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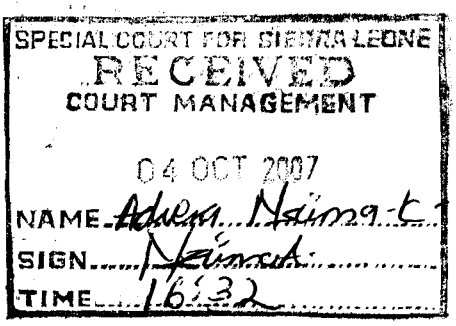
SCSL-04-16-A
(1387 – 1732)

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 A. Raja N. Fernando
Registrar:	Mr. Herman Von Hebel
Date filed:	4 October 2007



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

Case No. SCSL-04-16-A

PUBLIC
RESPONSE BRIEF OF THE PROSECUTION

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1. Introduction

(a) General matters

1.1 Pursuant to Rule 112 of the Rules of Procedure and Evidence, and the Appeals Chamber's "Decision on Urgent Joint Defence and Prosecution Motion for an Extension of Time for the Filing of Response Briefs" of 26 September 2007, the Prosecution files this **Response Brief** containing the submissions of the Prosecution in response to:

(1) the "Brima Appeal Brief" (the "**Brima Appeal Brief**"), filed on behalf of Alex Tamba Brima ("**Brima**") on 13 September 2007;

(2) the "Kamara Appeal Brief" (the "**Kamara Appeal Brief**"), filed on behalf of Brima Bazzy Kamara ("**Kamara**") on 13 September 2007; and

(3) "Kanu's Submissions to Grounds of Appeal" (the "**Kanu Appeal Brief**"), filed on behalf of Santigie Borbor Kanu ("**Kanu**") on 13 September 2007.

These three documents are referred to collectively in this Response Brief as the "other parties' Appeal Briefs".

1.2 The submissions made in this Response Brief are without prejudice to the submissions made in the Prosecution Appeal Brief. The submissions in this Response Brief merely respond to the arguments in the other parties' Appeal Briefs in the light of the Trial Chamber's Judgement, not taking into account the arguments raised by the Prosecution in its own appeal in this case.

(b) Structure of this Response Brief

1.3 Some grounds of appeal of each of the parties raise issues that are common to grounds of appeal of one or more of the other parties. In order to avoid repetition, this Response Brief therefore does not deal in order with each of the grounds of appeal of each party. Instead, some sections of this Response Brief deal with multiple Defence grounds of appeal that raise similar issues. Furthermore, this Response Brief deals with the various Defence grounds of

appeal grouped in a thematic order. The table in Appendix A indicates where each of the other parties' grounds of appeal is dealt with in this Response Brief.

1.4 Before addressing the arguments made in the other parties' Appeal Briefs, the Prosecution makes preliminary submissions on certain general issues in the following sections of this Part below.

(c) The standards of review on appeal

1.5 Under the Statute and Rules of the Special Court, an appeal may be allowed on the basis of:

(1) a procedural error,

(2) an error on a question of law invalidating the decision, and/or

(3) an error of fact which has occasioned a miscarriage of justice.[1]

1.6 The standard of review to be applied by the Appeals Chamber in an appeal against a decision of the Trial Chamber is different for each of these different types of alleged errors. These standards are now well-established in the case law of the ICTY and ICTR.

1.7 Where the appellant alleges an **error of fact**, the Appeals Chamber will not conduct an independent assessment of the evidence admitted at trial, or undertake a *de novo* review of the evidence.[2] The standard of review on appeal for an error of fact of this type has been articulated by the Appeals Chamber of the ICTY as follows:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.

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[1] See Article 20 of the **Special Court Statute** and Rule 106 of the **Rules of Procedure and Evidence**.

[2] See, for instance, ***Čelebići* Appeal Judgment**, paras. 203–204.

> ... it is initially the Trial Chamber's task to assess and weigh the evidence presented at trial. In that exercise, it has the discretion to 'admit any relevant evidence which it deems to have probative value', as well as to exclude evidence 'if its probative value is substantially outweighed by the need to ensure a fair trial.' As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence. The presence of inconsistencies in the evidence does not, per se, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.
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> ... The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion, following from Article 23(2) of the Statute[3].

1.8 In other words, in an appeal against conviction, the Appeals Chamber does not determine whether it is *itself* satisfied beyond a reasonable doubt of the guilt of the accused. Rather, it applies a "deferential standard" of review, under which it must decide whether a reasonable Trial Chamber, based on all of the evidence in the case, *could* have been satisfied beyond reasonable doubt as to the finding

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[3] ***Kupreškić*** **Appeal Judgement**, paras. 30–32 (footnotes omitted). See also ***Tadić*** **Appeal Judgement**, para. 64; ***Aleksovski*** **Appeal Jugement**, para. 63; ***Kunarac*** **Appeal Judgement**, paras. 39–42; ***Čelebići*** **Sentencing Appeal Judgement**, paras. 54–60; ***Bagilishema*** **Appeal Judgement**, paras. 11–14; ***Rutaganda*** **Appeal Judgement**, paras. 22–23; ***Krnojelac*** **Appeal Judgement**, paras. 11–12; ***Vasiljević*** **Appeal Judgement**, para. 7.

in question.[4] An appellant can only establish an error of fact where the appellant can establish that the finding of fact reached by the Trial Chamber is one which could not have been made on the evidence by ***any*** reasonable tribunal of fact.

1.9 It has further been held that in making this determination:

> The Appeals Chamber does not review the entire trial record *de novo*; in principle, it only takes into account evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal, if any.[5]

1.10 Not every error of fact leads to a reversal or revision of a decision of a Trial Chamber. Article 20(1)(c) of the Statute requires that the error of fact be one which has "occasioned a miscarriage of justice". The Appeals Chamber of the ICTY has for instance held that the appellant must establish that the error was critical to the verdict reached by the Trial Chamber, thereby resulting in a "grossly unfair outcome", or a "flagrant injustice", such as where an accused is convicted despite a lack of evidence on an essential element of the crime.[6]

1.11 Where the appellant alleges an **error of law**, the Appeals Chamber, as the final arbiter of the law of the Court, must determine whether such an error of substantive or procedural law was in fact made.[7] The Appeals Chamber of the ICTY has said that:

> Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and,

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[4] ***Blaškić*** **Appeal Judgement**, para. 22.
[5] ***Brđanin*** **Appeal Judgement**, para. 15.
[6] See, *e.g.*, ***Kupreškić*** **Appeal Judgement**, para. 29. See also ***Furundžija*** **Appeal Judgement**, para. 37; ***Kunarac*** **Appeal Judgement**, para. 39; ***Krnojelac*** **Appeal Judgement**, para. 13; ***Vasiljević*** **Appeal Judgement**, para. 8; ***Kvočka*** **Appeal Judgement**, para. 18.
[7] ***Kunarac*** **Appeal Judgement**, para. 38.

> for other reasons, find in favour of the contention that there is an error of law"[8].

1.12 In other words, the Appeals Chamber accords no particular deference to the findings of law made by the Trial Chamber, since the Appeals Chamber is as capable as the Trial Chamber of determining what is the law. However, in accordance with the general principle that it is for a party asserting a right or seeking relief to establish the existence of that right or the entitlement to that relief, an appellant may be said to bear a burden of persuasion[9]. Thus, it has been said that:

> [A] party who submits that the Trial Chamber erred in law must at least identify the alleged error and advance some arguments in support of its contention. An appeal cannot be allowed to deteriorate into a guessing game for the Appeals Chamber. Without guidance from the appellant, the Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake. If the party is unable to at least identify the alleged legal error, he or she should not raise the argument on appeal. It is not sufficient to simply duplicate the submissions already raised before the Trial Chamber without seeking to clarify how these arguments support a legal error allegedly committed by the Trial Chamber.[10]

1.13 As to the remedy to be granted in cases where an error of law has been established, it has been held that:

> Where the Appeals Chamber finds that there is an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, it is open to the Appeals Chamber to articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly. In doing so, the Appeals Chamber not only corrects a legal error, but applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond reasonable doubt as to the factual finding

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[8] ***Furundžija*** **Appeal Judgement**, para. 35. See also, *e.g.*, ***Kajelijeli*** **Appeal Judgement**, para. 5; ***Vasiljević*** **Appeal Judgement**, para. 6.

[9] See, *e.g.*, ***Tadić*** **Additional Evidence Appeal Decision**, para. 52.

[10] ***Kupreškić*** **Appeal Judgement**, para. 27. See also ***Kunarac*** **Appeal Judgement**, paras. 43-48; ***Krnojelac*** **Appeal Judgement**, para. 10.

challenged by the Defence before that finding is confirmed on appeal.[11]

1.14 Thus, not every error of law leads to a reversal or revision of a decision of a Trial Chamber. Pursuant to Article 20(1)(b) of the Statute, the Appeals Chamber is empowered to reverse or revise a Trial Chamber's decision only when the error of law is one "invalidating the decision".[12] The party alleging an error of law must identify the alleged error and explain how the error invalidates the decision, and an allegation of an error of law which has no chance of resulting in an impugned decision being quashed or revised may be rejected on that ground.[13]

1.15 In the case of an alleged **procedural error**, it is necessary to distinguish between cases where it is alleged that there has been a non-compliance with a *mandatory procedural requirement* of the Statute and the Rules, and cases where it is alleged that the Trial Chamber has erroneously exercised a *discretionary power*. Errors of the former type will not necessarily invalidate the Trial Chamber's decision, if there has been no prejudice to the Defence.[14]

1.16 In cases where it is alleged that the Trial Chamber has erroneously exercised its discretion, the issue on appeal is not whether the decision is correct, 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.[15]

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[11] ***Kvočka* Appeal Judgement**, para. 17; see also ***Blaškić* Appeal Judgement**, para. 15; ***Kordić* Appeal Judgement**, para. 17; ***Stakić* Appeal Judgement**, paras. 9, 312 (but see the **Partly Dissenting Opinion of Judge Shahabuddeen**, paras. 2-7); ***Brđanin* Appeal Judgement**, para. 10.

[12] Compare ***Kunarac* Appeal Judgement**, para. 38.

[13] See, for instance, ***Krnojelac* Appeal Judgement**, para. 10; ***Kvočka* Appeal Judgement**, para. 16; **CDF Subpoena Appeal Decision**, para. 7 "To show that the discretion was based on an error of law, an appellant must give details of the alleged error, and must state precisely how the legal error invalidates the decision.". However, even if an appellant's arguments are insufficient to support the contention of an error, the Appeals Chamber may conclude for other reasons that there has been an error of law: *Stakić* Appeal Judgement, para. 8.

[14] See, e.g., ***Čelebići* Appeal Judgment**, paras. 630–639. See also ***Krstić* Appeal Judgement**, paras. 187–188 (holding that the prosecution's failure to comply with its disclosure obligations did not warrant a retrial where no prejudice to the accused was established).

[15] See, e.g., **CDF Subpoena Appeal Decision**, para. 5; ***Milošević* Reasons for Decision**, para. 14; ***Bagosora* Interlocutory Appeal Decision**, para. 10.

1.17 The test for determining whether the Trial Chamber has erred in the exercise of a discretion is whether the Trial Chamber "has 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].

1.18 In simple terms, the question is whether the exercise of the discretion was "reasonably open" to the Trial Chamber,[17] or whether, conversely, the Trial Chamber "abused its discretion",[18] or has "erred and exceeded its discretion",[19] or whether the Trial Chamber has committed a "discernible error" in the exercise of its discretion,[20] or whether the Trial Chamber's decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[21]

1.19 The standards of review in an appeal against sentence are dealt with in Part 7(a) below.

(d) The waiver principle

1.20 The Appeals Chamber of the ICTY has held that:

> The appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing.[22]

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[16] **CDF Subpoeana Appeal Decision**, para. 6; ***Milošević* Reasons for Decision,** para. 5. See also ***Milošević* Interlocutory Appeal Decision,** para. 7; ***Bizimungu* Interlocutory Appeal Indictment Decision,** para. 11; ***Karemera* Interlocutory Appeal Indictment Decision,** para. 9.

[17] ***Čelebići* Appeal Judgment**, paras. 274–275 (see also para. 292, finding that the decision of the Trial Chamber not to exercise its discretion to grant an application was "open" to the Trial Chamber).

[18] *Ibid.*, para. 533 ("[T]he Appeals Chamber recalls that it also has the authority to intervene to exclude evidence, in circumstances where it finds that the Trial Chamber abused its discretion in admitting it"), and see also at para. 564 (finding that there was no abuse of discretion by the Trial Chamber in refusing to admit certain evidence, and in refusing to issue a subpoena that had been requested by a party at trial).

[19] *Ibid.*, para. 533.

[20] ***Naletilić and Martinović* Appeal Judgement**, paras. 257-259; ***Mejakić* Rule 11*bis* Decision**, para. 10.

[21] Compare ***Mejakić* Rule 11*bis* Appeal Decision**, para. 10.

[22] ***Erdemovic* Appeal Judgement**, para. 15; ***Kupreškić* Appeal Judgement**, para. 408.

1.21 Consistently with this principle, it has been said that:

> The Appeals Chamber accepts that, as a general principle, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party.[23]

1.22 Thus, if a party fails to raise any objection to a particular issue before the Trial Chamber, in the absence of any special circumstances, the party is to be taken as having waived its right to adduce the issue as a valid ground of appeal. A concomitant of this principle is that the accused cannot raise a defence for the first time on appeal.[24] This principle is referred to below as the "waiver principle".

1.23 The waiver principle is based in part on judicial economy: if an issue is raised and dealt with at trial, an unnecessary appeal, with the ensuing possibility of a subsequent retrial, may be avoided. The ICTY Appeals Chamber has also indicated that it may be difficult for it to determine precisely what prejudice has been caused to a party if the objection was not raised before the Trial Chamber.[25]

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[23] ***Čelebići* Appeal Judgment**, para. 640 (referring to earlier case law) (and see at para. 351). See also ***Kunarac* Appeal Judgement**, para. 61; ***Naletilić and Martinović* Appeal Judgement,** paras. 21-22; ***Kambanda* Appeal Judgement**, paras. 25–28, 55; ***Kayishema* Appeal Judgement**, para. 91; ***Musema* Appeal Judgement**, paras. 127, 341; ***Bagilishema* Appeal Judgement**, para. 71. The waiver principle applies also to appeals against sentence: ***Čelebići* Sentencing Appeal Judgement**, para. 15.

[24] ***Aleksovski* Appeal Judgement**, para. 51. Nevertheless, it appears that the Appeals Chamber will not apply the waiver principle in exceptional cases: see, for instance ***Aleksovski* Appeal Judgement**, paras. 51-56; ***Kambanda* Appeal Judgement**, para. 55. It has been held that where a convicted person raises an alleged defect in the form of the indictment for the first time on appeal, he bears the burden of proving that his ability to prepare his defence was materially impaired, but that when an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare a defence was not materially impaired: ***Simić* Appeal Judgement,** paras. 25, 56-74; ***Bagosora* Appeal Decision,** para. 42.

[25] ***Čelebići* Appeal Judgment**, para. 641.

(e) General requirements of appeal briefs

1.24 The Appeals Chamber of the ICTY and ICTR has made clear that the Appeals Chamber does not operate as a second Trial Chamber, and that an appeal does not involve a trial *de novo*.[26]

1.25 Consistently with this principle, and the waiver principle, and the standards of review on appeal referred to above, it is incumbent upon an appellant to demonstrate in his appeal brief how the Trial Chamber erred. It is not sufficient for an appellant simply to duplicate the submissions already raised before the Trial Chamber without seeking to clarify *how* these arguments support a legal error allegedly committed by the Trial Chamber.[27]

1.26 The ICTY Appeals Chamber has said that it cannot be expected to consider the parties' claims in detail if they are obscure, contradictory or vague, or if they are vitiated by other blatant formal defects, and that the party appealing must therefore set out the sub-grounds and submissions of its appeal clearly and provide the Appeals Chamber with precise references to relevant transcript pages or paragraphs in the judgment to which the challenge is being made, and exact references to the parts of the records on appeal invoked in its support.[28] The ICTY Appeals Chamber has added that it does not have to provide a detailed written explanation of its position with regard to arguments which are clearly without foundation, and that it will reject without detailed reasoning arguments raised by appellants in their briefs or at the appeal hearing if they are obviously ill-founded.[29]

1.27 It has further been held that an appellant who makes no submission to the effect that the Trial Chamber's findings were unreasonable but who merely challenges

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[26] ***Tadić* Additional Evidence Appeal Decision**, paras. 41-42; ***Furundzija* Appeal Judgement**, para. 40; ***Čelebići* Appeal Judgment**, paras. 203, 724; ***Vasiljević* Appeal Judgement**, para. 5; ***Kvočka* Appeal Judgement**, paras. 424-425.

[27] ***Čelebići* Appeal Judgment**, para. 371; ***Kupreškić* Appeal Judgement**, paras. 26-27 (indicating that there is a possible exception "where the Trial Chamber has made a glaring mistake"); ***Niyitegeka* Appeal Judgement**, para. 9 ("A party cannot merely repeat on appeal arguments that did not succeed at trial, unless that party can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber").

[28] ***Krnojelac* Appeal Judgement**, para. 16; ***Vasiljević* Appeal Judgement**, paras. 10-11; ***Kordić* Appeal Judgement**, para 22; ***Kvočka* Appeal Judgement**, para 425.

[29] *Ibid.*

the Trial Chamber's findings and suggests an alternative assessment of the evidence, fails to discharge the burden of proof incumbent on it when alleging errors of fact.[30] The Appeals Chamber of the ICTY and ICTR has sometimes been quite strict, and has said that it may dismiss without detailed reasoning submissions that do not meet the formal requirements of the applicable rules and practice directions.[31]

(f) Failure to make submissions on grounds of appeal

1.28 The Brima Appeal Brief makes no submissions on Brima's Second, Third, Seventh and Eighth Grounds of Appeal (all relating to Brima's responsibility for enslavement crimes). Consistent with the principles referred to above, the Prosecution submits that these grounds of appeal of Brima must therefore be treated as abandoned.

1.29 The Prosecution submits that a party is required to set out its arguments in relation to its grounds of appeal fully in its appeal brief. The purpose of this requirement is to give the responding party full notice of the appellant's arguments, and to enable to responding party to address those arguments in its response brief. The Prosecution submits that an appellant cannot be permitted to present its arguments in relation to grounds of appeal for the first time in its reply brief, or in its oral arguments before the Appeals Chamber, at which time the responding party will not have been given adequate notice of those arguments, and will not have an opportunity adequately to respond.

1.30 The Prosecution submits that Brima should therefore be precluded from presenting any further arguments in relation to these grounds of appeal of Brima. Alternatively, that if Brima is subsequently permitted to present

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30 ***Krnojelac*** **Appeal Judgement**, para. 20 (and see also at paras. 21–27); ***Vasiljević*** **Appeal Judgement**, paras. 13–21.

31 ***Vasiljević Appeal Judgement***, para. 10; ***Semanza*** **Appeal Judgement**, paras. 9-11. See also, *e.g.*, ***Kajelijeli*** **Decision on Prosecution Notice of Appeal,** (rejection of notice of appeal filed out of time); ***Kayishema*** **Appeal Judgement**, paras 15–49 (Prosecution appeal held to be inadmissible in its entirety, and Prosecution's respondent's briefs to be inadmissible, due to failure to file appeal brief and respondent's briefs in time); but *c. f.* ***Bagilishema*** **Appeal Judgement**, paras. 15-23.

arguments on these grounds, the Prosecution should be given adequate time to respond, in accordance with the time limits provided for under the Rules.

2. Alleged procedural errors

(a) Alleged denial of equality of arms

2.1 This section of this Response Brief responds to Brima's First Ground of Appeal. In this ground of appeal, Brima contends that the principle of equality of arms was violated in this case in that the Defence lacked adequate time and resources.

2.2 The submissions of Brima in relation to this ground of appeal consist almost entirely of a treatment of general legal principles relating to the concept of equality of arms. Brima does not explain exactly how he claims that the principle of equality of arms was violated in his case, or exactly what prejudice he suffered as a result. Brima's first ground of appeal makes no submissions at all on the particular circumstances of his own case, other than to make the bare assertion, in paragraph 81 of the Brima Appeal Brief, that "a fair trial of the Appellant was substantially and seriously compromised and impaired without the adequate time and resources needed by the Defence to conduct investigations that were vital to the presentation of the Appellant's case before the Trial Chamber".

2.3 The Brima Appeal Brief expressly acknowledges that:

(1) a determination of what constitutes "adequate time" depends on the circumstances of each case;[32]

(2) the right of an accused to have adequate time for the preparation of his defence is not absolute but ought to be exercised in correlation with the right of the accused to be tried without undue delay;[33] and

(3) equality of arms does not guarantee an equality of resources between the Prosecution and the Defence.[34]

2.4 Any question of whether the principle of equality of arms was violated in this case could thus only be determined in the light of all relevant details of the

[32] ***Brima*** **Appeal Brief**, paras. 76, 77, 79, 80.
[33] ***Brima*** **Appeal Brief**, para. 81.
[34] ***Brima*** **Appeal Brief**, para. 82.

specific circumstances of this case. The Brima Appeal Brief does not deal at all with the specific circumstances of this case.

