolving with respect to the prosecution of sexual violence committed during armed conflict as serious international crimes. The international community has increased its efforts to end the cycle of impunity for these crimes by ensuring, for both victims and perpetrators, that justice is done. The International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, as well as the proposed permanent International Criminal Court, are welcome advances in this campaign for justice, and it is hoped that these tribunals will endeavour to implement the best practices possible in this regard.

111. The international legal framework of humanitarian law, human rights law and criminal law which currently exists to prosecute crimes of sexual violence committed during armed conflict, although not always sufficiently explicit, clearly prohibits and criminalizes sexual violence and sexual slavery and

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AN ANALYSIS OF THE LEGAL LIABILITY OF THE GOVERNMENT OF JAPAN FOR "COMFORT WOMEN STATIONS" ESTABLISHED DURING THE SECOND WORLD WAR

Introduction

1. Between 1932 and the end of the Second World War, the Japanese Government and the Japanese Imperial Army forced over 200,000 women into sexual slavery in rape centres throughout Asia. These rape centres have often been referred to in objectionably euphemistic terms as "comfort stations". The majority of these "comfort women" [This term has obvious derogatory connotations and is used solely in its historical context as the term assigned to this particular atrocity. In many ways, the unfortunate choice of such a euphemistic term to describe the crime suggests the extent to which the international community as a whole, and the Government of Japan in particular, has sought to minimalize the nature of the violations.] were from Korea, but many were also taken from China, Indonesia, the Philippines and other Asian countries under Japanese control. Over the past decade, an increasing number of women survivors of these atrocities have come forward to seek redress for these crimes. The present appendix relies exclusively on the facts established in the Japanese Government's own review of the involvement of Japanese military officials in establishing, supervising and maintaining rape centres during the Second World War. Based on these admissions by the Japanese Government, the appendix then seeks to evaluate the Japanese Government's current legal liability for the enslavement and rape of women in "comfort stations" during the Second World War. Although numerous grounds for liability may exist, this report focuses specifically on liability for the most egregious international crimes of slavery, crimes against humanity and war crimes. The appendix also sets out the legal framework under international criminal law and examines claims that may be brought by survivors for compensation.

I. THE POSITION OF THE GOVERNMENT OF JAPAN

2. After denying for many years the extent to which the Japanese military was directly involved in establishing and supervising rape centres during the Second World War, the Japanese Government finally recognized the extent of its own involvement in the establishment of the "comfort stations" in an official study entitled "On the issue of wartime 'comfort women' of 4 August 1993 by the Japanese Cabinet Councillors' Office on External Affairs and in a statement by the Chief Cabinet Secretary on the same date (E/CN.4/1996/137, annex I)". The study included a review of wartime archives and interviews with both military personnel and former "comfort women". As discussed in the present appendix, the 1993 study highlights the "comfort women's" lack of personal and sexual autonomy and the regulation of the health of the women as if they were chattel.

3. The Japanese Government has recently offered a number of public apologies for the "problem" of the "comfort women." Most notably, in July 1995, on the occasion of the fiftieth anniversary of the end of the Second World War, Japanese Prime Minister Tomiichi Murayama noted that "the scars of war still run deep" and that the "problem of the so-called 'wartime comfort women' is one such scar, which, with the involvement of the Japanese military forces of the time, seriously stained the honour and dignity of many women. This is entirely inexcusable. I offer my profound apology to all those who, as wartime comfort women, suffered emotional and physical wounds that can never be closed." [Statement by Japanese Prime Minister Tomiichi Murayama, July 1995, reprinted in Asian Women's Fund (an official programme description). See also Japan's policy on the issues of violence against women and "comfort

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OHCHR REPORT

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Office of the United Nations High Commissioner for Human Rights

OHCHR

Abolishing Slavery and its Contemporary Forms

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United Nations
New York and Geneva 2002

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I. FORMS OF SLAVERY

30. In this section the review will summarize briefly the various forms of slavery and slavery-like practices.

A. Serfdom

31. Serfdom has been categorized as a form of slavery since the first discussions preceeding the adoption of the Slavery Convention of 1926. In its final report to the League of Nations, the Temporary Slavery Commission regarded serfdom as the equivalent of "predial slavery", that is to say the use of slaves on farms or plantations for agricultural production.[35] The requirement contained in the Slavery Convention of 1926, "to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms," consequently applies to serfdom as well as slavery.