2.5 In cases where the Defence raises an issue before the Trial Chamber about an alleged lack of time and resources, the Trial Chamber has a discretion as to what remedy, if any, to order in the event that it finds the complaint substantiated. For the Defence to succeed in an appeal against the approach adopted by the Trial Chamber, it is necessary for the Defence to establish that the Trial Chamber has committed a discernible error *resulting in prejudice to the Defence*, and to do this the Defence must establish that the exercise of the Trial Chamber's discretion was (i) based on an incorrect interpretation of the governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[35]

2.6 Regarding any alleged error of law, in application of the general principle that the party asserting a right or seeking a relief has to establish the existence of that right or the entitlement to that relief (see Part 1(c) above), Brima bears the burden of persuasion.[36] The Accused Brima should therefore have at least identified the alleged error and advanced some arguments in support of his contention. Furthermore, Brima bears the burden of proof in establishing the facts on which this ground of appeal is based.

2.7 The Brima Appeal Brief does not provide any details of the time and resources that were available to it for the preparation of the Defence, or details of what additional time and resources the Defence claims that it needed, or details of why such additional time and resources were needed, or of precisely what prejudice the Defence claims that it suffered as a result of this lack of additional time and resources. As submitted in paragraph 1.26 above, submissions in an appellant's appeal brief must set out the sub-grounds and submissions of its appeal clearly and provide the Appeals Chamber with specific references to the sections of the appeal case it is putting forward in support of its claims. A mere

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[35] ***Pandurević and Trbić* Interlocutory Appeal Decision**, para. 6.

[36] See, *e.g.*, ***Tadic* Additional Evidence Appeal Decision**, para. 52.

unsubstantiated and non-specific assertion that the Defence lacked adequate time and resources cannot suffice to entitle the Defence to a remedy on appeal. By making such an unsubstantiated and non-specific assertion, the Defence cannot place the burden on the Prosecution to establish that the Defence ***did*** have adequate time and resources.

2.8 An appeal cannot be allowed to deteriorate into a guessing game for the Appeals Chamber.[37] It appears that the Brima Defence is unable to identify the alleged legal error, and it should therefore have refrained from raising this issue before the Appeals Chamber.[38] In the absence of any detailed submissions by the Defence establishing how Brima was denied his right to equality of arms, the Appeals Chamber should only address the alleged legal error if the Trial Chamber has made a glaring mistake. No such glaring mistake is apparent in this case. In this ground of appeal, Brima fails to discharge any of the burdens of an appellant.

2.9 For this reason alone, Brima's First Ground of Appeal should be rejected.

2.10 It is furthermore submitted that, during the trial the Defence never filed any written motions before the Trial Chamber setting out with any detailed justification their need for additional time or resources. The principle of equality of arms, and the Defence claims that it needed more time and/or resources, were raised only orally on various occasions by the Defence before the Trial Chamber. Brima does not establish that the Trial Chamber did not give due considerations to the submissions made by the Defence on those occasions.

2.11 For instance, at a status conference on 4 April 2006, the Defence indicated that it wanted the Defence case to start in early September 2006, in order to give the Defence adequate time to prepare. The Prosecution proposed a start date of 5 June 2006, which the Trial Chamber accepted, albeit indicating that it had hoped for an earlier start date. The Trial Chamber in fixing that date noted that the Defence could have ***some*** witnesses who were ready to testify by that date,

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[37] See paragraph 1.12 above.

[38] ***Kupreškić*** **Appeal Judgement**, para. 27. See also ***Kunarac*** **Appeal Judgement**, paras. 43-48; ***Krnojelac*** **Appeal Judgement**, para. 10.

particularly if any of the accused decided to give evidence, that the Defence would thereby have sufficient evidence to take their case to the Summer recess, and that the Defence would then be able to utilise the time over the Summer recess for further preparations.[39] The Trial Chamber concluded by stating that "We have considered the statutory rights of the accused under Article 17(4)(b) to have adequate time and preparation for their defences and under Article 14(c) to be tried without undue delay. We consider that these rights would not be contravened if we order that the Defence case commenced on Monday, 5 June 2006, and we so order". It is submitted that Brima has not established that this decision, and other decisions of the Trial Chamber relating to the time to be allocated to the Defence, were based on an incorrect interpretation of the governing law or on a patently incorrect conclusion of fact, or that they were so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.

2.12 The Trial Chamber did indicate a willingness to entertain applications by the Defence in relation to specific difficulties that it faced. At the hearing on 17 July 2006, the Presiding Judge said to Defence counsel that "If you are having difficulty getting witnesses coming to court, perhaps the court can help you there by issuing subpoenas, but we note that we don't have any applications in that regard before us at the moment".[40] No applications for subpoenas were ever made by the Defence in this case. When Defence counsel later at the same hearing spoke of the "logistical constraints" faced by the Defence, the Presiding Judge said that "We have taken note of what you've said. We will deal with applications if and when any are made".[41] However, no formal written applications were ever made by the Defence.

2.13 Earlier, for instance, on 10 March 2005, Defence counsel indicated that they were not in a position to cross-examine a witness. The Presiding Judge indicated that Defence counsel could if they desired apply to recall that witness subsequently, and that any such application would be dealt with at the

[39] Transcript, 4 April 2006, pp. 31-32.
[40] Transcript, 17 July 2006, p. 75.
[41] Transcript, 17 July 2006, p. 76.

appropriate time.[42] The Defence never made any application to recall this witness.

2.14 The Trial Chamber was in fact of the view that Defence counsel were not using their time efficiently. On 27 July 2007, the Presiding Judge said that:

> ... we have given the Defence what we consider not only ample time, but generous time to prepare their witnesses to give evidence in court in their case, and the Trial Chamber is of the view that the Defence has squandered that time, not made good use of it at all.

2.15 Brima does not establish that the Defence was in fact making an efficient use of its time and resources.

2.16 The Prosecution does not contest that "[w]hat is generally called 'equality of arms', that is the procedural equality of the accused with the public prosecutor, is an inherent element of a fair trial."[43] Nor does the Prosecution challenge that the principle equality of arms, as part of the guarantees to a fair trial, is contained in international human rights treaties and most domestic legal systems.[44] The Prosecution does not contest either that the right to equality of arms "obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case."[45] The Prosecution notes that in the *Kordić and Čerkez* case, the Appeals Chamber added that the disadvantage had to be substantial.[46]

2.17 According to Cassese, the concept of equality of arms as developed by the European Court of Human Rights implies that "the accused may not be put at a *serious procedural disadvantage* with respect to the Prosecutor."[47]

2.18 The Appeals Chamber of the *ad hoc* Tribunals has stated that the principle of equality of arms should be interpreted in favour of both parties and not only in

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42 Transcript, 10 March 2006, p. 42.
43 **Brima Appeal Brief**, para. 72.
44 **Brima Appeal Brief**, para. 74.
45 ***Nahimana* Stay of Proceedings Decision**, para. 5, citing ***Tadić* Appeal Judgement**, para. 48; ***Orić* Interlocutory Decision**, para. 7.
46 ***Kordić* Appeal Judgement**, para. 175; ***Kordić and Cerkez* Extension of Time Decision**, para. 6.
47 Antonio **Cassese**, *International Criminal Law*, Oxford University Press, 2003, p. 395 (emphasis added).

favour of the accused[48] and that the equality means procedural equality as opposed to substantive equality.[49]

2.19 It is for the party invoking this principle –here the Defence- to establish that it was violated.[50]

2.20 As conceded by the Defence,[51] the equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources.[52] It is also not to say that an accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution.[53]

2.21 The case law acknowledges that in international criminal justice systems, as in national criminal justice system, the Prosecution typically requires greater resources than the Defence.[54] Under the Statute, the Prosecutor is charged with responsibility for the investigation and prosecution of large scale crimes committed over long periods of time by large numbers of people. At the Trial stage of proceedings, the Prosecutor has the burden of proving all elements of all crimes beyond a reasonable doubt, while the defence bears no burden at all, and need only point to a reasonable doubt in relation to one essential element of each crime in order to obtain an acquittal. Furthermore, the Prosecution bears certain procedural obligations to which the Defence is not subject, such as disclosure requirements under Rule 68 of the Rules of Procedure and Evidence. In a multiple accused trial, at the trial stage, the Prosecution bears the burden of proving the guilt of a number of different accused beyond a reasonable doubt,

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48 In ***Aleksovski* Admissibility of Evidence Decision**, paras 23-25; **Jones and Powles**, para. 8.5.77.

49 ***Tadić* Appeal Judgement**, paras 48, 49, 51, 52, quoted in **Jones and Powles**, para. 8.5.80.

50 ***Milutinovic Interlocutory* Appeal Decision** paras 19-24.

51 **Brima Appeal Brief**, para. 73.

52 ***Milutinovic Interlocutory* Appeal Decision**, para. 23; ***Kayishema* Appeal Judgement**, para. 69; ***Kordić* Appeal Judgement**, para. 176.

53 ***Orić Interlocutory Decision***, para. 7.

54 *Ibid.*: "The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavour which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides".

while each defence team is charged only with the issue of whether there is a reasonable doubt in respect of the guilt of a single accused.

2.22 In the absence of any explanation by Brima of why he allegedly lacked time or resources, or why his right to equality of arms was supposedly impaired, the Prosecution submits that the question is (if at all entertained and examined by the Appeals Chamber) limited to establish whether, taking into account the circumstances and complexity of the case, the amount of time and the number of witnesses allocated to the Defence were reasonably proportional to the Prosecution's allocation and sufficient to permit Brima a fair opportunity to present his case.[55]

2.23 The amount of time generally considered to be adequate for the preparation of a defence depends on the complexity of case.[56]

2.24 The Trial Chamber summarized the procedural history of this case in Annex A to the Trial Chamber's Judgement. The Trial Chamber noted that the Pre-Trial Brief of the Prosecution was filed on 5 March 2004 and that the Prosecution case-in-chief commenced on 7 March 2005 and closed on 21 November 2005.[57] The Defence therefore had almost a full year to prepare before the opening of the Prosecution's case.

2.25 Moreover, the Defence case-in-chief started on 5 June 2006 and finished on 26 October 2006.[58] The Defence had thus more than six months since the end of the Prosecution's case to investigate and prepare its evidence, while it had no burden of proof whatsoever.

2.26 It should be noted that the following decision, although it relates to the Accused Kanu, shows that the concern of ensuring a fair trial as to the time allocated to the Defence of the three Accused was taken into consideration by Trial Chamber II: On 22 March 2004 Defence Counsel for Kanu also submitted its

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[55] ***Orić Interlocutory Decision***, para. 9.

[56] ***Taylor* Joint Decision on Adequate Facilities and Time**, para. 13; Trial Chamber II referred to *Twalib v. Greece*, European Court of Human Rights, Judgement, 9 Jun 1998, Reports 1998-IV, para. 40.

[57] **Trial Chamber's Judgement**, Annex A, paras 55, 56, 58.

[58] *Ibid.*, para. 59.

Pre-Trial brief.[59] With the same order by which it requested the Prosecution to supplement its Brief, the Trial Chamber modified the deadline for the filing of the Defence Pre-Trial Briefs, originally set for 26 March 2004, setting it for two weeks prior to the date for the commencement of the trial. Thus, Defence Counsel for Kanu was given the possibility to file any supplement to his brief with the same deadline.[60]

2.27 In addition, it should be noted that the rebuttal requested by the Prosecution was denied.[61]

2.28 Finally, the Prosecution notes that Judge Boutet examined on 18 March 2004 a motion filed by the Defence Counsel for Kanu and on 23 March 2004 a motion filed by Defence Counsel for Brima. Both motions submitted that the Prosecution had breached its disclosure obligations by failing to comply with Rule 66(A)(i) and requested a similar relief, [62] *i.e.* that witnesses who gave their statements after 23 October 2003 should not testify for the Prosecution at trial.[63] Judge Boutet dismissed both motions[64], as he found that the Defence would not be prejudiced in any way as a consequence of the disclosure practice adopted by the Prosecution, that they had been provided with adequate notice of the case against the Accused "*and that they had sufficient time to adequately prepare for trial*".[65]

2.29 In conclusion, these elements establish that the amount of time allocated to the Defence was reasonably proportional to the Prosecution's allocation and sufficient.

2.30 The Prosecution called *59 witnesses.*[66] In total, the *Defence called 87 witnesses*, including the first Accused Brima who testified pursuant to Rule 85(C) of the

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[59] **Kanu-Defence Pre-Trial Brief** and **Notification of Defenses.**
[60] **Order to file Supplemental Pre-Trial Brief**; **Trial Chamber's Judgement**, Annex A, para. 56.
[61] **Rebuttal Decision**; Trial Chamber's Judgement Annex A, para. 61.
[62] **Motion for Exclusion of Prosecution Witness Statements.**
[63] ***Kanu*-Motion for Exclusion of Prosecution Witness Statements**; See also *id.*, ***Kanu*-Additional Motion for Exclusion of Prosecution Witness Statements.**
[64] **Kanu-Decision on Motions for Exclusion of Prosecution Witness Statements**; **Brima-Decision on Motions for Exclusion of Prosecution Witness Statements**
[65] **Trial Chamber's Judgement**, Annex A, para. 45 (emphasis added).
[66] **Trial Chamber's Judgement**, Annex A, para. 58.

Rules.[67] Again, this establishes that the number of witnesses allocated to the Defence was reasonably proportional to the Prosecution's allocation and sufficient. The number of Defence witnesses was in fact superior to the number of Prosecution witnesses.

2.31 Regarding adequate facilities, the meaning of this expression has been interpreted broadly, encompassing for instance access to a photo-copier,[68] a laptop,[69] and may comprise everything which is necessary for trial.[70]

2.32 However, the Registrar has the primary responsibility in such matters, according to Rule 45 of the Rules of Procedure and Evidence.[71] The Trial Chamber can only intervene if it is shown that the circumstances are such that the Accused's fair trial rights have not been respected.[72] The Appeals Chamber of the Special Court has endorsed this view of the law.[73] It is for the party invoking such intervention –here the Defence- to establish that such intervention is justified.[74] Allegations of belief without appropriate supporting evidence are not sufficient to establish any violation of such principle.[75]

2.33 In the present case, there is no evidence that the Defence pursued available remedies by bringing the matter to the Registrar according to the prescribed statutory procedure, here in accordance with Article 22 of the Directive, which provides for arbitration of any dispute between the Defence Office and Contracting Counsel arising from the LSC.[76] In the absence of any showing

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[67] **Trial Chamber's Judgement**, Annex A, para. 59.

[68] ***Taylor* Joint Decision on Adequate Facilities Time**, para. 13; Trial Chamber II referred to *Kamasinski v. Austria*, European Court of Human Rights, Judgement, 19 December 1989, series A no 168, para. 88.

[69] *Ibid.*; Trial Chamber II referred to *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on the Oral Request of the Accused Jadranko Prlić for Authorisation to Use a Laptop Computer at Hearings or to be Seated Next to his Counsel, 29 June 2006.

[70] *Ibid.*;Trial Chamber II referred to *Mayzit v. Russia*, European Court of Human Rights, Judgement, 20 January 2005, para. 78.

[71] ***Milutinovic Interlocutory* Appeal Decision**, para. 19.

[72] ***Brima* Decision on the Assignment of Counsel**, paras 65, 129-32; ***Taylor* Joint Decision on Adequate Facilities Time**; **Sesay Logistical Resources Decision**; ***Blagogević* Reasons for Decision**, para. 7; See **Esad Landžo's Motion** para.3.

[73] Decision on Brima-Kamara Defence Appeal Motion, para. 76.

[74] ***Milutinovic Interlocutory* Appeal Decision**, paras 19-24.

[75] See, generally, ***Kayishema* Appeal Judgement**, para. 72; **RUF Decision on Defence Application II** para. 23.

[76] ***Sesay* Decision on Defence Application for Review**, para. 16; **RUF Decision on Defence Application II**, para. 24. In addition, the Appeals Chamber has held that the Chamber's inherent jurisdiction may

that the Defence exhausted all available remedies through the Registry, the Trial Chamber would in any event not have been in a position to intervene.

2.34 Furthermore there is once again no concrete evidence to support the contention that Brima was not provided with adequate resources for the preparation of his defence.[77] Brima has therefore failed to substantiate that his rights were violated because inadequate resources was provided to him.

2.35 In any hypothesis, nothing in the record suggests that Brima did not benefit from the facilities guaranteed by Article 26 of the Special Court's Directive on the Assignment of Counsel entitled "Provisions of Facilities", which provides, *inter alia*, that assigned Counsel and members of the Defence team who do not have professional facilities close to the seat of the Special Court shall be provided with reasonable facilities and equipment such as access to photocopiers, computer equipment, various types of office equipment, and telephone lines.

2.36 The Prosecution submits that the Appellant does not provide any factual basis establishing prejudice to the Defence, and that nothing in the record suggests such prejudice.

2.37 Brima's First Ground of Appeal should therefore be rejected.

(b) The effect of the words "those bearing the greatest responsibility"

2.38 This section of this Response Brief responds to Kanu's Ground One.

2.39 In this ground of appeal, Kanu argues that the Trial Chamber erred in law and in fact in finding that the words "persons who bear the greatest responsibility" in Article 1(1) of the Statute of the Special Court do not create a jurisdictional requirement that must be satisfied before an accused before the Special Court can be convicted of any crime. Kanu argues that on the evidence he does not qualify as one of those who bears the "greatest responsibility" within the meaning of Article 1(1) of the Statute, and that the guilty verdict against him

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be exercised "only in the silence of the regulations applicable to the matter in question." ; See *Prosecutor v.* **Decision on *Brima-Kamara* Defence Appeal Motion**, paras 71, 135.

[77] See in the same sense, **RUF Decision on Defence Application II**, para. 27.

should be set aside on the ground that he does not meet the jurisdictional threshold required by that provision.[78]

2.40 The Trial Chamber's findings on the effect of the words "persons who bear the greatest responsibility" in Article 1(1) of the Statute are set out in paragraphs 640 to 659 of the Trial Chamber's Judgement. The Prosecution submits that those findings were correct in law. The Trial Chamber found in particular as follows:

> The 'greatest responsibility requirement'... solely purports to streamline the focus of prosecutorial strategy. ... The Trial Chamber cannot accept the idea that the drafters of the Statute purported to make 'the greatest responsibility requirement' a jurisdictional threshold which, if not met, would oblige a Trial Chamber to dismiss the case without considering the merits.
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> Article 15 of the Statute vests the Prosecutor with responsibility "for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law [...]". In doing so, the Prosecutor shall "act independently as a separate organ of the Special Court". The Trial Chamber is therefore not called upon to review the prosecutorial discretion in bringing a case against the Accused, nor would it be in a position to do so. Therefore, no issue arises for the Trial Chamber's determination as to whether, within the meaning of Article 1 of the Statute, the Accused in the present case bear the 'greatest responsibility' for the crimes alleged against them.[79]

2.41 The Trial Chamber reached this conclusion after considering the drafting history of the Special Court's Statute.[80] The Prosecution submits that the Trial Chamber was correct in finding that the drafting history of the Statute required this conclusion. The Prosecution submits that any other conclusion would also be unprincipled and impracticable.

2.42 In proposing the Statute of the Special Court, the Secretary-General of the United Nations suggested that Article 1(1) of the Statute should refer to

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[78] ***Kanu* Appeal Brief**, para. 1.28.
[79] **Trial Chamber's Judgement**, paras. 653-654.
[80] **Trial Chamber's Judgement**, paras. 650-652.

"persons most responsible" rather than to "persons who bear the greatest responsibility".[81] He said:

> "While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership and authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases."[82]

2.43 The Security Council subsequently indicated its desire to retain the expression "persons who bear the greatest responsibility" in Article 1(1).[83] However, the Security Council expressed no disagreement with the opinion of the Secretary-General that the relevant wording must be seen "not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases". The Prosecution submits that it is thus clear from the documents leading to the establishment of the Special Court that it was intended that the question whether a person is one of the "persons who bear the greatest responsibility" for the purposes of Article 1(1) of the Statute is to be decided as a matter of prosecutorial discretion.[84]

2.44 The Prosecution submits that it is self-evident that this must be the case. If the words "persons who bear the greatest responsibility" were interpreted to be a test criterion or a distinct jurisdictional threshold, it would be necessary to determine, at the pre-trial stage, as a matter of *fact*, that there is no person who has not been indicted by the Prosecution who bears greater responsibility than the Accused. In order to determine this fact, it would be necessary to determine, at the pre-trial stage, as a matter of fact, not only the precise extent

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[81] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 (the "**Report of the Secretary-General**"), para. 29 and page 15.
[82] **Report of the Secretary-General**, para. 30.
[83] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, **U.N. Doc. S/2000/1234**, 22 December 2000, para. 1.
[84] See also **Trial Chamber's Judgement**, paras. 651-652.

of the criminal responsibility of the Accused. It would also be necessary to determine the precise extent of the criminal responsibility of every other person believed to have committed crimes within the jurisdiction of the Special Court, in order to be able to determine whether the Accused had greater responsibility than they did. Essentially, on the Defence's theory it would be necessary, before it would be possible to conduct a trial of any accused, to conduct a fact-finding trial of every person who was involved in the commission of crimes within the jurisdiction of the Special Court in order to determine which of them bore the greatest responsibility. This would clearly be absurd.

2.45 It is clear that at the pre-trial stage, the precise scope of the criminal liability of the Accused cannot be known. It cannot be known at the pre-trial stage whether at the end of the trial the Accused will be convicted on all of the counts with which he or she has been charged. Furthermore, the Prosecution may have evidence that the Accused committed other crimes with which, in the interests of efficiency, the Prosecution has decided not to charge the Accused in the Indictment. At the pre-trial stage, it is also impossible to know the precise scope of the criminal liability of any other person who was involved in the conflict in Sierra Leone. As no proceedings before the Special Court have yet been finalised by final appeals judgements, it cannot be known exactly what is the precise scope of the criminal liability of any other person who has been indicted by the Special Court. There is also no way of determining with any certainty what is the precise scope of the criminal liability of any person who has not been indicted by the Special Court.

2.46 Accordingly, the only sensible interpretation of the words "persons who bear the greatest responsibility" is that these words are, as indicated by the Secretary-General, intended to provide guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases. In other words, the Prosecution is called upon to decide, based upon all of the evidence it has collected in the course of its investigations, which persons it considers to bear the greatest responsibility for the crimes within the jurisdiction of the Special Court, and to indict those persons. Because that decision is one

that must be based upon all of the evidence that the Prosecution has collected in the course of its investigations as a whole, it is a decision that cannot be susceptible to judicial review on the merits. For a Chamber to review that decision, it would be necessary for the Chamber to review all of the evidence that the Prosecution has collected in the course of its investigations as a whole, in order to determine whether the Prosecution's decision based upon all of that evidence was justified. That would clearly be an impossibility.

2.47 It is acknowledged that the wording of Article 1(1) of the Statute of the Special Court is slightly different to Article 1 of the Statutes of the ICTY and ICTR. Article 1 of the ICTY Statute provides that the ICTY has the power "to prosecute persons responsible for serious violations of international humanitarian law", without that power being limited to those "who bear the greatest responsibility". However, if the Defence's argument were correct, there would be no reason why the words "persons responsible" in Article 1 of the ICTY Statute should not also be considered to be a jurisdictional requirement. In other words, if Article 1 were interpreted as imposing a jurisdictional threshold, the Prosecution of the ICTY would only be able to prosecute those who are actually guilty, so that it would be necessary to determine guilt at the pre-trial stage. Such a reading would clearly be an absurdity. At the pre-trial stage, it cannot be known whether or not the Accused is guilty. In the same way, it cannot be known at the pre-trial stage whether the Accused is one of the "persons who bear the greatest responsibility". Indeed, it would be contrary to the presumption of innocence enshrined in Article 17(3) of the Special Court Statute to determine at the pre-trial stage that the Accused is one of the "persons who bear the greatest responsibility".

2.48 Despite the difference of wording between Article 1(1) of the Special Court Statute and Article 1 of the Statutes of the ICTY and ICTR, the structure of the legal system of the Special Court is materially the same as that of the other two international criminal tribunals. Under Rule 47(B) of the Rules of Procedure and Evidence of the Special Court, as under the equivalent provisions of the

Rules of the ICTY and ICTR,[85] it is for the Prosecutor to be "satisfied" in the course of an investigation that a suspect has committed a crime or crimes within the jurisdiction of the court and to prepare an indictment. In exercising this function, the Prosecutor is required to act independently as a separate organ of the Special Court, and must not seek or receive instructions from any Government or from any other source.[86] Within the structure of the legal system of these institutions, the decision as to which persons are to be indicted, and for what crimes, is a matter of prosecutorial discretion. In the ICTY and ICTR, this prosecutorial discretion is well established.[87]

2.49 This prosecutorial discretion is subject to certain limits. As the Appeals Chamber of the ICTY has said:

> "The discretion of the Prosecutor at all times is circumscribed in a more general way by the nature of her position as an official vested with specific duties imposed by the Statute of the Tribunal. The Prosecutor is committed to discharge those duties with full respect of the law. In this regard, the Secretary-General's Report stressed that the Tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by the recognised principles of human rights."[88]

2.50 Thus, for instance, it would be impermissible for the Prosecutor to act inconsistently with an accused's right to equality before the law, by basing a decision to prosecute on impermissible discriminatory motives such as, *inter alia*, race, colour, religion, opinion, national or ethnic origin.[89] However, as the Appeals Chamber of the ICTY has added:

> The burden of the proof rests on ... appellant alleging that the Prosecutor has improperly exercised prosecutorial discretion, to demonstrate that the discretion was improperly exercised in relation to him ... [and] must therefore demonstrate that the decision to prosecute him or to continue his prosecution was based on impermissible motives, such as race or religion, and that the Prosecution failed to prosecute similarly situated defendants. ... The breadth of the

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[85] Rule 47(B) of the **Rules of Procedure and Evidence of the ICTY and ICTR** respectively.
[86] **Special Court Statute**, Article 15(1); **ICTY Statute**, Article 16(2); **ICTR Statute**, Article 15(2).
[87] See ***Čelebići* Trial Judgement**, para. 179; ***Furundžija* Indictment Decision**, para. 16; ***Barayagwiza* Arrest Decision**, p. 6; ***Ntuyahaga* Indictment Decision**, p. 6.
[88] ***Čelebići* Appeal Judgment**, paras. 602-604.
[89] *Ibid.*, para. 605.

> discretion of the Prosecutor, and the fact of her statutory independence, imply a presumption that the prosecutorial functions under the Statute are exercised regularly. This presumption may be rebutted by an appellant who can bring evidence to establish that the discretion has in fact not been exercised in accordance with the Statute; here, for example, in contravention of the principle of equality before the law in Article 21.[90]

2.51 It is submitted that the words "persons bearing the greatest responsibility" were included in Article 1(1) of the Special Court's Statute in response to the experience of the ICTY and the ICTR, whose Statutes did not contain these words, and where a much larger range of accused were indicted, ranging from high-level perpetrators and heads of state, down to individual foot soldiers. When the Special Court was established, it was decided that its mission should be more focused and that it should concentrate on the main alleged perpetrators. Article 1(1) of the Statute achieves this by mandating the Prosecutor to exercise his prosecutorial discretion by focusing prosecutions on those who, based on all of the evidence that the Prosecutor has collected, appear to the Prosecutor to be those bearing the greatest responsibility. Article 1(1) did not intend to make the criminal justice system of the Special Court unworkable by preventing any prosecution from proceeding unless it is first established judicially that an accused is in fact one of those bearing the greatest responsibility, which would be an impossible task.

2.52 Indeed, the question of which persons can be regarded as those bearing the greatest responsibility is one on which reasonable minds could in any event differ. It is not a question that can be determined with any kind of objective precision, even if all facts about all perpetrators of all crimes committed during the conflict in Sierra Leone were known, which is in itself an impossibility, given the different circumstances and roles played by different perpetrators. A certain discretion therefore has to be exercised in determining who is to be considered as falling within that category. That discretion is not one that can be exercised by the judges, or even the designated judge who approves the indictment, because the designated judge and the judges of the Trial Chamber

[90] *Ibid.*, paras. 607-611.

and Appeals Chamber do not have before them all of the evidence that the Prosecution has gathered in the course of all of its investigations and are, therefore, unable to make that assessment. The only workable interpretation of Article 1(1) is that it guides the Prosecutor in the exercise of his prosecutorial discretion. That discretion must be exercised by the Prosecution in good faith, based on sound professional judgment.

2.53 The Prosecution submits that it would also be unreasonable and unworkable to suggest that the discretion is one that should be exercised by the Trial Chamber or the Appeals Chamber at the end of the trial. It is submitted that it would be inconceivable that a long and expensive trial could be permitted to proceed to its end, and for the Trial Chamber to conclude that serious crimes have been established beyond a reasonable doubt, but for the accused then to be acquitted (or the case dismissed with no verdict entered) on the ground that it has not been established that the Accused was one of those bearing the greatest responsibility. It is therefore submitted that Trial Chamber I of the Special Court erroneously concluded that the issue of whether an accused is one of those "bearing the greatest responsibility" is a jurisdictional requirement,[91] and that the question is "an evidentiary matter to be determined at the trial stage".[92]

2.54 For the same reason, the Prosecution submits that it is untenable to suggest, as Kanu does in paragraph 1.17 of the Kanu Appeal Brief, that the question of whether the Accused is one of those "bearing the greatest responsibility" is a question that can be determined judicially at the Rule 98 stage. It is submitted that it would be unprincipled and inefficient to suggest that the Prosecution case could be permitted to be conducted to its conclusion in a long and complex case, and for the Accused then to be acquitted at the Rule 98 stage on the basis that the Trial Chamber was not satisfied that the Accused was one of those bearing the greatest responsibility.

2.55 In any event, in this case the Defence did raise this argument at the Rule 98 stage. The Trial Chamber found in its Rule 98 Decision that "there is evidence,

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[91] ***Norman*** **Preliminary Motion Decision**, para. 27, **CDF Trial Judgement** para. 89
[92] *Ibid.*, para. 44.

if believed, that is capable of placing each of the three accused in the category of 'persons who bear the greatest responsibility' for the crimes charged in the Indictment".[93]

2.56 Kanu further suggests at paragraphs 1.18 to 1.20 of the Kanu Appeal Brief that it would be possible for the greatest responsibility requirement to be determined by the Trial Chamber at the pre-trial stage. For the reasons given above, it is submitted that it would not. However, in any event, Kanu did not file any preliminary motion or other motion at the pre-trial stage asserting that he did not fall within the category of "those bearing the greatest responsibility". Having failed to do so, he must be taken to have waived any right to do so at a later stage, assuming that such a right exists.

2.57 It has not been established in this case that the Prosecutor's discretion in indicting Kanu was not exercised in good faith or that it was exercised unreasonably. Furthermore, even if Kanu were to suggest that there was any kind of abuse of discretion, and Kanu has not done so, it would have been incumbent upon Kanu to raise this issue at the earliest opportunity, namely at the pre-trial stage. The Prosecution submits that Kanu has waived his right to raise this issue later.

2.58 For these reasons, the Prosecution submits that it is unnecessary for the Appeals Chamber in this appeal to determine the scope of the words "persons bearing the greatest responsibility", or to determine whether Kanu is one of the persons falling within that category.

2.59 However, even if the Appeals Chamber were to consider this issue, the Prosecution submits that it is not the case that the Prosecution must establish that there is no person other than those who have been indicted in proceedings before the Special Court that bear any greater responsibility that those who have been indicted. In other words, if the Prosecutor indicts a total of only 13 people, it is not necessary to prove that these are necessarily the "top 13" perpetrators. An Accused could not seek to evade conviction by arguing that only 13 accused have been indicted by the Prosecutor in total, and that the Accused was only the

[93] **Rule 98 Decision**, para. 39.

15th most responsible, so that he cannot be convicted unless the 14th most responsible person is first indicted.

2.60 The meaning of the expression "persons bearing the greatest responsibility" remains, in the Prosecution's submission, that described in the Report of the Secretary-General, quoted above, namely:

> While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime.[94]

2.61 As the Trial Chamber further found in this case:

> The Security Council maintained its position that 'the greatest responsibility requirement' limited the "focus of the Special Court to those who played a leadership role". Acknowledging the choice of the 'greatest responsibility requirement', the Secretary General subsequently expressed the view that Article 1 of the Statute was not limited to political and military leaders only. The Security Council, and later the Government of Sierra Leone, concurred with this approach.
>
> The Trial Chamber notes that in light of the foregoing that the 'greatest responsibility' requirement necessarily was intended to restrict the number of accused to appear before the Special Court to a small category of individuals. Yet, the Statute needs to be read in its totality. Indeed, Article 7 of the Statute provides for the jurisdiction of the Special Court over alleged perpetrators between the age of 15 and 18 years. 'The greatest responsibility requirement' set out in Article 1 must therefore be interpreted in a manner broad enough to include such alleged perpetrators.
>
> It is the Trial Chamber's view that 'the greatest responsibility requirement' could potentially apply to an array of individuals ranging from military and political leaders down to individuals as young as 15 years of age.[95]

2.62 The Prosecution submits that the arguments in paragraphs 1.22 to 1.24 of the Kanu Appeal Brief do not provide an answer to this finding of the Trial

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[94] **Report of the Secretary-General**, para. 30.
[95] **Trial Chamber's Judgement**, paras. 657-659. See also **Rule 98 Decision**, paras. 30-37.

Chamber. It is clear that the Statute of the Special Court does provide that children as young as 15 might be indicted by the Special Court. It is no answer to suggest dismissively, as Kanu does, that "it was not seriously contemplated that juvenile offenders would be arraigned before the court" or that children as young as 15 could be amongst those bearing the greatest responsibility if they were in leadership positions.

2.63 The Prosecution submits that Kanu has not established that he was not within the category of those bearing the greatest responsibility, even assuming that this is an issue that the Appeals Chamber can address. The Trial Chamber found that in Koinadugu and Bombali Districts Kanu was a senior commander of the AFRC fighting force and that he was the commander in charge of abducted civilians including women and children.[96] In Freetown and the Western Area, throughout the Freetown invasion and Freetown retreat, the Trial Chamber found that Kanu was Chief of Staff and commander in charge of civilian abductees.[97] The Trial Chamber found that Kanu was in a superior position of authority over AFRC troops in Bombali District and during the Freetown invasion and Freetown retreat, and that he was responsible under Article 6(3) for crimes committed by AFRC troops in Bombali District and during the Freetown invasion and retreat.[98] In its Sentencing Judgement, the Trial Chamber expressly found that:

> The Trial Chamber considers that Kanu's position as third in command of armed forces was not a lowly one. He was not a foot soldier nor was he subject to duress. The fact that there were two persons superior to him does not lessen his culpability for crimes committed and does not mitigate his sentence.[99]

2.64 The Prosecution submits that it cannot tenably be suggested that Kanu falls outside the scope of the range of perpetrators encompassed by the expression "persons bearing the greatest responsibility".

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[96] **Trial Chamber's Judgement**, para. 526.
[97] **Trial Chamber's Judgement**, paras. 528-535.
[98] **Trial Chamber's Judgement**, paras. 2032-2044, 2065-2080.
[99] **Sentencing Judgement**, para. 116.

2.65 Kanu makes the further alternative submission at paragraphs 1.29 and 1.30 of the Kanu Appeal Brief that even if he does fall within the scope of the words "persons bearing the greatest responsibility", his culpability "should only be considered in the context of his leadership role". By this, Kanu suggests that he should not be convicted of any crimes that he committed *in person*, and that any crimes that he committed *in person* should be taken into account as aggravating factors in sentencing only.

2.66 The Prosecution submits that this argument of Kanu has no basis in the text of the Statute and the Rules, and no basis in logic or principle. Apart from anything else, there is no reason why crimes committed by Kanu in person cannot be regarded as crimes committed "in the context of his leadership role". Two of the incidents in which Kanu was found to have committed crimes in person were the amputations of civilians at Upgun and Kissy Old Road during the Freetown invasion. On both occasions, it was found that Kanu personally committed amputations in order to "demonstrate" to AFRC troops how this was to be done.[100] In performing these crimes in person, Kanu was clearly deliberately exercising a leadership role in causing similar crimes to be committed by AFRC troops under his command. Any distinction between crimes committed "in the context of a leadership role" and crimes committed "in person" is unworkable in general, but in any event, no such distinction can be drawn on the facts in this case.

2.67 It has not been established by the Defence that it was in any way improper for the Prosecution to consider Kanu in the circumstances one of the persons "bearing the greatest responsibility" for crimes within the jurisdiction of the Special Court. In view of the failure of the Defence to adduce any evidence to establish that the Prosecutor had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute the Accused, Kanu's arguments should be rejected.[101]

2.68 Kanu's Ground One should therefore be rejected.

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[100] **Trial Chamber's Judgement**, paras. 1230, 2050-2052; and 1229, 2053-2056, 2061.
[101] See also ***Ntakirutimana*, Trial Judgment**, para. 871.

(c) Alleged defects in the form of the indictment

(i) Pleading of crimes alleged to have been "committed"

2.69 This section of this Response Brief responds to Kanu's Ground Two.

2.70 The Trial Chamber found that the Indictment in this case was defectively pleaded to the extent that it alleged that the Accused were individually responsible for personally "committing" crimes, as the Indictment gave no particulars regarding time, location and the identity of the victims in relation to the crimes that the Accused personally "committed".[102] However, the Trial Chamber found in relation to certain crimes that this defect had been cured by timely, clear and consistent information by the Prosecution, and/or that the Defence had waived its right to object to such lack of notice by failing to object when evidence of crimes personally committed by the Accused was adduced at trial.

2.71 The Trial Chamber set out the general approach that it took in relation to this matter at paragraphs 45 to 55 of the Trial Chamber's Judgement. This approach was summarised by the Trial Chamber in paragraph 50 of the Trial Chamber's Judgement as follows:

> (i) It must be established whether the Indictment pleaded the particulars in relation to crimes personally committed by the Accused in sufficient detail;
>
> (ii) If the Indictment does not provide sufficient detail, the Trial Chamber must consider whether this defect prejudiced the Accused in mounting a defence against the charge. In this context, the Trial Chamber will assess whether supplementary information given to the Defence cured the shortcomings in the Indictment, and review the Prosecution Pre-trial Brief and Opening Statement, and in some instances information contained in material disclosed to the Defence;
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> (iii) If the Defence was not sufficiently put on notice, the Trial Chamber will consider whether an objection was raised when evidence of crimes personally committed by the Accused was adduced at trial.

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[102] **Trial Chamber's Judgement**, para. 52.

2.72 In relation to the first of these steps, as noted above, the Trial Chamber found that the Indictment did not plead the particulars in relation to any of the crimes personally committed by the Accused in sufficient detail.[103] The Trial Chamber therefore subsequently went on to consider, in relation to each crime of which there was evidence that the crime was personally committed by one of the Accused, the second and third of these steps.

2.73 In Kanu's Ground Two, Kanu argues that the Trial Chamber erred in law in convicting Kanu on the basis of having personally committed certain crimes after having found that the Indictment was defective in relation to the pleading of crimes personally committed by the Accused.

2.74 Paragraphs 2.2 to 2.6, and 2.10, of the Kanu Appeal Brief deal with the pleading requirements where an indictment alleges that an accused personally committed crimes. These paragraphs are immaterial to the present ground of appeal, since the Trial Chamber found that the Indictment in this case was defectively pleaded in this respect, and the Prosecution has not appealed against that finding.

2.75 Paragraphs 2.7 to 2.9 of the Kanu Appeal Brief appear to accept the principle that where an Indictment is defective for failing to plead sufficient particulars of crimes alleged to have been personally committed by an accused, that defect may be cured through the subsequent provision by the Prosecution of timely, clear and consistent notice to the Defence of the case alleged against the accused. The relevant case law at Appeals Chamber level establishing this principle is cited by the Trial Chamber in paragraphs 47 and 48 of the Trial Chamber's Judgement. The Prosecution submits that it has not been suggested or established by Kanu that the Trial Chamber erred in law in its articulation of this principle.

2.76 The Kanu Appeal Brief also appears to accept the principle that where an Indictment is defective for failing to plead sufficient particulars of crimes alleged to have been personally committed by an accused, a failure by the defence to object to the admissibility of evidence of such crimes at the time that

[103] **Trial Chamber's Judgement**, para. 52.

it is adduced will constitute a waiver, precluding the defence from raising an objection later that it was not sufficiently put on notice.[104] The relevant case law at Appeals Chamber level establishing this principle is cited by the Trial Chamber in paragraph 49 of the Trial Chamber's Judgement. The Prosecution submits that it has also not been established by Kanu that the Trial Chamber erred in law in its articulation of this principle, but rather, Kanu's complaint is based on the way that the Trial Chamber applied this principle in the circumstances of the present case.

2.77 Kanu was ultimately convicted of personally committing crimes in three incidents, namely:

(1) personally "demonstrating" an amputation to his troops near Kissy Old Road during the Freetown Invasion (the "**Kissy Old Road incident**");[105]

(2) personally "demonstrating" an amputation to his troops at Upgun during the Freetown Invasion (the "**Upgun incident**");[106] and

(3) personally looting at least one vehicle in Freetown (the "**Freetown looting incident**").[107]

2.78 In relation to the Kissy Old Road incident and the Upgun incident, the Trial Chamber found that the defect in the Indictment in failing to give adequate particulars of Kanu's personal commission of these crimes had *not* been cured by timely, clear and consistent notice from the Prosecution. However, the Trial Chamber found that the Defence had failed to object when evidence was led on these incidents and in fact had specifically cross-examined the Prosecution witness on these incidents.[108]

2.79 In relation to the Freetown looting incident, the Trial Chamber did not expressly consider whether the defect in the Indictment had been cured by timely, clear

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[104] Paragraph 2.7 of the ***Kanu* Appeal Brief** refers to the Trial Chamber's articulation of this principle. Paragraph 2.17 of the ***Kanu* Appeal Brief** then states that "in the circumstances of the matter", the Trial Chamber erred "in imputing a waiver". The Prosecution therefore understands that Kanu does not dispute the existence of this principle, but rather, disputes the way in which this principle was applied in the circumstances of Kanu's case.

[105] **Trial Chamber's Judgement**, paras. 1230, 2050-2052.

[106] **Trial Chamber's Judgement**, paras. 1229, 2053-2056, 2061.

[107] **Trial Chamber's Judgement**, paras. 1442, 2057.