32. The Temporary Slavery Commission also noted in a 1924 report that many people were found in "agricultural debt bondage" which combined elements of both debt bondage and serfdom.[36] That conclusion was confirmed by later investigations by the International Labour Organization (ILO) into the status and conditions of indigenous labour in Latin America during the 1940s.[37] Both serfdom and debt bondage are sometimes referred to by the term "peonage", particularly in the Latin American context.[38]

33. The Supplementary Convention of 1956 categorizes serfdom as a form of "servile status", and defines it as "the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status" (art. 1(b)). Land tenure systems viewed in all their aspects – legal, economic, social and political – can in certain circumstances be seen as oppressive power relationships arising from ownership or use of land and disposition of its products to create forms of servitude and bondage.[39]

34. Records of discussions that occurred both in the United Nations and in the ILO before the adoption of the Supplementary Convention in 1956 indicate that the term "serfdom" was intended to apply to a range of practices reported in Latin American countries and more generally referred to as "peonage".[40] Those practices, which had developed in a context of conquest, subjugation of indigenous peoples, and seizure of their lands, involved a landowner granting a piece of land to an individual "serf" or "peon" in return for specific services, including (1) providing the landowner with a proportion of the crop at harvest ("share cropping"), (2) working for the landowner or (3) doing other work, for example domestic chores for the landowner's household. In each case, it is not the provision of labour in return for access to land that is in itself considered a form of servitude, but the inability of the person of serf status to leave that status. The term "serfdom" and

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[35] Temporary Slavery Commission Report to the Council, League of Nations document A.19.1925.VI (1925), para. 97. Slaves involved in growing and harvesting sugar cane in the West Indies in the eighteenth century were classified as "praediala" or predial slaves. See Seymour Drescher and Stanley L Engerman, eds., "Caribbean Agriculture", in *A Historical Guide to World Slavery,* (1998), p. 113.

[36] Ibid.

[37] Report for the Committee of Experts on Indigenous Labour, ILO document (1951), p. 135.

[38] See section on Debt Bondage, *infra.*

[39] See report of the Working Group on Slavery on its fifth session, United Nations document E/CN/4/Sub.2/434 (1979), paras. 10-16.

[40] C. W. W. Greenidge, *Slavery at the United Nations* (1954), p. 8.

a prostitute are included in the price the tourist pays for his ticket. This specialized kind of tourism is grafted onto an existing prostitution market and develops it."[201]

110. The Commission on Human Rights Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography, urges that "[s]pecial attention should be given to the problem of sex tourism. Legislative and other measures should be taken to prevent and combat sex tourism, both in the countries from which the customer comes and the countries to which they go. Marketing tourism through enticement of sex with children should be penalized on the same level as procurement."[202]

111. The Preamble to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography affirms that the States parties are "Deeply concerned at the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution and child pornography". Under article 4, a State "may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, in the following cases: (a) when the alleged offender is a national of that State or a person who has his habitual residence in its territory". The Optional Protocol does not, however, contain any specific articles addressing sex tourism directly.

G. Forced Marriage and the Sale of Wives

112. Although the most recent instruments dealing with sexual exploitation are applicable to men and women equally, within the context of marriage women are particularly vulnerable. The Temporary Slavery Commission in 1924 included in its list of practices analogous to slavery "[a]cquisition of girls by purchase disguised as payment of dowry, it being understood that this does not refer to normal marriage customs".[203] The Supplementary Convention of 1956 identifies three types of institutions or practices akin to slavery to which women can be subjected in the context of marriage. The Supplementary Convention first prohibits any institution or practice whereby "a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family, or any other person or group".[204] It is not the payment which is an abuse but its occurrence in a forced or non-consensual marriage. The second practice prohibited by the Supplementary Convention is the right, by a woman's husband, his family, or his clan "to transfer her to another person for value received or otherwise".[205] The third prohibited practice concerns the inheritance of a widow on her husband's death by her husband's brother or another member of her deceased husband's family. This custom, known as "levirate", involves automatic remarriage to a member of the deceased's family.