[108] **Trial Chamber's Judgement**, paras. 2051, 2054-2055.

and consistent notice from the Prosecution. However, for the purposes of this appeal, the Prosecution does not contend that it was. Nor does the Prosecution contend that the Defence cross-examined the relevant Prosecution witness on this particular incident. The Trial Chamber's finding that Kanu was able to be convicted of personally looting at least one vehicle therefore necessarily rested on the basis that the Defence for Kanu had failed to object when evidence was led of this particular incident, and had therefore waived its right to object to lack of notice.[109]

2.80 Therefore, in respect of all three incidents, the Trial Chamber's finding that Kanu could be convicted of personally committing crimes was based on the waiver principle.

2.81 Kanu argues that the Trial Chamber erred in applying the waiver principle for three reasons.

2.82 First, Kanu argues that he "raised the issue of defects in the Indictment right from the beginning".[110] The Prosecution submits that this argument must be rejected. While Kanu did file a preliminary motion alleging defects in the form of the indictment,[111] this preliminary motion, while alleging a variety of specific defects in the Indictment, raised no objection that the Indictment failed to provide sufficient particulars of the crimes which Kanu was alleged to have personally committed. No such objection was subsequently raised by Kanu at any time during the course of the trial.

2.83 Secondly, Kanu argues that his failure to object to the evidence at the time that the evidence was adduced cannot be regarded as a waiver of his right to object. Kanu argues that he was entitled to assume that this evidence was either "out-rightly irrelevant" on the basis that it was evidence of conduct that had not been specifically pleaded in the Indictment,[112] or that he was entitled to assume that the evidence was being relied on by the Prosecution for other purposes, such as to establish Kanu's responsibility under other modes of liability, or to establish

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[109] Paragraph 2.16 of the ***Kanu* Appeal Brief** appears to accept this.
[110] ***Kanu* Appeal Brief**, paras. 2.17 and 2.18.
[111] ***Kanu* Preliminary Motion**
[112] ***Kanu* Appeal Brief**, para. 2.19.

the chapeau elements of the crimes against humanity that were charged in the Indictment, or to establish aggravating factors for sentencing.[113] Kanu argues, in effect, that given the complexity of the case, and the "intertwining of the evidence", the Defence could not always be aware of the particular aspect of the Indictment to which each item of evidence related,[114] and that it would therefore be unreasonable to have expected the Defence for Kanu to realise that evidence was being presented for the purpose of establishing that he personally committed the crimes in question.

2.84 The Prosecution submits that this argument must also be rejected. The Indictment in this case clearly alleged that Kanu was individually responsible for "committing" the crimes charged in the Indictment. In cases where evidence was led by the Prosecution of Kanu having personally committed specific crimes, it must have been abundantly clear to the Defence, regardless of how complex the case may have been as a whole, that the Prosecution would rely on that evidence as establishing Kanu's individual responsibility for "committing" crimes.

2.85 Kanu thirdly argues that even where the Defence fails to object to evidence being adduced at trial, this will not constitute a waiver "if he or she was not in a reasonable position to understand the charges against him or her".[115] It is established in the case law that where the defence fails to object at the time that evidence is adduced of matters of which sufficient notice has not been given to the defence, the position is as follows:

> Failure to object before the Trial Chamber will usually result in the Appeals Chamber disregarding the argument. Here, the Defence did not object to the introduction of Witness GEK's testimony at trial; rather, it challenged her credibility in cross-examination. However, even in such a case, the Appeals Chamber may choose to intervene *proprio motu*, considering the importance of the accused's right to be informed of the charges against him and the possibility of serious prejudice to the accused if the Prosecution informs him about crucial facts for the first time at trial. In such circumstances the accused has

[113] ***Kanu* Appeal Brief**, paras. 2.20 to 2.24.
[114] See especially ***Kanu* Appeal Brief**, para. 2.22.
[115] ***Kanu* Appeal Brief**, para. 2.25.

> the burden of proving on appeal that his ability to prepare his case was materially impaired.[116]

2.86 Thus, given Kanu's failure to object to this evidence being adduced at trial, Kanu now has the burden of proving on appeal that his ability to prepare his case was materially impaired. It is submitted that Kanu's Ground Two fails to discharge this burden. At paragraph 2.26 of the Kanu Appeal Brief, Kanu merely argues that there is a "presumption" that injustice was caused by the failure to plead the particulars of the crimes that were personally committed by Kanu. However, this overlooks the fact that where the Defence fails to object to evidence being adduced at trial, the burden of proof shifts to the Defence. Paragraph 2.27 of the Kanu Appeal Brief argues that the failure of the Defence to object to the evidence can only be held against the Defence if it is established that the failure to object was a "deliberate defence tactic". However, no authority is cited to support this proposition, and the Prosecution submits that it is contrary to the settled case law.

2.87 Paragraph 2.28 of the Kanu Appeal Brief cites municipal law cases in which evidence was excluded despite the absence of objection by the defence. However, the Prosecution submits that Kanu does not establish the relevance of these authorities. Kanu appears to be suggesting that the Trial Chamber was under an obligation not to consider evidence of crimes personally committed by Kanu, notwithstanding the absence of any objection by the Defence. That position is also contrary to the established case law of international criminal

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[116] ***Kamuhanda*** **Appeal Judgement**, para. 21. See also ***Niyitegeka*** **Appeal Judgement**, paras. 199-200: "Failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on grounds of waiver. In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation. ... The importance of the accused's right to be informed of the charges against him under Article 20(4)(a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal. Where, in such circumstances, there is a resulting defect in the indictment, an accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired. All of this is of course subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case."

tribunals. The Indictment in this case clearly charged Kanu with personally committing crimes, and the evidence of crimes being personally committed by Kanu was therefore clearly material to the charges in the Indictment. The only question is whether that evidence must be disregarded on the ground that the material facts of those crimes were not sufficiently particularised in the Indictment. Given Kanu's failure to object when the evidence was adduced at trial, the answer to that question will only be in the affirmative if Kanu discharges the burden of proving on appeal that his ability to prepare his case was materially impaired. The citing of these municipal law cases goes no way towards discharging this burden.

2.88 Paragraph 2.29 of the Kanu Appeal Brief appears to relate to the definition of the "beyond reasonable doubt" standard, and the relevance of this paragraph to Kanu's Ground Two is unclear. The Trial Chamber was clearly satisfied that Kanu's individual responsibility for personally committing these crimes was established beyond a reasonable doubt, and Kanu does not establish how this conclusion was one which was not open to any reasonable trier of fact.

2.89 Paragraph 2.30 of the Kanu Appeal Brief merely asserts that Kanu was "embarrassed" by the failure to give sufficient particulars in the Indictment of the crimes that Kanu was alleged to have personally committed. However, merely asserting this cannot discharge Kanu's burden of proof in this respect.

2.90 The Prosecution submits that it is clear that the Indictment in this case charged Kanu with personally committing crimes. Although the Indictment was found not to give sufficient particulars of the crimes that he was alleged to have personally committed, Kanu himself never raised this objection before the Trial Chamber and never objected when evidence of crimes that he personally committed was adduced before the Trial Chamber. The Prosecution submits that whatever complexities and "intertwining of evidence" that Kanu may claim existed in this case, it must have been obvious to any competent Defence counsel that evidence of crimes being personally committed by Kanu would be relied upon by the Prosecution to establish Kanu's individual responsibility for

"committing" those crimes. Kanu has not established how the preparation of his defence was materially impaired in the circumstances.

2.91 Kanu's Ground Two should therefore be rejected.

(ii) Pleading of joint criminal enterprise liability

2.92 This section of this Response Brief responds to Kanu's Ground Ten.

2.93 Paragraph 10.1 of the Kanu Appeal Brief refers to a Pre-Trial Decision of Trial Chamber I, in which Trial Chamber I said that the Indictment in this case "in its entirety, is predicated upon the notion of a joint criminal enterprise".[117]

2.94 Based on this finding, Kanu argues that the allegation of joint criminal enterprise liability was inseparable or inseverable from the Indictment as a whole, so that once the Trial Chamber found that joint criminal enterprise liability was defectively pleaded, it should have found that the Indictment as a whole was defectively pleaded.

2.95 The Prosecution submits, first of all, that this is an argument that the Defence did not make at the pre-trial stage or at any other stage during the trial. In accordance with the waiver principle, Kanu is now precluded from raising this as an argument on appeal, even assuming that this argument is well founded (which for the reasons given below it is not); unless he can establish that his ability to prepare his defence was materially impaired by the alleged resulting defectiveness in the Indictment as a whole.[118] Kanu does not do this. In paragraph 10.3 of the Kanu Appeal Brief, Kanu only makes a sweeping general assertion that as a result of the alleged defectiveness in the Indictment as a whole, he was "prejudiced substantially in the preparation of his defence, as at all material times, he was not sure of the exact nature of the case that he was facing". However, no specifics are given at all of how he was prejudiced in relation to defending against the charges that he was individually responsible under other modes of responsibility under Article 6(1) and Article 6(3) of the Statute. For this reason alone, this ground of appeal should be rejected.

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[117] ***Kamara* Preliminary Motion Decision**, para. 52.
[118] See footnote 24 above.

2.96 The Prosecution submits, secondly, that joint criminal enterprise was not defectively pleaded in the Indictment. The Prosecution refers in this respect to the submissions in Part V.C of the Prosecution Appeal Brief.

2.97 The Prosecution submits, alternatively, that even if joint criminal enterprise was defectively pleaded in the Indictment, that defect was subsequently cured through the provision by the Prosecution to the Accused of timely, clear and consistent information detailing the factual basis underpinning the charges against him. The Prosecution refers in this respect to the submissions in Part V.D of the Prosecution Appeal Brief.

2.98 The Prosecution submits, thirdly, that even if joint criminal enterprise was defectively pleaded in the Indictment, and even if that defect was *not* subsequently cured, this would not have the effect contended for by Kanu of invalidating the entire Indictment.

2.99 The Indictment in this case clearly and expressly pleaded joint criminal enterprise liability in the *alternative* to other modes of liability under Article 6(1) and Article 6(3). It is clear from the case law of international criminal tribunals that modes of individual responsibility can be pleaded in the alternative,[119] and Kanu does not suggest otherwise.

2.100 Where an accused is charged with joint criminal enterprise liability alternatively with other modes of liability, the accused can be convicted on the other modes of liability if these are established beyond a reasonable doubt, even if joint criminal enterprise liability is found by the Trial Chamber not to have been proved beyond a reasonable doubt.[120] In other words, where an accused is

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[119] See, for instance, ***Gacumbitsi* Appeal Judgement**, paras. 118-125.

[120] An example of where this occurred was in the *Krnojelac* case. 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 expressly found that Krnojelac was *not liable as a participant in a joint criminal enterprise* (***Krnojelac* Trial Judgement**, paras 127, 248, 315, 346, 427, 487, 525). 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 (***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)).

charged with joint criminal enterprise liability alternatively with other modes of liability, the conviction of the accused does not stand or fall on proof of the joint criminal enterprise liability. Where several modes of liability are charged in the alternative, it will always be a question of which of the various modes of liability alleged, if any, have been proved beyond a reasonable doubt.

2.101 Furthermore, where the Prosecution alleges at trial that an accused is individually responsible on the basis of joint criminal enterprise liability, but where joint criminal enterprise liability is found to have been defectively pleaded in an indictment, this does not prevent an accused from being convicted on the other modes of liability under which he is charged in the indictment.[121]

2.102 Kanu cites no authority for the proposition that an alternative pleading of joint criminal enterprise liability may be inseverable or inseparable from the Indictment, so that the entire Indictment will fail if the joint criminal enterprise liability is found to be defectively pleaded. The Prosecution is aware of no such authority, and submits that this argument of Kanu is contrary to basic principles as established in the case law of international criminal tribunals.

2.103 Kanu's Ground Ten should therefore be rejected.

[121] See, for instance, ***Gacumbitsi* Appeal Judgement**, paras. 158-179.

3. Alleged errors of law

(a) The *mens rea* for recruitment and use of child soldiers

3.1 This section of this Response Brief responds to Kanu's Ground Seven.

3.2 Kanu contends that the Trial Chamber erred in law "in dismissing the argument that the absence of criminal knowledge on his part vitiated the requisite *mens rea* to the crimes relating to child soldiers."[122]

3.3 Alternatively, Kanu "argues that conscripting or enlisting children under the age of 15 was not a war crime at the time alleged in the Indictment."[123] However, the Prosecution notes that the Accused, in doing so, contradicts his declaration at paragraph 7.3 of his brief that he "accepted that it was a crime under international law."[124]

3.4 The Prosecution will only address the first argument above, as the second point has been comprehensively addressed by this Appeals Chamber in the "Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)".[125] This Appeal Chamber has decided that:

> Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments. As set out above the principle of legality and the principle of specificity are both upheld.[126]

3.5 This issue has therefore already been settled by the Appeals Chamber (as noted by the Trial Chamber[127]) and Kanu cannot and should not be permitted to relitigate this issue now.

3.6 Regarding the first argument, the Prosecution submits that the Trial Chamber did not err in law (or in fact) in dismissing Kanu's argument that he did not

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[122] ***Kanu* Appeal Brief**, para.7.1.
[123] ***Kanu* Appeal Brief**, para. 7.10.
[124] ***Kanu* Appeal Brief**, para. 7.3.
[125] **CDF Child Soldiers Preliminary Motion Decision**
[126] *Ibid.*, para. 53.
[127] **Trial Chamber's Judgement**, para. 731.

possess the requisite *mens rea* for the crime of conscripting, enlisting or using child soldiers because of an alleged mistake of law.[128]

3.7 The Trial Chamber did not exclude the possibility of a defence of mistake of law as such, but found that Kanu had not acted under such a mistake.[129] The Trial Chamber dismissed the argument of the Defence that the supposed practice of the various governments in Sierra Leone of recruiting persons under the age of 15 into the military prior to the Indictment period impacted on the accused Kanu's awareness of the unlawfulness of this conduct.[130]

3.8 The Prosecution submits that this conclusion of fact is one that was open to a reasonable trier of fact in view of the applicable law, the findings of the Appeal Chamber on this issue, and the findings of the Trial Chamber, or the evidence accepted by the Trial Chamber in making its findings.

3.9 The Appeals Chamber of the Special Court has already expressly held that:

> ... the Government of Sierra Leone was well aware already in 1996 that children below the age of 15 should not be recruited. Citizens of Sierra Leone, and even less, persons in leadership riles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law.[131]

3.10 The Trial Chamber held in the Sentencing Judgement that:

> The Trial Chamber found in the instant case that young children were forcibly kidnapped from their families, often drugged and forcibly trained to commit crimes against civilians. In those circumstances, the Trial Chamber cannot accept that Kanu did not know that that he was committing a crime in recruiting and using these children for military purposes.[132]

3.11 In the Trial Chamber's Judgement, the Trial Chamber further held that:

> The Trial Chamber is of the view that the AFRC fighting faction used children as combatants because they were easy to manipulate and program, and resilient in battle. In the instant case, the evidence is conclusive that most, if not all, of the children in question were forcibly abducted from their families or legal guardians. In addition to having been kidnapped, child soldiers described having been forced

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[128] **Trial Chamber's Judgement** para. 732.
[129] *Ibid.*
[130] *Ibid.*
[131] **CDF Child Soldiers Preliminary Motion Decision**, para. 52.
[132] **Sentencing Judgement**, para. 127.

> into hard labour and military training, and sent into battle, often on the frontlines. They were also beaten; forced to watch the commission of crimes against family members; injected with narcotics to make them fearless; compelled to commit crimes including rape, murder, amputation and abduction; used as human shields; and threatened with death if they tried to escape or refused to obey orders.[133]

3.12 The Trial Chamber further found that "Kanu had the direct intent to establish and implement the system of exploitation involving the three enslavement crimes, namely, sexual slavery, conscription and use of children under the age of 15 for military purposes, and abductions and forced labour".[134]

3.13 If there is a defence of mistake of law in international criminal law (as to which see below), the question of whether an accused acted under a mistake of law is a question of fact. Kanu has not established that the Trial Chamber's conclusion of fact on this issue was one that was not open to a reasonable trier of fact on the evidence before it.

3.14 Furthermore, there was a considerable amount of other evidence supporting the conclusion that Kanu must have been aware that his conduct was unlawful.

3.15 The Trial Chamber found that the AFRC government was subject to international political pressure.[135] Both regional and international institutions passed resolutions pressing for the restoration of democracy. The pressure increased as human rights violations within Sierra Leone escalated. For instance, Security Council Resolution 1181 dated 13 July 1998, concerning the Ongoing Conflict in Sierra Leone, mentioned the children affected by the conflict. There were negotiations to release children,[136] in particular child soldiers.[137] The Trial Chamber also referred to the expert report noting that "the overthrow of the AFRC government brought negotiations for the release of child combatants between child protection organisations and the rebel

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[133] **Trial Chamber's Judgement**, para. 1275.
[134] **Trial Chamber's Judgement**, para. 2095.
[135] **Trial Chamber's Judgement**, para. 173.
[136] **Trial Chamber's Judgement**, para. 1273.
[137] **Trial Chamber's Judgement**, para. 490.

government to a halt."[138] The Trial Chamber also accepted the evidence that UNICEF protected child soldiers.[139]

3.16 Furthermore, the Trial Chamber noted that the domestic law of Sierra Leone defines a 'child' as a person under 16 years of age, and that therefore any defence based on cultural distinctions regarding the definition of "childhood" was rejected.[140]

3.17 In addition, the Prosecution's expert report, admitted by the Trial Chamber and on which it based some of its findings,[141] clearly indicates that there were numerous organisations and institutions present on the territory of Sierra Leone prior to, during, and after the Indictment period, aiming at tackling the issue of the child soldiers and trying to protect children from this crime and negotiating the release of the child soldiers.[142] These organisations and institutions were national[143] and international.[144] The UNICEF had a strong presence and was negotiating with the government and rebel groups, including the AFRC, for the release of children abducted and non-recruitment of children.[145]

3.18 The Trial Chamber found that "the Prosecution expert report emphasizes that the illegal recruitment and/or use of children as combatants was not an isolated, localised, or accidental phenomenon"[146] and considered this finding as relevant with regard to the assessment of whether a perpetrator "knew or should have known" that persons recruited were under the age of 15.[147] The Trial Chamber also noted that the Defence expert report affirmed that the recruitment and use of children as combatants by all the forces involved in the conflict, including by renegade soldiers, was widespread.[148]

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[138] **Trial Chamber's Judgement**, para. 1249.
[139] **Trial Chamber's Judgement**, para. 1255 (referring to witness TF1-157, who the Trial Chamber found credible and reliable at paras. 1252 and 1255).
[140] **Trial Chamber's Judgement**, para. 1251.
[141] **Trial Chamber's Judgement**, paras. 1248, 1251.
[142] See Exhibit P-33.
[143] See, for example, the Church Counsel of Sierra Leone, the Child Protection Committee put in place by the State of Sierra Leone, the Ministry of Social Welfare, mentioned at pp. 2, 5, 6, 7 of Exhibit P-33.
[144] See **UNICEF**, mentioned throughout exhibit P-33.
[145] Exhibit P-33, in particular p. 2.
[146] **Trial Chamber's Judgement**, para. 1248.
[147] *Ibid.*
[148] **Trial Chamber's Judgement**, para. 1250.

3.19 Numerous findings of the Trial Chambers establish that the child soldiers were systematically abducted by soldiers of the AFRC,[149] and the Chamber held "that ***most, if not all, of the children in question were forcibly abducted".***[150] The Trial Chamber noted that abduction was "a particularly egregious form of 'conscription"[151].

3.20 Finally, the Trial Chamber found that Kanu planned and implemented the system involving the three enslavement crimes, including the conscription and use of children under the age of 15 for military purposes.[152] The Trial Chamber found that it was a "*system of exploitation*".[153]

3.21 The Trial Chamber found that Kanu joined the Sierra Leone Army on 3 December 1990 at the Benguema Training Camp, Freetown, Western Area. [154] He was a Corporal at the time of the coup in May 1997. [155] In Bombali District, Kanu, who was already a Colonel, was promoted to Chief of Staff.[156] Then "Brima promoted the Accused Kanu to Brigadier. He remained Chief of Staff and was third in command."[157] The Accused Kanu was thus a professional soldier and trained as such.

3.22 The Prosecution submits that TRC-01, a Defence witness whose testimony was accepted by the Trial Chamber and relied upon to make various finding,[158] gave specific evidence that the SLAs were trained by the ICRC in international humanitarian law and were well versed in the laws of war. According to this witness, a lot of the SLAs were even aware of the Geneva Conventions.[159] TF1-167, whose testimony was also found credible by the Trial Chamber,[160] confirms that as a vigilante he heard about the Geneva Conventions during his

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[149] **Trial Chamber's Judgement**, paras. 1253-1257 (witnesses found credible at paras. 1252 and 1258).
[150] **Trial Chamber's Judgement**, para. 1275 (emphasis added); see also para. 1276.
[151] *Ibid.*, para. 1276.
[152] **Trial Chamber's Judgement**, para. 2095.
[153] *Ibid.* para. 2095, 2097.
[154] **Trial Chamber's Judgement**, para. 503.
[155] *Ibid.*
[156] **Trial Chamber's Judgement**, para. 576.
[157] **Trial Chamber's Judgement**, para. 602.
[158] **Trial Chamber's Judgement**, paras. 311, 312, 316, 318, 428, 507, 555.
[159] TRC-01, Transcript 16 October 2006, pp. 111-112. While the transcript reads "RCRC", the Prosecution submits that the witness clearly said or meant to say "ICRC", and that this is likely a transcription error.
[160] **Trial Chamber's Judgement**, para. 1705.

training.[161] This is corroborated by at least two Defence witnesses, that the Trial Chamber found credible,[162] who were former SLAs and who gave evidence that they had received training in international humanitarian law.[163] Some Defence witnesses even gave evidence that SAJ Musa told the troop about crimes against humanity and that he would refer to the Geneva Conventions which he had with him in a book.[164]

3.23 Furthermore, the Trial Chamber found that Kanu possessed the direct intent to *establish* and *implement the system of exploitation* involving the three enslavement crimes, including the conscription and use of children under the age of 15 for military purposes, and abductions and forced labour.[165] The Trial Chamber found that the Accused Kanu was in charge of all abductees [from Mansofinia to Rosos].[166] The Trial Chamber also relied in its findings on the evidence of Witness TF1-334, who testified that the Accused Kanu was in charge of military training at Camp Rosos including the training of abducted civilians, and George Johnson, who testified that Kanu and FAT Sesay were in charge of providing military training to civilians, including children, at Camp Rosos.[167] The Trial Chamber was thus satisfied that "the Accused Kanu …was a senior commander of the AFRC fighting force. In addition, ***he was the Commander of the AFRC fighting force in charge of abducted civilians including women and children."***[168]

3.24 Furthermore, Kanu mentions, to justify his alleged lack of awareness, that "the UNICEF Global Report published in 2001 states that Sierra Leone's position is that children can be recruited at "*any age with consent*" and refers to Section 16(2) of the Royal Sierra Leonean Military Forces Act, 1961."[169] However, the findings of the Trial Chamber are clear: the children conscripted and used as

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[161] TF1-167, Transcript 19 September 2005, p. 90.
[162] **Trial Chamber's Judgement**, para. 605.
[163] DAB-033, Transcript 25 September 2006, pp. 38-39; TRC-01, Transcript 16 October 2006, p. 111-112, 118.
[164] DAB-033, Transcript 25 September 2006, pp. 84-85; DBK-012, Transcript 9 October 2006, p. 18-19.
[165] Trial Chamber's Judgement, para. 2095.
[166] **Trial Chamber's Judgement**, para. 526.
[167] **Trial Chamber's Judgement**, para. 525.
[168] **Trial Chamber's Judgement**, para. 526 (emphasis added). See also paras. 535, 2091, 2093, 2094.
[169] ***Kanu* Appeal Brief**, para. 7.4.

child soldiers were almost in all cases abducted. This practice of the AFRC was therefore in any case not comparable with alleged practice of the Sierra Leonean Army.

3.25 Furthermore, the Defence expert report referred to by Kanu only mentions recruitment (as opposed to conscription) of child soldiers, and does not indicate that such recruitment (much less conscription) was perceived as lawful. [170] On the contrary it states that the Sierra Leonean State had "ratified a number of international legal instruments bordering on the prevention of underage recruitment into the military". [171] The expert went on saying that it was "not a deliberate government or military policy" but that "the war circumstances created a fertile ground for the practice of involving children in the military". [172] The expert added that the "precarious situation [due to the war] among other things *compelled* Momoh to embark on a crash military recruitment drive advocating for vigilantes to join the force *thus sidelining military recruitment standards and procedure*...This background saw the infiltration of a number of children into the military through a variety of ways *including backdoor enlistment*."[173]

3.26 These paragraphs of the expert report rather indicate that the perception in the Sierra Leonean army was that this practice, albeit common, was not lawful. It is therefore unable to support the Accused's argument.

3.27 The concept of a child holding a weapon and killing combatants or civilians offends the most basic human feelings and sentiment of human dignity. It is untenable to contend that the supposedly common practice in the Sierra Leonean army could change that perception of unlawfulness.

3.28 In the circumstance, the Prosecution submits that it was open to the Trial Chamber to conclude that Kanu was aware of the unlawfulness of the conduct for which he was convicted under Count 12 in the Indictment.

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[170] ***Kanu* Appeal Brief**, para. 7.5.
[171] *Ibid.*, p. 54.
[172] *Ibid.*, p. 55.
[173] *Ibid.*, pg. 55-56 (emphasis added) (footnotes omitted).

3.29 The Prosecution submits that in the circumstances it is unnecessary for the Appeals Chamber to decide whether a defence of mistake of law does or does not exist in customary international criminal law.

3.30 Neither the Statute of the Special Court nor the Statutes of the ICTY or ICTR contain provisions recognising a defence of mistake of law or mistake of fact. The jurisprudence from the *ad hoc* Tribunals on this question is clear.[174]

3.31 Article 32 of the Statute of the International Criminal Court provides that:

> Article 32
> Mistake of fact or mistake of law
>
> 1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
>
> 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

3.32 Judge Cassese states that:

> Like most national legal systems, international law does not consider ignorance of law as a ground for excluding criminal responsibility. Article 32 (1) first sentence of the ICC Statute...may be held to codify existing customary law."[175]

3.33 Kanu himself admits that "mistake of law is generally not a defence", [176] in accordance with the Latin principle *ignorantia legis non excusat*, that is, ignorance of the law is no defence. Nevertheless, Kanu submits that this defence may be exceptionally invoked when it is established that the offender, because

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[174] On mistake of law, see ***Čelebici* Appeal Judgement**, para. 374 (reaching no conclusion on the question); *Jović* Trial Judgement, paras. 16 and 21 (rejecting such a defence in contempt proceedings). On mistake of fact, see ***Erdemović* Appeal Judgement – Joint Separate Opinion of Judge Macdonald and Judge Vohrah** para 34 (referring to such a defence), ***Erdemović* Appeal Judgement - Separate and Dissenting Opinion of Judge Cassese** para. 10, 37 (stating that "the accused cannot be allowed on the one hand to admit to his guilt and by the same token nullify this plea by claiming that he acted under . . . a mistake of fact").

[175] **Cassese**, p. 256.

[176] ***Kanu* Appeal Brief**, para. 7.9.

of his ignorance of a legal element, did not possess the requisite mental element.[177]

3.34 The Prosecution submits that even if Article 32 of the ICC Statute can be regarded as a codification of customary international law (a matter which it is submitted is unnecessary to be decided in this case), that provision does not recognise any defence of *ignorance* of the law. The second sentence of Article 32(2) of the ICC Statute recognises a defence of *mistake* of law, but only in circumstances where the mistake of law negates the mental element of a crime, or in circumstances to which Article 33 of the ICC Statute applies (dealing with superior orders).

3.35 The Prosecution submits that there is a clear distinction between ignorance of the law on the one hand, and, on the other hand, a mistake of law to which Article 32(2) of the ICC Statute applies.

3.36 An example illustrating the distinction between the two is as follows: Suppose that a law provides that it is illegal to import certain items (for instance military armaments or drugs) without a valid governmental permit. Suppose that an accused seeks and obtains what the accused thinks is a valid permit, and then imports the items pursuant to that permit. Suppose, however, that it turns out that the permit is, in fact, for some technical reason legally invalid, and that the accused was unaware of this. In such circumstances it can be argued that the accused imported the items under a mistake of law as to the legal validity of the permit to do so, and that the accused had no *mens rea* to commit the crime. In this example the accused would in fact have done everything he thought he had to do in order to act lawfully.

3.37 The Prosecution submits that this is a very different situation from one in which an accused simply argues that he was unaware that it was unlawful to import the items in question without a permit. Such an argument would be an alleged ignorance of the law, rather than a mistake of law.

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[177] ***Kanu* Appeal Brief**, para. 7.9. and footnote 160, quoting Dinstein: " there may be no choice but to admit that, as a result of mistake of law, *mens rea* is negated."

3.38 Thus, it has been said that "[n]ormative ignorance as such is not enough to constitute a mistake of law."[178] Authors set out the test to be met for a mistake of law to be recognised as a valid excuse: the absence of awareness of the unlawfulness of his conduct by the offender is not sufficient. The defence can be considered only when: (i) the offender *had no knowledge of an essential element of law* referred to in he international prohibition of a certain conduct, (ii) this lack of knowledge *did not result from negligence*; (iii) consequently the person when he took a certain action, *did not possess the requisite mens rea.*"[179]

3.39 As regards the second of these requirements, the lack of knowledge cannot be admitted when the relevant rule of international law is "simple and universally known'.[180] Secondly, the required awareness sufficiently exists when the perpetrator is or was aware of the *social significance* of a material element of the conduct.[181] Therefore "a mistake of law negating the mental element [may exist] only if the perpetrator did not even realize the *social everyday* meaning of the material element of the crime."[182] Thirdly, as correctly mentioned by the Accused Kanu borrowing the words of Dinstein, "*mens rea* cannot be negated if the illegality is obvious to *any reasonable man.*" [183] This defence is thus not admissible when the law on the matter is *clear* ***or*** *should be known to any servicemen engaged in armed conflict* or more generally *to any person of average intelligence and education*".[184] In other words, "a mistake of law cannot be established by the perpetrator's claiming not to have known the legal provisions and/or their jurisprudential interpretation, but only by his not even

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[178] **Rome Statute Commentary**, p. 941.

[179] **Cassese**, p. 256; **Rome Statute Commentary**, p. 941 (emphasis added); See also the *B.* case, in which the Prosecution submitted: "This is not sufficient to relieve him of responsibility, for that the error must also have been pardonable. Only if there was no intent and no negligence as to the unlawfulness, is the accused not liable criminally". **The *B.* Case**, Netherlands, Field Court Martial, Decision of 2 January 1951, in NederJ 1952, no 247, 516-25, referred to in **Cassese**, pp. 258-259.

[180] ***Llandovery Castle***, German Supreme Court of Leipzig (Reichsgericht), Judgment of 16 July 1921, in Verhandlungen, 2579-2586 (English translation in 26 AJIL (1922), Suppl. 708-23), para. 2585, referred to in Cassese, p. 258 (emphasis added); Cassese, p. 263.

[181] **Rome Statute Commentary**, p. 941 (emphasis added).

[182] *Ibid.*(emphasis added).

[183] ***Kanu* Appeal Brief**, para. 7.9 and footnote 161 (emphasis added).

[184] **Cassese**, p. 263 (emphasis added).

having been aware of the social meaning or significance of the material element in a layman's perspective."[185]

3.40 This defence was upheld in a small number of post-World War II cases, involving crimes of destruction or taking of property or the failure to respect certain rights of prisoners of war.[186]

3.41 However, the defence of mistake of law was dismissed in the case of a German official attached to a Dutch provincial Labour Office during the German occupation of the Netherlands, who alleged that he was unaware of the "criminal nature of the *German deportation of Dutch men to slave labour* to Germany".[187] The court found that "similar practices applied by Germany on a much smaller scale in the First World War in Belgium and Northern France gave rise to *general outrage*...[this measure was] opposed as a violation of international law or as a dangerous error...[hence] it must be regarded as a matter of *general knowledge that public opinion condemned these practices*."[188]

3.42 The Prosecution submits therefore that even if the defence of mistake of law does exist in international criminal law, Kanu would not satisfy the requirements of that defence on the facts as found by the Trial Chamber. This was not a case of ignorance of some detailed legal regulation. The recruitment and use of child soldiers in the circumstances as found by the Trial Chamber was clearly morally repugnant to Sierra Leonean society and the international community generally.

3.43 Kanu's Ground Seven should be accordingly rejected.

(b) Cumulative convictions

3.44 This section of this Response Brief responds to Kanu's Ground Eight.

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[185] **Rome Statute Commentary**, p. 943. This commentary further states: "mere ignorance of legal norms or their misinterpretation can, in principle, not establish a valid mistake of law, the only major exception being the misperception of normative elements or references, provided that the perpetrator is not even aware of the social significance of the normative implications concerned." *Ibid.*

[186] **Cassese,** pp 258-260.

[187] **Cassese**, p. 260, footnote 41, referring to ***Zimmermann***, Netherlands, Special Court of Cassation, Judgement of 21 November 1949, in ***NederJ.*** 1950, no. 9, 30-2 (emphasis added).

[188] *Ibid.* (emphasis added).

3.45 Kanu contends that the Trial Chamber erred in law in imposing a global sentence of fifty years of imprisonment.[189] Kanu does not challenge that "it was well within the Trial Chamber's discretion to enter a global sentence for all the conviction [sic] entered."[190] Rather, the nub of Kanu's argument is that, according to him, cumulative convictions should have been "discounted for sentencing purposes".[191] Kanu further contends that there exists a "legal requirement that the accused should not suffer any prejudice resulting from multiple convictions" and that "[t]he global sentence should therefore have been adjusted to reflect the extent of the multiple convictions".[192] Kanu concludes that "[t]he severity of the sentence imposed...does not reflect that multiple convictions entered against him were considered at all for purposes of sentencing."[193] The remedy sought by Kanu does not relate to the cumulative convictions entered against him as such, but only to the sentence, which Kanu regards as "grossly excessive"[194] due, allegedly, to the lack of consideration of the cumulative convictions entered against him.

3.46 The Prosecution submits that the argument of Kanu is erroneous and suggests a misunderstanding of the sentencing principles applicable under this jurisdiction, as well as a misperception of the gravity of his criminal conduct of which he was found guilty.

3.47 The Trial Chamber held (correctly it is submitted) that 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.[195] The Separate and Dissenting

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[189] ***Kanu* Appeal Brief,** para. 8.1; the Accused Kanu contends this, "in the alternative".
[190] ***Kanu* Appeal Brief**, para. 8.3.
[191] ***Kanu* Appeal Brief**, para. 8. 1.
[192] ***Kanu* Appeal Brief**, para. 8.1, see also para. 8.6: "...the Trial Chamber, with all due respect, was oblivious of the duty upon it to ensure that the Appellant should not suffer any prejudice resulting from the cumulative convictions".
[193] ***Kanu* Appeal Brief**, para. 8.9.
[194] *Ibid.*
[195] **Trial Chamber's Judgement**, para. 2099. See also ***Čelebići* Appeal Judgement**, paras 412-413, 421.

Opinion of Judge Hunt and Judge Bennouna, quoted by the Accused, concurs with this,[196] contrary to what Kanu seems to suggest.[197]

3.48 The Trial Chamber, far from being oblivious of the necessity to ensure that no injustice would be occasioned to the Accused, was very careful and cautious (sometimes excessively cautious, which induced the Trial Chamber into error, as submitted by the Prosecution in its Appeal Brief[198]) in considering this principle. The Trial Chamber recalled that "in considering cumulative convictions the Trial Chamber must balance the 'very real risk of prejudice to an accused' with its obligation to describe the 'full culpability of a particular accused'".[199] The Trial Chamber equally referred to the necessity to the take into account "the entire situation so as to avoid a mechanical or blind application of its guiding principles."[200] Furthermore, at paragraphs 2107 to 2109 of its Judgement, the Trial Chamber examined carefully for which offences it was permissible and impermissible to enter cumulative convictions. Similarly, the issue of the convictions under Article 6(1) and/or Article 6(3) responsibility was carefully considered by the Trial Chamber.[201] If anything, as submitted in the Prosecution's Appeal Brief, the Trial Chamber erred on the side of caution and should have entered more cumulative convictions,[202] and all multiple convictions decided by the Trial Chamber are permissible.[203]

3.49 In view of the above, Kanu's argument at paragraphs 8.7 and 8.8 of is brief are untenable. The Trial Chamber followed the law and jurisprudence, and therefore did not make any error when it entered cumulative convictions for murder as a crime against humanity (Count 4) and violence to life in particular murder

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[196] ***Čelebići*** **Appeal Judgement, Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna**, paras. 13-23.

[197] ***Kanu*** **Appeal Brief**, footnote 171.

[198] Prosecution's Grounds of Appeal 6,7,8,9.

[199] **Trial Chamber's Judgement**, para. 2101 (quoting ***Kunarac*** **Appeal Judgement**, para. 169).

[200] **Trial Chamber's Judgement**, para. 2101 (quoting ***Kunarac*** **Appeal Judgement**, para. 174).

[201] **Trial Chamber's Judgement**, para. 800.

[202] Prosecution's Grounds of Appeal 6,7,8,9.

[203] Convictions are permissible under Articles 2 and 3 of the Statute of the Special Court, and/or Articles 2 and 4 of the Statute. ***Kunarac*** **Appeal Judgement**, paras 176-178; see also ***Kupreškić*** **Appeal Judgement**, para. 388, and ***Jelisić*** **Appeal Judgement**, para. 82. Convictions under Article 3(b) or 3(d), as well as the underlying crimes charged in Articles 3(a) (murder and mutilation) and Article 3(e) (outrages upon personal dignity) is permissible as each statutory provision involved has a materially distinct element not contained in the other.

(Count 5), or when it convicted Kanu cumulatively for terrorism, collective punishment and murder or mutilation or outrages upon personal dignity respectively. Kanu states erroneously that the Trial Chamber convicted him ***based on the same conduct*** under extermination (a crime against humanity, Count 3) and murder as a crime against humanity (Count 4).[204] Indeed, the Trial Chamber clearly excluded such a practice.[205] Similarly, Kanu maintains incorrectly that the Trial Chamber convicted him, ***based on the same conduct,*** of both rape (Count 6) and outrages upon personal dignity (Count 9).[206]

3.50 Multiple convictions must be entered when they are admissible, because they "serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct".[207] This must therefore also be reflected at sentencing stage.

3.51 The Trial Chamber correctly applied Article 19 (2) of the Statute of the Special Court, which states that "In imposing the sentences, the Trial Chamber should take into account such factors as *the gravity of the offence* and the individual circumstances of the convicted person."[208] The Trial Chamber also correctly held that "with the holding of the ICTR Appeals Chamber in *Prosecutor v. Kambanda*, that '[...] the Statute is sufficiently liberally worded to allow for a single sentence to be imposed. Whether or not this practice is adopted is within the discretion of the Chamber.' *The governing criteria is that the final or aggregate sentence should reflect the totality of the culpable conduct, or generally, that it should reflect the gravity of the offences and the overall culpability of the offender, so that it is both just and appropriate.* In the present case, the Trial Chamber finds it appropriate to impose a global sentence for the multiple convictions in respect of Brima, Kamara and Kanu."[209] Indeed, when there are cumulative convictions and when it comes to sentencing, "the sentence

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[204] **Kanu Appeal Brief**, para. 8.7.
[205] **Trial Chamber's Judgement**, para. 2109.
[206] **Kanu Appeal Brief**, para. 8.8; **Trial Chamber's Judgement**, para. 2107.
[207] **Prosecution Final Brief,** para. 1921 (citing ***Kunarac*** **Appeal Judgement**, para. 169).
[208] **Statute of the Special Court for Sierra Leone**, Article 19(2) (emphasis added).
[209] **Trial Chamber's Sentencing Judgement**, para. 12 (emphasis added and footnote ommitted).

must "reflect the totality of the criminal conduct and overall culpability of the offender."[210]

3.52 The Prosecution submits that in the evaluation of the gravity of the offences of which Kanu was found guilty, the Trial Chamber was allowed, in the exercise of its discretion, to take into account in sentencing, to the extent that it deemed it appropriate, the fact that in relation to certain conduct, Kanu satisfied the legal elements of more than one crime within the jurisdiction of the Special Court, and was therefore convicted cumulatively of more than one crime in respect of the same conduct.[211] The Prosecution reiterates that a convicted person cannot be punished more than once in respect of the same conduct. However, conduct that satisfies the elements of more than one crime within the jurisdiction of the Special Court is graver than conduct which satisfies the elements of only one crime, and this should be reflected in sentencing.[212] This principle has been upheld by the Appeal Chamber of the ICTY when it stated: "...the sentence to be served by an accused must reflect the totality of the accused's criminal conduct"[213]. Thus, permissible multiple convictions must be taken into account properly in the overall assessment of the *totality* of the culpable conduct, to reflect the gravity of the offences and the overall culpability of the offender.

3.53 This is not to say that a person convicted of more than one crime in respect of the same conduct should receive a sentence that is the combined total of the individual sentences that would have been imposed in respect of each of those crimes considered in isolation. However, in determining the appropriate sentence in respect of that conduct, the Trial Chamber should take into account

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[210] **Jones and Powles**, para. 8.3.7, referring to ***Kunarac* Trial Judgement**, para. 551. See also ***Tadić* Form of the Indictment Decision**, para. 1995. When the *Tadić* Trial concluded, the Trial Chamber imposed ***concurrent sentences***, both as ***between Article 3 and Article 5 charges relating to the same conduct***, and as between different instances of misconduct (e.g. different beatings). See **Jones and Powles**, para. 8.3.13.

[211] **Trial Chamber's Judgement**, paras. 2099-2111.

[212] Prosecution's Sentencing Brief, para. 85. This is reinforced by the fact that consecutive sentences in case of cumulative charges and convictions appear to be possible, See **Jones and Powles**, para. 8.3.15: "The Chamber would only have had to clarify the matter if it had wished to impose consecutive sentences under Rule 101 (C), since that would only appear to be permissible where charges are cumulative."

[213] ***Čelebići* Appeal Judgement**, para. 771

that the conduct in question satisfied the elements of more than one crime within the jurisdiction of the Special Court. It is submitted that Kanu has not established that the Trial Chamber acted otherwise than in accordance with this principle.

3.54 In the present case, the gravity of the offences committed by the Accused, notably Kanu, is established not only by their scale, pattern and virtually continuous repetition, but also by the fact that some criminal conduct was so grave that it constituted multiple breaches of international humanitarian law and justified multiple convictions under international criminal law. In view of this, the Trial Chamber correctly approached its task upon an overall assessment of what was appropriate, and was founded to exercise its discretion and consider the multiple convictions as it deemed appropriate.