113. Recognizing the close link between these three forms of servile status and the general practice of forced marriage, the Supplementary Convention requires States parties "to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the

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[201] Jean Fernand-Laurent, Report of the Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others, United Nations document E/1983/7, para. 39 (also stating that "such tourism is quite plainly the worst possible image of development which the industrialized countries could project").

[202] Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography, United Nations document E/CN.4/Sub.2/1991/41, Commission on Human Rights resolution 1992/74, para. 47. In 1995 the Working Group on Contemporary Forms of Slavery recommended that "[g]overnments prohibit advertising or publicizing sex tourism and they not facilitate other commercial activities involving sexual exploitation". Report of the Working Group on Contemporary Forms of Slavery on its twentieth session, *supra* note 78, Recommendation 3 on the Prevention of Traffic in Persons and the Exploitation of the Prostitution of Others.

[203] The suppression of slavery (memorandum submitted by the Secretary-General to the Ad Hoc Committee on Slavery), United Nations document ST/SPA/4 (1951), p. 31.

[204] Supplementary Convention, *supra* note 20, art. 1(c)(i).

[205] Ibid., art. 1(c)(ii).

consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages".[206]

114. The Universal Declaration provides that "[m]arriage shall be entered into only with the free and full consent of the intending spouse" (art. 16(2)). The 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages specifies that "[n]o marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and other witnesses".[207] Article 2 requires States parties to "take legislative action to specify a minimum age for marriage" but does not itself specify any minimum age. The Convention on the Elimination of All Forms of Discrimination against Women stipulates that "[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."[208]

1. *Mail-order brides*

115. A relatively recent development concerning women available for marriage is the advertising of women for marriage outside their own countries in a variety of media (magazines, videos and the Internet), prompting the description "mail-order brides" and the concern that they may be trafficked. The Committee on the Elimination of Discrimination Against Women (CEDAW) has classified such marriages as a new form of sexual exploitation.[209]

116. While the marriage of women from one society, country or continent to men from another cannot by itself be categorized as a form of slavery or servitude, it seems clear that women who leave their families to marry a man in a foreign country that they have not previously visited are vulnerable to a wide range of forms of exploitation prohibited by existing international standards. The involvement of commercial agents in organizing marriages does not in itself appear to be unacceptable, but if the agent makes payments to the bride's parents or others, the arrangement would come close to infringing the prohibition on the sale of women for marriage in the Supplementary Convention.

117. Women advertised for marriage are becoming victims of a contemporary form of slavery or of trafficking. Advertisements may portray women as commodities rather than people – in much the same way as they are portrayed in various forms of pornography – and are therefore demeaning to women in general. Almost invariably women from developing countries advertise themselves to men in industrialized countries, creating a perception that women from developing countries have a secondary or servile status; this view is supplemented by a concern that certain men in industrialized countries deliberately seek out women from abroad who will behave in a more subservient way than women in their own culture. As new brides in countries where they do not have relatives or friends and where they may not immediately acquire a permanent right of residence, women may be exposed to abuse by their new husbands and either not know where to turn for help or fear deportation if they abandon their new husbands.[210]

118. Some marriages that involve a spouse moving from one country to another disguise either migrant smuggling or trafficking in persons and are often referred to as "paper marriages" (i.e. the

[206] Ibid., art. 2.

[207] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, General Assembly resolution 1763 A (XVII) of 7 November 1963, *United Nations Treaty Series*, vol. 521, p. 231, art. 1(1); entered into force on 9 December 1964.

[208] Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 144, art. 16(2).

[209] General Recommendation No. 19, Committee on the Elimination of Violence Against Women (eleventh session, 1992), United Nations document A/47/38, para. 14.

[210] Markus Dreixler, *Der Mensch als Ware – Erscheinungsformen modernen Menschenhandels unter strafrechtlicher Sicht* (Peter Lang, 1998), p. 200.