3.55 It is not certain that in this case the Trial Chamber considered these multiple conviction to increase the sentence. But in any case, if this entered into the consideration of the Trial Chamber and if the Trial Chamber considered that such multiple convictions justified an increased the sentence, such consideration is neither an error, nor it is a mistake in the exercise of its discretion. The Prosecution submits that the Trial Chamber was at liberty to decide, if it did so, to increase the sentence imposed on Kanu to reflect the additional criminal liability due to his multiple convictions.

3.56 In any case, the Trial Chamber was under no obligation, as there is no such legal principle, to *discount* the cumulative convictions entered against Kanu for sentencing purposes. When the Accused Kanu contends that "had the Trial Chamber looked at the criminal conduct of the Appellant [Kanu] and not the number of criminal convictions entered, it would have crystallized the multiple convictions entered into just about a handful acts of criminal conduct as would make the penalty unduly excessive and disproportionate",[214] he shows again his misperception of the extent of his criminal conduct and the gravity of the numerous offences for which he was found guilty by the Trial Chamber. Such

[214] ***Kanu* Appeal Brief,** para. 8.7.

an argument also suggests a misunderstanding of the applicable law in principles regarding sentencing.

3.57 The Prosecution submits that Kanu has failed to demonstrate that Trial Chamber made any error of law, or that it erred in the exercise of its discretion, in entering the cumulative convictions that it did. Nothing in the judgement on the merits or in the sentencing judgement suggests that the Trial Chamber took one conduct into consideration into a disproportionate manner. On the contrary, the Trial Chamber has demonstrated a rather over-cautious attitude, sometimes leading to errors that the Prosecution has raised in its Appeal Brief.[215] The argument of the Accused Kanu only shows that he has not appreciated the gravity of his acts and criminal conduct. Kanu has thus failed, the Prosecution submits, in establishing that the Trial Chamber erred in law or erred in the exercise of its discretion in deciding upon an excessive sentence.

3.58 Kanu's Ground Eight should therefore be rejected.

[215] Prosecution's Grounds of Appeal 6,7,8,9.

4. Alleged errors of fact: general matters

(a) The Trial Chamber's evaluation of the evidence generally

4.1 This section of this Response Brief responds to Brima's Ninth Ground of Appeal.

4.2 Paragraph 168 of the Brima Appeal Brief submits that the Trial Chamber erred in law and/or fact by resolving any reasonable doubt in respect of the liability of the appellant Brima in favour of the Prosecution, thereby occasioning a miscarriage of justice.

4.3 There are two allegations here. First is the blatant allegation that the Trial Chamber had resolved reasonable doubts in favour of the Prosecution. Implicit in that allegation is the second allegation to the effect that the Trial Chamber had preferred the evidence of Prosecution witnesses.

Whether the Trial Chamber had Resolved Doubts in Favour of the Prosecution

4.4 It is a vague or unfounded allegation to say that the Trial Chamber had resolved reasonable doubts in favour of the Prosecution. It is vague as it failed to state with precision (a) the reasonable doubt that was resolved in favour of the Prosecution, and (b) how it was that such a doubt was resolved in favour of the Prosecution.

4.5 The vagueness of the allegation constitutes a failure of the obligation of the appellant to state his case with precision. An Appellant must set out the sub-grounds and submissions of its appeal clearly and provide the Appeals Chamber with specific references to the sections of the appeal case it is putting forward in support of its claims (see paragraph 1.26 above).

4.6 The allegation is unfounded because there is nowhere that the Trial Chamber found a reasonable doubt which it then resolved in favour of the Prosecution; nor was there, otherwise, any reasonable doubt which the Trial Chamber in fact resolved in favour of the Prosecution.

Whether the Trial Chamber had preferred the Evidence of Prosecution Witnesses

4.7 In the search for truth, it is for the Trial Chamber to make findings of fact on the basis of the evidence of witnesses whom the Trial Chamber finds credible. The Appeals Chamber may not lightly disturb the findings of the Trial Chamber so made.[216] The standards of review in an appeal alleging an error of fact are dealt with in section 1(c) of this Response Brief above.

4.8 The task of the Trial Chamber outlined in the foregoing way necessarily entitles the Trial Chamber to prefer the evidence which it finds more credible. It is never an error (of law or fact) for the Trial Chamber to prefer the evidence of Prosecution witnesses whom the Chamber found more credible on a point on which Defence witnesses had given contrary testimony.

Alleged Failure to Address All Objections and Inconsistencies

4.9 In paragraph 169, Brima complains that the Trial Chamber erred in law and in fact for failing to address all his objections relating to prior inconsistent statements of Witness TF1-184. In particular, Brima 'submits that TF1-184 provided inconsistent account about him and the death of SAJ Musa.' According to Brima, 'TF1-184's explanations concerning this discrepancy at trial were so confusing that a reasonable trier of fact would have rejected his testimony. That the Chamber acted unreasonably on the witnesses' [sic] trial testimony irrespective of the doubt raised therein without providing any reason for disregarding the earlier statement.'

4.10 Brima's complaint as stated in paragraph 169 of his brief is without merit. The reasons are as follows. The complaint is vague in the part entailing a general complaint regarding the treatment of 'all his objections relating to prior inconsistent statements of Witness TF1-184'. And in the part entailing a specific complaint regarding the alleged 'inconsistent account about him and the death of SAJ Musa', Brima's complaint is flawed in the following ways: (a) it is

[216] ***Niyitegeka* Appeal Judgement**, para 95. ***Kvočka* Appeal Judgement**, para 19.

vague as regards content and outcome; (b) it is at odds with the jurisprudence on the test of reception or rejection of evidence; and, (c) it is at odds with the jurisprudence regarding inconsistencies.

The Complaint is Vague in its General Part

4.11 Brima's complaint is vague in the part entailing a general complaint of 'failing to address all his objections' relating to prior inconsistent statements of Witness TF1-184. This complaint is couched in the impermissible manner of 'general references to the submissions made during the trial.' Complaints so couched have been held to not pass the muster of the obligation of precision in appellate litigation. As noted earlier, an appellant has an obligation 'to clearly set out his grounds of appeal as well as the arguments supporting them. He has to provide the Appeals Chamber with exact references to paragraphs in judgments, transcript pages, exhibits or any authorities, indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made, so that the Appeals Chamber may fulfil its mandate in an efficient and expedient manner. General references to the submissions made during the trial clearly do not fulfil this requirement, and therefore will be disregarded by the Appeals Chamber.'[217]

4.12 At any rate, as regards Brima's complaint of failure of the Trial Chamber to 'address all his objections', it is settled that there is no requirement on a Trial Chamber to articulate every step of its reasoning. In *Deronjić*, the ICTY Appeals Chamber held that 'a Trial Chamber is not obliged to refer to every piece of evidence in the trial record in its judgment nor to every submission made during the trial.'[218] And where an appellant wishes to complain to the Appeals Chamber that an omission in reasoning constitutes an appealable error, 'it is necessary for [that] appellant ... to identify the specific issues, factual

[217] ***Kvočka* Appeal Judgement**, para 425.
[218] ***Deronjić* Appeal Judgement**, para 21.

findings or arguments which he [or she] submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.'[219]

4.13 In the circumstances, the Prosecution urges the Appeals Chamber to disregard Brima's submission in this regard.

The complaint is vague as to allegation of inconsistent account about 'him' and the death of SAJ Musa

4.14 Beyond the general allegation of 'failing to address all his objections' relating to prior inconsistent statements of Witness TF1-184, Brima does attempt to narrow down the breadth of this complaint. This is in virtue of his submission 'that TF1-184 provided inconsistent account about him and the death of SAJ Musa.' Still, the allegation is vague in its content, for the same reasons as those stated above.

4.15 The complaint also suffers from additional vagueness in terms of juridical outcome. This is because the appellant Brima failed to explain how it was that the alleged inconsistencies had resulted in a miscarriage of justice.[220]

4.16 It is settled law that the Appeals Chamber will not overturn a decision of a Trial Chamber because of every error of fact. It is only an error which has caused a miscarriage of justice that may cause the Appeals Chamber to overturn the decision of a lower court. In this regard, miscarriage of justice has been defined as a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[221]

4.17 The appellant Brima has not shown that there had been a miscarriage of justice, on grounds of a grossly unfair outcome that resulted from any failure of the Trial Chamber to resolve any particular inconsistency.

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[219] ***Kvočka* Appeal Judgement**, para 25.
[220] *Ibid*, para 14. See also ***Kordić* Appeal Judgement**, para 14; and ***Blaškić* Appeal Judgement**, para 12.
[221] ***Kvočka* Appeal Judgement**, para 18. See also ***Vasiljević* Appeal Judgement**, para 8; ***Kordić* Appeal Judgement**, para 19; ***Krstić* Appeal Judgement**, para 40; and ***Krnojelac Appeal Judgement***, paras 11 and 13.

The complaint is at odds with the jurisprudence on the test of acceptance or assessment of evidence

4.18 As part of his submission 'that TF1-184 provided inconsistent account about him and the death of SAJ Musa,' Brima complained that "TF1-184's explanations concerning this discrepancy at trial were so confusing that *a reasonable trier of fact would have rejected his testimony.*' [Emphasis added.]

4.19 It is submitted that Brima's complaint in this connection is premised upon a misapprehension of the correct legal standard of 'reasonableness' as regards the acceptance or assessment of particular items of evidence. The correct test is the test of *certainty that no reasonable tribunal of fact* would have accepted the impugned evidence or analysed a particular item of evidence in the impugned way. As the test was stated by the ICTY Appeals Chamber in *Krnojelac*:

> [W]hen considering this type of error, the Appeals Chamber applies the "reasonable nature" criterion to the impugned finding. *Only* in cases where *it is clear* that *no reasonable person would have accepted the evidence* on which the Trial Chamber based its finding or when the assessment of the evidence is absolutely wrong can the Appeals Chamber intervene and substitute its own finding for that of the Trial Chamber.[222] [Emphasis added.]

4.20 Hence, the test of reasonableness that the appellant must overcome is that 'it is clear that no reasonable person would have accepted the evidence' in question. It is not enough for him to contend, or even show, that 'a reasonable trier of fact would have rejected' the impugned testimony. The test of reasonableness upon which Brima hitched his complaint does not overcome the rider that 'two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.'[223] It is precisely for this reason that the ICTY Appeals Chamber in *Krnojelac*, stated that: 'A party suggesting only a variation of the findings which the Trial Chamber might have reached therefore has little chance of a successful appeal, unless it is established beyond any reasonable doubt that

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[222] *Ibid.*, para 12. See also ***Kvočka* Appeal Judgement**, paras 19, 20; ***Blaškić* Appeal Judgement**, paras 18, 19; and ***Tadić* Appeal Judgement**, para 64.

[223] ***Tadić* Appeal Judgement**, para 64.

no reasonable trier of fact *could have* reached a guilty finding.'[224] [Emphasis received.]

4.21 The Prosecution submits that the Trial Chamber did not convict Brima on the basis of any evidence which no reasonable trier of fact would have received. Nor was the Trial Chamber absolutely wrong in the assessment of the evidence on which Brima's conviction was founded.

The complaint is at odds with the jurisprudence regarding testimonial inconsistencies

4.22 As regards Brima's complaint about any inconsistencies in the testimony of witness TF1-184, and indeed any inconsistencies in the evidence of any other witness for the Prosecution, it is recalled that it is settled in the jurisprudence that the mere existence of inconsistencies does not nullify the testimony of a witness. As the ICTY Appeals Chamber observed in *Kupreškić*:

> The presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence.[225]

4.23 In international criminal justice it has been accepted that it lies in the nature of criminal proceedings that a witness may be asked different questions at trial than he or she was asked in prior interviews; and that he or she may remember additional details when specifically asked particular questions in court. It is also accepted that a witness on the stand may simply momentarily suffer the very ordinary human experience of forgetfulness or confusion.[226]

4.24 For inconsistencies to have a nullifying effect, the appellant must show that the inconsistencies in question do truly unsettle the 'fundamental features' of the case.[227] Brima has made no such showing in his submissions. In the

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[224] ***Krnojelac* Appeal Judgement**, para 12.
[225] ***Kupreškić* Appeal Judgement**, para 31.
[226] ***Strugar* Trial Judgement**, para 8. See also ***Limaj* Trial Judgement**, paras 12 and 543.
[227] ***Kupreškić* Appeal Judgement**, para 31.

circumstances, the Appeals Chamber is urged to reject his submissions in this regard.

4.25 Paragraphs 170 to 178 are a multifarious assemblage of sundry complaints made *en passant*, in a vague and sprawling manner. These complaints appear to touch upon such diverse themes as the Prosecution's burden of proof; the standard of proof in a criminal case; presumption of innocence; rights of the accused; resolution of reasonable doubts; drawing of inferences; the shape and quality of the Prosecution evidence in the case; whether or not the appellant was responsible for the overthrow of President Kabbah in May 1997; and the duty of a judge to rule in an impartial and independent manner.

4.26 These submissions do not pass appellate muster, given their level of generality and vagueness.

4.27 At any rate, the Trial Chamber did not err in respect any of the themes identifiable in those paragraphs. That is to say, the Trial Chamber instructed itself correctly in relation to the Prosecution's burden of proof; that the correct standard of proof in a criminal case is beyond a reasonable doubt; that the accused enjoyed a presumption of innocence; that the rights of the accused must be keenly respected in a criminal case before an international criminal tribunal; that any reasonable doubt must be resolved in favour of the accused; that where other reasonable inferences suggest the innocence of the accused, such inferences shall be drawn; that the shape and quality of the Prosecution evidence in the case, upon which a conviction may be based, must have probative value; that any evidence relating to the overthrow of President Kabbah in May 1997 was put in its proper evidential context to the extent of its relevance to the question of guilt or innocence of the appellant; and, that the judges fully discharged the duty of a judge to rule in an impartial and independent manner.

(b) The Trial Chamber's assessment of the credibility of certain witnesses

4.28 This section of this Response Brief responds to Brima's Tenth and Eleventh Grounds of Appeal, Kamara's Eighth Ground of Appeal, and Kanu's Grounds Three and Four.

4.29 Ground 3 of the Kanu Appeal Brief (at paragraphs 3.1 and 3.2) contends that the Trial Chamber failed to assess objectively the Defence Witnesses' evidence against the Prosecution witnesses' evidence and generally preferred the Prosecution evidence. At paragraphs 3.3 to 3.13 he argues that the Trial Chamber ignored discrepancies and contradictions in the prosecution evidence. And at 3.15 and 3.16, he argues that the Trial Chamber erred when it attached less weight to Defence evidence which had not been put to Prosecution witnesses.

4.30 The prosecution reiterates its arguments with regard to the Trial Chamber's evaluation of witnesses in terms of credibility, reliability and the weight to be attached to the evidence of each witness as set out in this brief.

4.31 The Prosecution submits that Kanu's brief at paragraphs 3.2, 3.4 and 3.4, which highlights that the Trial Chamber rejected certain aspects of the evidence of TF1-167 and TF1-033, only enhances the fact that the Trial Chamber properly evaluated each witness's evidence in the light of the total trial record and that it did not slavishly accept all the evidence of all the Prosecution insider witnesses.

4.32 Furthermore, as cited in paragraphs 3.4, 3.5, 3.7, 310, 3.11, 3.12 and 3.13 of the Kanu Appeal Brief, the Trail Chamber does set forth its reasons for accepting, rejecting or explaining why it has interpreted a certain piece of evidence in a certain way. Again the Prosecution submits that this is indicative of the careful evaluation of witness evidence undertaken by the Trial Chamber.

4.33 In paragraph 3.15 of the Kanu Trial brief it is suggested that the Trial Chamber erred in attaching less weight to Defence evidence on the basis that the evidence

led had not been put to the Prosecution witnesses in cross-examination and that this was a deliberate Defence tactic.

4.34 The Prosecution submits that this was not an error on the part of the Trial Chamber. It is also a well founded rule of fairness. A classic statement of that rule was made by the House of Lords in well-known case of *Brown v Dunn*.[228]

4.35 Furthermore, the Prosecution submits that the tactic of the defence failure to put its case to Prosecution witnesses is akin to the position of the defence deliberately failing to raise a defect in the indictment for tactical advantage until the end of the trial. In such cases the Defence should not be entitled to benefit from the use of such a tactic.

4.36 For purposes of Grounds 10 and 11 of his Appeal Brief, the appellant Brima adopts the submissions made in Ground 8 of the appellant Kamara's Appeal Brief. Consequently, Ground 8 of Kamara's Appeal Brief is now engaged.

4.37 Brima's Grounds 10 and 11 contain similar submissions as Kanu's Ground 4, to the extent that they relate to the evidence of accomplice witnesses. Hence, the submissions made in this part of the Prosecution's response also address the submissions made by Kanu in his Ground 4.

The Trial Chamber Sufficiently Considered Credibility of Witnesses

4.38 In paragraphs 223, 224, 227 and 228 of his Appeal Brief, the appellant Kamara submitted that the Trial Chamber failed to consider in sufficient detail the question of credibility of Prosecution Witnesses: TF1-334, TF1-153, TF1-184 and George Johnson as being likely to be affected by ulterior motives, thereby invalidating the judgment and leading to a miscarriage of justice.

4.39 The reason for the ulterior motive alleged by Kamara is that these witnesses 'could be considered as co-perpetrators or accomplices' who had received assistance from the Prosecution, in exchange for their testimony.[229]

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[228] ***Browne v. Dunn***, (1893) 6 R 67 [HL].
[229] See paras 224, 227 and 228 of the **Kamara Appeal Brief**.

4.40 In Ground 4 of his Appeal Brief, the appellant Kanu makes similar submissions in respect of Prosecution Witnesses TF1-184, TF1-334, George Johnson and Gibril Massaquoi.

4.41 It is submitted that this complaint is without merit. The Trial Chamber was duly mindful of the concerns of the Defence in this regard and had correctly instructed itself on the appropriate legal standards.[230]

4.42 The law governing accomplice witnesses was sufficiently stated by the ICTR Appeals Chamber in *Niyitegeka*, in the following terms:

> The ordinary meaning of the term "accomplice" is "an associate in guilt, a partner in crime." Nothing in the Statute or the Rules of the Tribunal prohibits a Trial Chamber from relying upon testimony of those who were partners in crime of persons being tried before it. As stated above, a Chamber may admit any relevant evidence which it deems to have probative value. Accomplice testimony is not *per se* unreliable, especially where an accomplice may be thoroughly cross-examined. However, considering that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal, a Chamber, when weighing the probative value of such evidence, is bound to carefully consider the totality of the circumstances in which it was tendered. In the view of the Appeals Chamber, reliance upon evidence of accomplice witnesses *per se* does not constitute a legal error.[231]

4.43 The usual judicial practice is to evaluate the evidence of such criminally-tainted witnesses against the complete trial record, with a view to their relevance, probative value and reliability. Instances of this usual practice are seen in the judgments of two ICTY cases: *Blagojević* and *Simić*. The former involved two former co-accused who had pleaded guilty but had not been sentenced by the time of their testimony. *Simić* involved a former co-accused who had pleaded guilty and had been sentenced at the time of his testimony.

4.44 In *Blagojević*, the Trial Chamber observed as follows:

> The Trial Chamber has heard the testimony of former co-accused, Momir Nikolić and Dragan Obrenović, who appeared as witnesses for the Prosecution after having been convicted by the Trial Chamber, following them pleading guilty. As is the case for all witnesses, the Trial Chamber has assessed their evidence in light of the

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[230] See **Trial Chamber's Judgement**, paras 124 and 125.
[231] ***Niyitegeka* Appeal Judgement**, para 98.

> circumstances under which they gave their testimony and in particular, that they testified pursuant to a plea agreement; that they took the solemn declaration to speak the truth; that the charges dropped against them were dropped without prejudice; and that they had not yet been sentenced at the time of their testimony. Their testimony has been evaluated against the complete trial record.[232]

4.45 And in *Simić*, the Trial Chamber observed as follows:

> Stevan Todorović was initially a co-Accused in this case, until he pleaded guilty and became a witness for the Prosecution. The Trial Chamber acknowledges the problems that may be associated with his testimony—noting in particular the incentive for him to testify in a manner favourable to the Prosecution case and the hostile relations between him and his former co-Accused—but it does not consider his testimony inherently unreliable. When assessing the probative value and reliability of Stevan Todorović's evidence, the Trial Chamber viewed in his favour the fact that he was sentenced prior to giving his oral testimony. The Trial Chamber has also treated the testimony of the remaining co-Accused with caution and subjected it, as all other evidence, 'to the tests of relevance, probative value and reliability' according to Rule 89.[233]

4.46 The approach followed by the Trial Chamber in the case at Bar did not differ to any significant extent from the approach revealed in the foregoing cases. Mindful of the allegation of a criminal taint to some of the Prosecution Witnesses, the Trial Chamber instructed itself in the following way:

> A witness with self-interest to serve may seek to inculpate others and exculpate himself, but it does not follow that such a witness is incapable of telling the truth. [Footnote omitted.] Hence, the mere suggestion that a witness might be implicated in the commission of crimes is insufficient for the Trial Chamber to discard that witness's testimony. Moreover, none of these Prosecution witnesses has been charged with any crimes and their evidence cannot, therefore, be described as "accomplice evidence." Furthermore, having heard the evidence of the witnesses concerned, the Trial Chamber found no reason to give undue consideration to any of the defence allegations above.[234]

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[232] ***Blagojević and Jokić* Trial Judgement**, para 24.
[233] ***Simić* Trial Judgement**, para 21.
[234] **Trial Chamber's Judgement** para 125.

4.47 It is submitted that the Trial Chamber did not err at all in proceeding in that fashion, let alone err in a manner that occasioned a miscarriage of justice. The appellant's submissions must accordingly be rejected.

4.48 It might, of course, be argued that *Blagojević* and *Simić* contained the distinguishable fact of the witnesses having already pleaded guilty and been convicted; in contrast to the case at Bar where there had not been any such judicial events in relation to the Prosecution Witnesses at issue. But these would be distinctions without material juridical difference, given that both types of witnesses would have been testifying pursuant to an agreed upon incentive.

4.49 It is particularly notable in *Blagojević* that the witness had already pleaded guilty and been convicted, but had not been sentenced. He was thus arguably in a more vulnerable position of having committed himself to a guilty plea before his testimony; leaving open the possibility that the Prosecution might urge a stiffer sentence were he, in the meantime, to disappoint them in his testimony against his former co-accused. Such a position of increased vulnerability is arguably more injurious to the credibility factor than the position of a criminally-tainted witness (as in the case at Bar) who had not even pleaded guilty.

4.50 In paragraph 224 of his Appeal Brief, the appellant Kamara observes, as was done by Trial Chamber I in the *CDF Judgment*, that 'a trier of fact has to exercise particular caution in examining every detail of the witnesses' testimony.'[235] In paragraphs 4.7 to 4.9 of his own Appeal Brief, the appellant Kanu makes similar submissions, especially in relation to accomplice witnesses.

4.51 In a related submission, Kamara contends in paragraph 226 of his Appeal Brief, that the testimony of single witnesses supporting a conviction must be scrutinised with 'circumspection', and rejected where appropriate. A similar submission relating to the testimony of single witnesses may be found in paragraph 4.7 of the Appeal Brief of the appellant Kanu, relating especially to accomplice witnesses.

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[235] **CDF Trial Judgement**, para 278.

4.52 These submissions involve legal axioms the violations of which has not been demonstrated in the case at Bar. Indeed, the need for caution noted by Trial Chamber I in the *CDF Judgment* resonates within the theme of the following pronouncement made by the ICTY Appeals Chamber in *Kordić and Čerkez*:

> In *Kupreškić et al*, the Appeals Chamber emphasized that a Trial Chamber is required to provide a fully reasoned opinion, and that where a finding of guilt was made in a case on the basis of identification evidence given by a single witness under difficult circumstances, the Trial Chamber must be especially rigorous in the discharge of that obligation. A Trial Chamber may thus convict an accused on the basis of a single witness, *although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness.*[236] [Emphasis added.]

4.53 The Prosecution submits that the legal axiom relating to the exercise of particular or appropriate caution in examining 'every detail' of the testimony of a witness with possible 'underlying motive' must not be confused with something else. The confusion to guard against is any suggestion that an appealable error has occurred simply because the reasons for Judgment of the Trial Chamber does not *discuss* 'every detail' of the particular witness's testimony. There is no obligation on the Trial Chamber to discuss every such detail in this way. In this regard, the controlling legal standard remains the line of jurisprudence represented by the following pronouncement:

> It is not necessary [for the Trial Chamber] to refer to the testimony of every witness or every piece of evidence on the trial record. It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the finding is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective.[237]

4.54 Further to this line of jurisprudence, the ICTY Appeals Chamber has held that a Trial Chamber is 'in no way obliged to refer to every phrase pronounced by a

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[236] ***Kordić* Appeal Judgement**, para 274.
[237] ***Kvocka* Appeal Judgement**, paras 23 and 677. See also ***Kordić* Appeals Judgement**, para 382.

witness during his testimony but may, where it deems appropriate, stress the main parts of the testimony relied upon in support of a finding.'[238] That the reasons of the Trial Chamber 'refers only to some parts' of the testimony 'does not support the contention that the other parts ... were rejected or not taken into account by the Trial Chamber. To the contrary, reference to a certain portion of the witness's testimony is *prima facie* evidence that the Trial Chamber was cognisant of the whole testimony and took it into account.'[239]

4.55 In the circumstances, it is submitted that the Trial Chamber in the case at Bar must enjoy the presumption of having taken into account every detail of the testimony of the witnesses impugned by the appellant Kamara as having ulterior motive.

The Trial Chamber did convict in light of the trial record as whole

4.56 In paragraphs 229 and 230 of his Appeal Brief, the appellant Kamara appears to suggest that the Trial Chamber ignored the requirement to have regard to the trial record as a whole. In violation of this platitude, Kamara submits, the Trial Chamber relied exclusively on Prosecution Witnesses TF1-334, TF1-184 and TF1-167 to find that Kamara was responsible for the crimes of which he was convicted.

4.57 The principle requiring a trier of fact to have regard to the trial record as a whole is captured in the following statement of the ICTY Appeals Chamber in *Kupreškić*:

> A tribunal of fact must never look at evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of all the evidence in each case which must be considered.[240]

4.58 As a matter of legal principle, the point must be made that this rule does not preclude the tribunal of fact from separating the probative evidential wheat from the non-credible chaff, for purposes of the verdict, following a holistic appraisal

[238] See ***Jokić* Appeal Judgement on Sentencing**, para 73.
[239] *Ibid.*
[240] ***Kupreškić* Appeal Judgement**, para 334.

of all the evidence on record. In the nature of things, this is what the tribunal must do.

4.59 Hence, there is no appealable error even where the tribunal of fact had in fact relied 'exclusively' (employing the appellant Kamara's choice of adverb) on a limited number of the witnesses, following a holistic regard of all of the evidence on the record; provided of course that in case of conviction, the evidence of the limited number witnesses did establish the case of the Prosecution beyond a reasonable doubt.

4.60 The burden on an appellant convict then is to raise a good case of reasonable doubt and the correlative matter of miscarriage of justice, as regards the evidence upon which the tribunal of fact had relied. This has not been done.

The Trial Chamber did sufficiently address the discrepancies in the testimony of Prosecution Witnesses

4.61 In paragraphs 231 and 232, the appellant Kamara submits that there are discrepancies in the testimony of Prosecution Witnesses TF1-334 and TF1-167 which undermined fundamental features of the case for the Prosecution.

4.62 The Prosecution submits that the Trial Chamber did address the question of discrepancies found in the testimony of the Prosecution Witnesses. As part of that exercise, the Trial Chamber found some discrepancies to be significant[241] and others not.[242] These go to show that the Trial Chamber was at all times very alive to its duty to consider the weight of the evidence of each witness jointly

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[241] This was particularly the case with the evidence of Prosecution Witness TF1-033. The Chamber did observe 'that there were occasional significant discrepancies between the evidence witness TF1-033 gave at trial and his prior statements to the Prosecution'. As well, the Chamber found that 'Prosecution witnesses TF1-334 and George Johnson gave accounts of events at Tombodu, which differed substantially from the account provided by witness TF1-033': **Trial Chamber's Judgement**, para 365. Similarly, the Chamber found that this witness's testimony regarding 'troop restructure at Mansofinia suffered from the deficiencies typical in his testimony: it was overly general in comparison to the testimony of other witnesses present at the same events, but became specific when the presence or actions of one of the Accused were concerned:' **Trial Chamber's Judgement**, para 366. However, having observed the Witness testify, the Chamber did not feel that these weaknesses in the Witness's testimony warranted a categorical rejection of all of his testimony as entirely unreliable: Trial Judgement, para 366.

242 The Chamber found to be minor the discrepancies in the testimonies of Prosecution Witnesses TF1-334 (**Trial Chamber's Judgement**, para 359), TF1-184 (**Trial Chamber's Judgement**, para 362), and TF1-153 (**Trial Chamber's Judgement**, para 368).

and severally, as well as the effect of any inconsistencies or discrepancies found within and between those testimonies.

4.63 In paragraph 231 of his Appeal Brief, the appellant Kamara contends that a discrepancy between the evidence of Prosecution Witness TF1-334 (who testified that Savage was appointed by Kamara) was not a minor discrepancy in relation to the evidence of Prosecution Witness TF1-167 (who testified that Savage was appointed by Superman). According to the appellant Kamara, this particular discrepancy undermined the determination of Kamara's liability as a commander in Kono.

4.64 The Prosecution submits that even if it is accepted that the alleged discrepancy between the evidence of the two witnesses did undermine the question of the appointment of Savage, it is still not the case that such an appointment was a decisive consideration in the determination of Kamara's command responsibility. There were other factors which the Chamber relied upon to determine Kamara's command responsibility. These include the following: clear evidence that Savage was subordinate to the appellant Kamara; that the appellant Kamara both directly and indirectly (through the AFRC Operations Commander) was in a position to supervise the activities of Savage; that the appellant Kamara promoted Savage; that Savage himself reported to the appellant Kamara; and that the appellant Kamara was physically present in Tombodu when it was under the control of Savage.[243]

4.65 In view of the foregoing, the Prosecution submits that the appellants Brima, Kamara and Kanu have not established any error in the manner that the Trial Chamber addressed the credibility of the Prosecution Witnesses in question, let alone an error that resulted in a miscarriage of justice.

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[243] **Trial Chamber's Judgement**, para 1884.

5. Alleged errors of fact: superior responsibility

(a) Superior responsibility of Brima

(i) Bombali District

5.1 This section of this Response Brief responds to Brima's Fourth Ground of Appeal.

5.2 The appellant Brima contends that the Trial Chamber erred in fact in making factual findings on the existence of responsibility on his part. The errors are alleged as follows:

(a) erroneous reliance on Prosecution Witnesses TF1-334, TF1-167 and TF1-033, despite inconsistencies and contradictions in their accounts as to killings in the Bombali District, while ignoring the testimonies of several Defence Witnesses (paras 85, 92, 93 and 94);

(b) questionable identification of the appellant, in that the identification evidence was either derived from hearsay, or was totally absent on the record (para 86);

(c) that Defence Witnesses did not hear the name of appellant associated with the events in the Bombali district (paras 88, 89, 91 and 95);

(d) that the Prosecution did not explore the possibility that one Adama Cuthand and his group, rather than the appellant, were the perpetrators of the crimes in the Bombali District for which the appellant was convicted (para 90); and

(e) that there was some alibi evidence in favour of the appellant (paras 97, 98 and 119).

There were no unresolved inconsistencies and contradictions in the judgment

5.3 As has already been observed, the mere existence of inconsistencies or contradictions does not nullify the value of a particular piece of evidence. The inconsistencies or contradictions must unsettle the fundamental features of the case, for it to be able to unsettle, in turn, the probative value of the piece of evidence in question.

5.4 It is noted that the real object of the appellant's Fourth Ground of Appeal involves a challenge to the Trial Chamber's conviction of the appellant on the basis of his responsibility as a superior. The fundamental feature of the case for superior responsibility rests in the fact that the crimes in question were committed by subordinates.

5.5 The appellant's case relating to inconsistencies and contradictions address, at best, a few isolated events having to do with the appellant's personal participation as a direct perpetrator in the commission of certain criminal acts. As such, challenges of this sort will have limited bearing on the responsibility of the appellant for the crimes committed by his subordinates: that being the fundamental feature of the case in this regard.

5.6 In the first place, the Trial Chamber did, at any rate, clearly articulate how it resolved this evidential question of the involvement of the accused in those events. For instance, one of the more dramatic of these forensic events involves the question of the killing of the Imam of Karina Mosque. Incidentally, this is the only concrete instance of the so-called contradictory evidence discussed by the appellant in his Fourth Ground of appeal. The appellant revisited this event in paragraphs 92 to 95 of his Brief.

5.7 Prosecution Witness TF1-334 had indeed testified that he was present when the appellant shot and killed 'the Imam' of Karina Mosque, together with six men and five women.[244] The Chamber found, however, that *the* Imam was not killed. As the Chamber found:

> The Defence presented a different version of events. The Defence adduced evidence in closed session that established beyond reasonable

[244] **Trial Chamber's Judgement**, para 891.

> doubt that the Imam was not killed in the attack on Karina mosque. Defence Witnesses DBK-089 and DBK-094 gave evidence that the Imam left Karina three days prior to the attack, leaving the Imam's elder brother in charge of the mosque. The Imam's elder brother appointed someone to lead the prayers in the absence of the Imam.[245]

5.8 Although the Trial Chamber agreed with the Defence that *the* Imam of Karina Mosque was not shot and killed, the Chamber, in a clear reasoning, quite correctly rejected the Defence contention that PW TF1-334 had been discredited as a witness of truth. The foregoing passages from the judgment amply illumine the Trial Chamber's reasoning in this regard:

> Defence witnesses DBK-089 and DBK-094 did not dispute the killing of civilians at the mosque. The Brima Defence submits that the testimony of witness TF1-334 is unreliable based on his assertion that the Imam was killed. The Trial Chamber notes that when asked to whom Brima spoke at the mosque, Witness TF1-334 responded "It was the imam -- the imam that was in charge of the mosque who was leading prayers." The Trial Chamber is thus satisfied that the Witness referred to the person killed as the 'Imam' on the basis that this person was leading the prayers when the troops arrived at the mosque. This mistake on the part of the witness does not undermine the credibility of his evidence that the Accused Brima killed the person leading the prayers, along with 11 other civilians at the mosque.[246]
>
> In light of the above evidence, the Trial Chamber considers the testimony of witness DBK-094, who claimed to have only seen seven dead bodies in Karina after the attack to be unreliable. The Trial Chamber is satisfied that in fact civilians were killed on a massive scale in Karina. One witness estimated that at least 200 civilians were killed in the attack on Karina. Even though other witnesses have not estimated any total figures for the event, the figure of 200 civilians killed is corroborated by the totality of the evidence given, the massiveness of the attack on the village and the general destruction caused.[247]

5.9 At any rate, the appellant's unsuccessful evidential nitpicking on a few isolated forensic events in Karina, for instance, does not detract from the fact that the Trial Chamber reviewed a large body of consistent evidence establishing beyond reasonable doubt that subordinates of the appellate had committed

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[245] **Trial Chamber's Judgement**, para 892.
[246] *Ibid.*, para 893.
[247] *Ibid.*, paras 894 and 1563.

atrocities against civilians on a massive scale in Karina;[248] and that these crimes were committed in circumstances that engaged the individual criminal responsibility of the appellant as their superior.[249]

5.10 The findings of the Trial Chamber in this connection do not reveal any error of fact or law, let alone errors that resulted in an invalid judgment or a miscarriage of justice.

There were no weaknesses in the identification evidence

5.11 In paragraph 86 of his Appeal Brief, the appellant Brima attacked as weak the identification of evidence of Prosecution Witness TF1-157.

5.12 But this is a red herring. The identification of the appellant was amply done by insider witnesses who knew him quite well and who worked with him at the time. These insider witnesses include Prosecution Witness TF1-033, TF1-334 and George Johnson.[250] These witnesses knew the appellant at the time and it was on the basis of their evidence that the Trial Chamber found that the appellant 'ordered his subordinates to perpetrate crimes against the civilian population in Karina and its environs with the specific intent of instilling terror in the civilian population.'[251] The appellant has not challenged the evidence of these other witness, but has rather limited his challenge to the evidence of TF1-157. The evidence of this witness correctly identified the appellant. His evidence was also amply corroborated by the evidence of these other insider witnesses.

The Chamber found credible the evidence of Prosecution Witnesses who directly implicated the appellant in the crimes

5.13 In paragraphs 88, 89, 91 and 95 of his Appeal Brief, the appellant Brima challenges the findings of the Trial Chamber on grounds that the Defence

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[248] **Trial Chamber's Judgement**, paras 894 and 1563.
[249] See discussion below on the issue of the Trial Chamber's findings on the appellant's superior responsibility.
[250] **Trial Chamber's Judgement**, paras 1559, 1710, 1712, 1715.
[251] *Ibid.*, paras 1711, 1713 and 1716.

Witnesses did not hear the name of appellant associated with the events in the Bombali district.

5.14 This complaint deserves no more response than (a) that the Defence Witnesses testified that they did not hear his name associated with the commission of crimes does not mean that he did not commit crimes; and (b) the Trial Chamber heard and accepted as credible the evidence of witnesses who beyond a reasonable doubt observed him commit the crimes for which he was convicted or who otherwise implicated the appellant in the manner warranting the verdict of the Trial Chamber.

5.15 In this regard, the appellant has made no credible case of error of fact on the part of the Trial Chamber, such as resulted in a miscarriage of justice.

The culpability of the appellant is not precluded by the possibility that one Adama Cuthand and his group might have committed crimes

5.16 In paragraph 90 of his Appeal Brief, the appellant Brima impugned the judgment on grounds that the Prosecution did not explore the possibility that one Adama Cuthand might have committed crimes in the same area that the appellant and his subordinates had been implicated as having committed crimes.

5.17 Once more, it is sufficient only to respond that the Trial Chamber heard ample evidence upon which it concluded that it had been established beyond reasonable doubt that the appellant was culpable for the crimes committed in the Bombali District.

The appellant's alibi was not credible

5.18 In paragraphs 97, 98 and 119 of his Appeal Brief, the appellant Brima argues that the Trial Chamber erred in law, in failing to take his alibi evidence into account.

5.19 The Prosecution submits that the Trial Chamber did fully consider the alibi testimony given by the appellant and other Defence Witnesses.[252] In the end, the Trial Chamber found the alibi too porous to rise to a reasonable doubt in the

[252] **Trial Chamber's Judgement**, paras 346 to 352.

face of the overwhelming evidence proving the culpability of the appellant beyond reasonable doubt.[253]

5.20 Notable in this alibi is the claim that that 05 and witness DBK 012 arrested Brima at Yaya. However, when DBK 012 gave evidence he did not corroborate taking part in this arrest. The first DBK 012 heard about Brima's arrest was when SAJ Musa told him about it at Col Eddie Town.[254] It is also pertinent to note that of the two Prosecution witnesses (TF1-334 and TF1-167) who gave evidence that Brima was under arrest at Col Eddie Town, neither gave evidence that Brima was brought under arrest to Col Eddie Town. On the contrary both witnesses gave evidence that Brima was the commander at Colonel Eddie Town until his arrest.

5.21 With regard to paragraph 98, it is correct that Prosecution witnesses TF1-334, TF1-167 and TF1-045 corroborate the arrest and detention of Brima at Kailahun. This was even conceded in the Prosecution Final Trial Brief at paragraph 1049 and 1051 but only to the extent that such a detention was for a very short duration.[255] However, none of the Defence witnesses was able to corroborate the period for which Brima was detained in Kailahun. In fact TF1-334 and FT1-167 gave evidence that Brima returned from Kailahun to Kono in late April or early May with logistics for the SLA/RUF troops based in Kono.[256] The other Defence alibi witnesses for the period in which Brima alleged that he was in his home town of Yaha were rightly rejected by the Trial Chamber in its Trial Judgment for want of credibility.

5.22 Further details of the Trial Chamber's consideration of Brima's alibi may be found at paragraphs 342, 353, 378, 379, 380, 381, 382, 383, 384 of the judgment.

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[253] **Trial Chamber's Judgement**, para 353.
[254] DBK-012, Transcript, 9 October 2006 p 12-13.
[255] **Prosecution Final Trial Brief** dated 1 December 2006 para 1049 and 1051
[256] See evidence of TF1-167, TF1-334, TF1-184 and TF1-153.

Alleged Legal Errors

5.23 The appellant Brima also contends that the Trial Chamber committed errors of law. In this connection, the appellant embarks upon interesting legal musings from paragraphs 99 to 117. The points of these submissions are ultimately contained in the following allegations appearing in paragraph 118:

(a) the appellant must not be judged by the actions of those over whom he had no effective control;

(b) the appellant's guilt must not be presumed because of his title or rank in the defunct AFRC junta, if he had no reason to know of criminal activities committed in the Bombali District; and

(c) the appellant could not have taken necessary measures to prevent or punish those activities of which he was not aware or could not have controlled.

5.24 These legal submissions may summarily be responded to as follows:

(a) The appellant was not convicted on the basis of actions of those over whom he had no effective control. The Trial Chamber did conduct a detailed review of the evidence, at the end of which the Chamber found that the appellant had effective control over the perpetrators of the crimes for which he was convicted.[257]

(b) The appellant's guilt was never presumed, let alone presumed on the basis of his title and rank in the defunct AFRC junta. The Chamber found, upon a review of the evidence, that all the elements of the appellant's superior responsibility had been proved beyond reasonable doubt.[258] This was because the appellant (i) was in a position of superior authority over the subordinates who committed the crimes;[259] (ii) had effective control over the perpetrators;[260] and (iii) did not take reasonable measures to prevent the commission of the crimes, although

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[257] **Trial Chamber's Judgement**, paras 1672, 1710-1713, 1719, 1724, 1725, 1726, 1727, 1728; 1770-1783, 1790, 1793, 1794, 1795 and 1803.
[258] *Ibid.*, paras 1744 and 1810.
[259] *Ibid.*, paras 1723, 1789, 1794, 1795, 1796, 1803 and 1805.
[260] *Ibid.*, paras 1672, 1710-1713, 1719, 1724, 1725, 1726, 1727, 1728; 1770-1783, 1790, 1793, 1794, 1795 and 1803.

he knew or ought to have known that they were about to be committed,[261] and did not punish those who had committed the crimes.[262]

(ii) Freetown and the Western Area

5.25 This section of this Response Brief responds to Brima's Sixth Ground of Appeal.

5.26 The submissions of the appellant Brima in relation to his Ground 6 question the legal standards applied by the Trial Chamber in finding him responsible as a superior.

5.27 It is submitted that those legal analysis employed by the Trial Chamber are amply clear from the judgment. The Trial Chamber's analysis is entirely consistent with the jurisprudence of international criminal law. It reveals no error of law or fact.

(b) Superior responsibility of Kamara

5.28 This section of this Response Brief responds to Kamara's Seventh Ground of Appeal.

5.29 With a few exceptions, the submissions of the appellant Kamara on the Seventh Ground of his appeal consist mostly of unremarkable legal statements on superior responsibility. The problem is that the appellant has not shown that the Trial Chamber violated any known principles of international criminal law to the extent that they were identified in his submissions.

5.30 Notable among these legal statements is the proposition that for purposes of superior responsibility, 'command and control are inseparable.'[263] Although the

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[261] *Ibid.*, paras 1716, 1730-1735, 1807, 1808 and 1809.
[262] *Ibid.*, paras 1736-1743.
[263] ***Kamara* Appeal Brief**, para 194.

appellant cites no authority in support of the proposition, the Prosecution sees no need at this time to quarrel with the statement.

5.31 The Prosecution agrees that to 'have control means having effective authority over subordinates.'[264] Similarly, the Prosecution accepts that the 'indicators of effective control are more a matter of evidence than substantive law.'[265]

5.32 The Prosecution, however, disputes the contention that 'the reliance by the Trial Chamber on the evidence cited in the Trial Judgment in support of the finding that [the appellant Kamara] exercised superior authority was unreasonable.'[266] That submission is vague, imprecise and unsubstantiated, in violation of the laid down requirements of appellate litigation.

The Trial Chamber's interpretation of the weekly muster parade testimony was reasonable

5.33 From the arrangement of his submissions,[267] it appears clear that one of the alleged grounds of unreasonableness of which the appellant complains is the fact that the Trial Chamber interpreted the evidence of PW TF1-334 as saying that 'the AFRC troops held muster parades every week in Kono, until they were prohibited from doing so by Morris Kallon (RUF).'[268]

5.34 The Prosecution submits that the Trial Chamber's interpretation of that evidence is entirely correct and wholly reasonable. The following is the relevant portion of the transcript of the proceedings:

> Q. You said there was some confusion between the RUF and the SLA. Just identify what that confusion was?
> A. Morris Kallon -- Morris Kallon said that we, the SLAs in Kono, should not muster, and he shot two of the SLA brothers in Kono. And also --
> JUDGE SEBUTINDE: Mr Interpreter, you said we the people -- the SLA in the Kono should not do what?
> THE INTERPRETER: Muster. He used the word muster.
> MS PACK: Muster is -- perhaps I could ask the witness to explain what he means by muster.

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[264] *Ibid.*, para 194.
[265] *Ibid.*, para 196.
[266] *Ibid.*, para 195.
[267] *Ibid.*, paras 197 and 198.
[268] **Trial Chamber's Judgement**, para 1869.

> Q. You use the word muster, M-U-S-T-E-R; what do you mean by muster?
> A. This is a military term that is to bring together the various forces and address them. That is what we call mustered.
> Q. How often does a muster generally occur in a military context?
> A. Well, this was a weekly address. Every week the two groups were addressed.
> Q. Now, go on. You were talking about Morris Kallon saying something about the SLAs and that they should not muster?
> A. And again he said the SLA should -- had no right to call themselves SLA in Kono, and neither AFRC, because he only knew of one faction and that is the RUF faction. So this brought confusion between the RUF and the SLA.

5.35 The appellant's complaint is that PW TF1-334 'talked about how often a muster generally occurs in a military context and not how often there was a muster in Kono. The Trial Chamber's interpretation of that statement was wrong.'[269]

5.36 The Prosecution submits that it is the appellant that is wrong in his interpretation of that part of the testimony. It is clear that what was on the mind of the witness at the time of that testimony was the subject of muster parades in Kono. While so pre-occupied, he was asked how often a muster parade occurs in a military context. But with his thought still on muster parades in Kono, he testified that 'this'—i e the muster parades in Kono that he was testifying about—'was a weekly address. Every week the two groups were addressed.' The two groups that he was talking about as receiving the weekly address were clearly the AFRC and the RUF. That he was talking about two groups being addressed weekly also shows that he was talking about muster parades in Kono, and not the general occurrence of military musters. Thus, the Trial Chamber's interpretation of the testimony was a perfectly reasonable and correct.

5.37 At any rate, the appellant has not shown how this bit of evidence, if misinterpreted, could have resulted in a miscarriage of justice in relation to the appellant's individual criminal responsibility as a superior.

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[269] ***Kamara* Appeal Brief**, para 198.

Total command does not negate responsibility within a formation

5.38 In paragraph 199 of his Brief, the appellant Kamara appears to contend that the Trial Chamber erred in holding him criminally responsible as a superior, considering that there might have been some evidence tending to show that the 'the RUF headed by Mosquito, Superman and Morris Kallon had total command and control over Kono.'[270] The appellant based this submission on (a) the theory that Savage might have been promoted from the rank of corporal to that of lieutenant by someone other than the appellant (in paragraph 200 and 201); and (b) the theory that Savage reported and took orders from someone other than the appellant.

5.39 The Prosecutor submits that this argument is without merit, for the criminal responsibility of one 'big fish' is not negated by the existence of a 'bigger fish' higher up the chain of command. This principle is aptly captured in the *Tokyo Judgment*, where the International Military Tribunal for the Far East indicated that the responsibility for the care of prisoners of war rests as high as with the members of government and as low as with those having direct and immediate control of the prisoners. As the Tribunal put it:

> In general the responsibility for prisoners held by Japan may be stated to have rested upon:
>
> i. Members of the government;
> ii. *Military or naval officers in command of formations having prisoners in their possession*;
> iii. Officials in those departments which were concerned with the well-being of prisoners;
> iv. *Officials, whether civilian, military, or naval, having direct and immediate control of prisoners*.[271] [Emphasis added.]

5.40 There is a strong body of modern jurisprudence to a similar effect. In *Limaj*, for instance, an ICTY Trial Chamber observed as follows:

> [T]he Chamber recalls that "the test of effective control [...] implies that more than one person may be held responsible for the same crime committed by a subordinate."[272]

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[270] *Ibid.*, para 199.

[271] ***The Tokyo Major War Crimes Trial*** *(Judgement)* (annotated, compiled and edited by R John Pritchard) [Lewiston: the Edwin Mellen Press, 1998] vol 101, pp 48,443—48,444.

And according to another ICTY Trial Chamber:

> Two or more superiors may be held responsible for the same crime perpetrated by the same individual if it is established that the principal offender was under the command of both superiors at the relevant time.[273]

5.41 In view of the foregoing, the individual criminal responsibility of the appellant is not relieved even by proof of the existence of another person occupying a coordinate or superior position in the chain of command in Kono.

5.42 Once again, the submission of the appellant fails to meet its mark.

An uncontrollable subordinate does not relieve the superior's own obligation of conduct

5.43 The Trial Chamber had found it established beyond reasonable doubt (a) that one Captain Mohamed Savage and troops under him had committed war crimes in the Tombudu area of Kono District, while Savage was the commanding officer in the area;[274] (b) that the appellant Kamara was the highest ranking AFRC soldier in the Kono District;[275] (c) that Savage was a member of the AFRC;[276] (d) that Savage reported to the appellant directly or indirectly through the AFRC Operations Commander;[277] (e) that the appellant Kamara had effective control over Savage.[278]

5.44 It was on the basis of the foregoing that the Trial Chamber held the appellant criminally responsible for the crimes committed by Savage in Tombudu, Kono.

5.45 In the submissions appearing from paragraphs 202 to 208 of his Brief, the appellant Kamara contends that the Trial Chamber was wrong in so holding him responsible. The reason for the alleged error is that there is evidence tending to show that Savage was unpredictable or difficult to control.

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[272] ***Limaj* Trial Judgement**, para 522. See also ***Aleksovski* Trial Judgement**, para 106; ***Strugar* Trial Judgement**, para 365; ***Halilović* Trial Judgement**; ***Blaškić* Trial Judgement**, para 303; ***Blaškić* Appeal Judgement: Partial Dissenting Opinion of Judge Weinberg de Roca**, paras 40-41.

[273] ***Krnojelac* Trial Judgement**, para 93.

[274] **Trial Chamber's Judgement**, para 1873.

[275] *Ibid.*, paras 564, 571, 1865.

[276] *Ibid.*, paras 565, 1318, 1884.

[277] *Ibid.*, para 1884. See also paras 564, 566 and 571.

[278] *Ibid.*

5.46 The Prosecution submits that this plea of insubordination is insufficient to relieve the appellant of individual criminal responsibility as a superior.

5.47 The appellant's submission is a purported application of the settled doctrine of effective control. As the ICTY Appeals Chamber stated the doctrine in the *Čelebići* case, a superior's 'possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power prima facie results in effective control unless proof of the contrary is produced.'[279] But an application of that doctrine in cases such as the present will be dangerously inadequate without the complementary understanding of what 'effective control' means in context. That complementary meaning was articulated in the *Blaškić* case. In an argument similar to the one now at issue, General Tihomir Blaškić had contended 'that to establish that effective control existed at the time of the commission of subordinates' crimes, proof is required that the accused was not only able to issue orders but that the orders were actually followed'.[280] But both the Trial Chamber and the Appeals Chamber rejected that contention, holding that in certain circumstances, the superior's obligation may only entail the submission of reports to higher authorities. As the Appeals Chamber put it:

> With regard to the position of the Trial Chamber that superior responsibility "may entail" the submission of reports to the competent authorities, the Appeals Chamber deems this to be correct. The Trial Chamber only referred to the action of submitting reports as an example of the exercise of the material ability possessed by a superior.[281]
>
> [...] The Appeals Chamber also notes the Appellant's argument that to establish that effective control existed at the time of the commission of subordinates' crimes, proof is required that the accused was not only able to issue orders but that the orders were actually followed. The Appeals Chamber considers that this provides another example of effective control exercised by the commander. The indicators of effective control are more a matter of evidence than of substantive law,

[279] ***Čelebići* Appeal Judgement**, para 197.
[280] ***Blaškić* Appeal Judgement**, paras 65 and 69.
[281] *Ibid*, para 68.

> and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate....[282]

5.48 For these reasons, the Appeals Chamber found that Blaškić had effective control to the extent that he had the ability to report subordinates' acts to his superiors.[283]

5.49 The principle of law indicated above is quite consistent with the command responsibility which the ICTY Appeals Chamber described in *Blaškić* as 'dependent on the circumstances surrounding each particular situation.'[284] A similar appreciation of the duty was expressed by the US Supreme Court in *Re Yamashita*.[285]

5.50 Writing more recently in the *Serbia Genocide Case*, in relation to the responsibility of States to prevent or punish the crime of genocide, the International Court of Justice described a similar duty as an 'obligation of conduct'. As the Court put it:

> [I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. ... On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question....[286]

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[282] *Ibid*, para 69.
[283] *Ibid*, para 511.
[284] *Ibid*, para 417.
[285] ***Yamashita v Styer*** (1946) 327 U S 1. There, the Court observed that a superior in the theatre of war had 'an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population': 327 U S 1, 16.
[286] **Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide** (Bosnia and Herzegovina v Serbia and Montenegro) (Judgement) 26 February 2007, General List, No 91, para 430.

5.51 To the foregoing synthesis of law may also be added the emphasis that the obligation of conduct—either as stated in the *Blaškić* case or in the *Serbia Genocide Case*—must pass the objective test of good faith and reasonableness. That is to say, the conduct of the superior must be viewed against the standards of what was reasonable in the circumstances.[287] It is not enough, for instance, for the superior in the position of General Blaškić simply to report the matter to his superiors and wash his hands off the matter. The dictate of good faith and reasonableness would require such a superior to follow up with persistence, in order to ensure that those in whom there is a better or greater situation of the powers to control the subordinates do make efforts in good faith to exercise such powers.

5.52 The requirement of reasonableness was essentially so delineated by the International Military Tribunal for the Far East when it stated that the duty upon superiors (from members of government to commanders with immediate possession of prisoners) to prevent prisoner abuse requires them to put in place systems for the prevention of such abuses. As the Tribunal put it:

> Each such persons *[sic]* has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application.[288]

5.53 The foregoing pronouncement is followed by the Tribunal's statement that the superior is not exonerated from responsibility by relying on the assurances of others better placed to prevent the commission of war crimes. According to the Tribunal:

> [I]t is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue.[289]

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[287] ***Blaškić* Appeals Judgement**, para 417.
[288] ***The Tokyo Major War Crimes Trial Judgement***, *supra*, p 48,444.
[289] *Ibid*, p 48,445.

5.54 The principle that flows from the foregoing pronouncements is that the superior's subjective obligation of conduct aimed at preventing the violation of international humanitarian law is balanced by an objective requirement to discharge that obligation reasonably and in good faith. This balance sufficiently addresses the need to maintain the innocence of a superior who truly tried his reasonable best in difficult conditions, as it holds criminally responsible the superior who might conveniently prefer to do nothing to stop an 'uncontrollable' subordinate from violating international humanitarian law.

5.55 The appellant Kamara belongs to the latter category; as did General Tomoyuki Yamashita who did not succeed in his defence to the effect that elements of the Japanese soldiers who had committed war crimes in the Philippines included rogue elements with a predisposition to disobey orders.[290]

There is no material inconsistency on the Prosecution evidence regarding the burning of the house in Karina

5.56 The Trial Chamber had found that the appellant 'Kamara ordered the unlawful killing of five young girls in Karina. Kamara ordered that the girls be locked in a house and that the house then be set on fire. This order was obeyed by AFRC troops.'[291]

5.57 In paragraph 214 the appellant Kamara attempts to impugn this finding by alleging that there were inconsistencies between the testimony of Prosecution Witnesses TF1-334 and TF1-167 in relation to that event. According to the appellant, the alleged inconsistency consists in the testimony of TF1-334 testifying that the appellant and his companions 'met five young girls *in* a flat and set the house ablaze while the main door was closed by [the appellant].'[292] That, says the appellant, ought to be contrasted with the testimony of TF1-167 who testified that the appellant was present when one of the appellant's

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[290] ***Trial of General Tomoyuki Yamashita*** (United States Military Commission, Manila) in the *Law Reports of Trials of War Criminals* (Selected and Prepared by the United Nations War Crimes Commission) vol IV [London: HMSO, 1948] pp 18, 23 - 24.

[291] **Trial Chamber's Judgement**, para 1915.

[292] TF1-334, Transcript 19 May 2005, p.13.

companion 'went *into* the house, wrapped people *with the carpets of the house* and set the house on fire.'[293] [Emphasis added.]

5.58 It is submitted that there is no material inconsistency in the essential features of the testimonies of the two witnesses, let alone such as may be seen to have occasioned a miscarriage of justice. The essential features of the testimony are these: (a) the a dwelling place was deliberately burnt down in a criminal fashion; (b) human beings were deliberately burnt alive to their death together with the dwelling place; (c) those human beings were burnt inside the house; and (d) the appellant, as a ranking military commander was present and implicated in that criminal act—as active participant, approving spectator or a commander with a duty to prevent the crime.

5.59 The appellant in his submission has not disputed these essential features of the testimonies. Indeed there are some variations in the details of how that crime was committed. The details of how this crime was perpetrated are not a matter that could possibly qualify as affecting the justice of the case in terms of miscarriage.

5.60 At any rate, the Trial Chamber was correct in preferring the details provided by TF1-334. They were fuller. They revealed the following: (a) that it was the appellant that gave the order to commit that crime; (b) the number of the people (five young girls) who were inside the house as it was burnt down; (c) that the culprits of that crime included himself, the appellant Kamara and TF1-167;[294] (d) that the five young girls had begged in vain for their lives but the appellant insisted that they must be burnt to death; and (e) that the appellant Kamara and his companions stayed back and watched the house and the occupants burn to ashes.[295]

5.61 The Trial Chamber's judgment in this regard is unassailable and the appellant's appeal must fail.

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[293] TF1-167, Transcript, 15 September 2005, pp 54-55.

[294] In paragraph 583, for instance, the Trial Chamber noted the tendency of one Prosecution Witness George Johnson to give evasive testimony regarding his own participation in crimes.

[295] TF1-334, Transcript, 23 May 2005, pp 65-67.

The Chamber did find that the appellant did give orders which were obeyed

5.62 In paragraph 217, the appellant Kamara admits that he 'had powers to issue orders' (although he claims that he had no disciplinary powers). This admission, coupled with evidence tending to show that his orders were obeyed when issued, is sufficient evidence of his material ability to control his subordinates, hence nullifying any argument about miscarriage of justice.

5.63 According to the case law, the ability to issue orders which are actually obeyed is an 'example of effective control exercised by the commander.'[296] The Trial Chamber did find in paragraph 1925 that 'Kamara issued an order to the troops in Karina which was obeyed. The Trial Chamber is satisfied on the evidence that the Accused Kamara participated in decision making. On the evidence the Trial Chamber is satisfied that the Accused Kamara exercised effective control over the AFRC troops and was aware that the troops under his control committed crimes in Bombali District.'

5.64 It is surprising then that he should contend (and wrongly so) that the Trial Chamber had found that 'there was no direct evidence with regard to Kamara's precise involvement in giving orders.' This is a misstatement of what the Trial Chamber actually said in paragraphs 1924-1925 of the Judgement. The Trial Chamber's observation at paragraph 1924 relates only to the involvement of the appellant in the planning of operations and issuing of orders from their headquarters at Rosos. Indeed, the testimony of TF1-334 upon which the Trial Chamber relied for that observation is even more narrowly focused: it relates to 'decisions':

> Q. Witness, I'm going to ask you to clarify. My question to you was what did you subsequently see the deputy chief in command do as second in command? Just focus on him specifically, please.
> A. He, the chief in command, the chief of staff and the senior military supervisors were responsible for taking decisions in the brigade.
> Q. How do you know that?

[296] ***Blaškić* Appeals Judgement**, para 69. See also ***Halilović Trial Judgement***, para 58; ***Kordić* Trial Judgement**, para 421; ***Naletilić and Martinović* Trial Judgement**, para 67; ***Kunarac Trial Judgement***, para 397; ***Brđanin Trial Judgement***, para 281.

A. I myself was present whenever they want to take a decision in my presence. I was there whenever they were deciding on anything before they can send it out.[297]

5.65 As indicated earlier, the Trial Chamber did immediately find in paragraph 1925 of the judgment that the appellant did issue that gruesome order to burn the house (and the young girls inside it) in Karina, which order was obeyed; thereby establishing his ability to control his troops effectively.

5.66 Consequently, the appellant's appeal must fail in this regard.

The appellant issued orders to burn houses in Freetown

5.67 In submissions appearing from paragraphs 218 to 222, the appellant Kamara seeks to impugn the finding of the Trial Chamber while in Freetown.

5.68 The grounds of the appellant's attack include the fact that the Trial Chamber had found that he was always in the company of the appellant Brima in the State House and participated in meetings in which operational decisions were made. According to the appellant, these factors are insufficient to ground his authority as a commander in Freetown.

5.69 It is submitted that this contention ought to be rejected. It is obvious that while the Chamber did rightly consider these factors as evidence of his stature as a commander, there are other indicia of his effective control over his troops in Freetown. In paragraph 1941, for instance, the Trial Chamber found that the appellant Kamara '*led a mission* to loot machetes' from the World Food Programme warehouse in Freetown.[298] This alone is strong proof of his stature as a commander in effective control over his troops.

5.70 The foregoing factors are consistent with his established stature as an effective commander in other sectors of the war before his arrival to Freetown with his troops.

5.71 It is perhaps important to recall at this juncture the caution against taking a view of evidence of events in a war discretely, as if they 'existed in a hermetically

[297] **Trial Chamber's Judgement**, para 1924.
[298] *Ibid.*, para 1941 (emphasis added)

sealed compartment.'[299] As the ICTY Appeals Chamber has rightly stated, 'it is the accumulation of all the evidence in each case which must be considered.'[300]

That Brima was known to have issued orders in Freetown does not negate Kamara's own superior responsibility

5.72 In paragraph 221 of his Brief, the appellant Kamara contends that there is contradiction in the evidence of Prosecution Witnesses TF1-184 and TF1-334. The one had testified that Kamara gave the order to burn houses in Freetown, while the other testified that Brima gave that order.

5.73 There is no inconsistency between the two testimonies. That Brima did order the commencement of arson in Freetown (as testified to by TF1-334), does not contradict the evidence of TF1-184 that Kamara gave a similar order, or had repeated it for that matter. In fact, a careful reading of the actual transcript of the two witnesses will reveal that the two testimonies are in harmony. Brima issued the order to commence the burning.[301] While the burning was ongoing, Kamara issued a reinforcement order to continue the burning.[302] In doing so, Kamara had reissued Brima's earlier order.

5.74 The submissions of the appellant therefore fail to raise any error in the judgment of the Trial Chamber in this regard.

Port Loko

5.75 In respect of Port Loko (unlike Kono, Bombali and Freetown), the appellant Kamara, in his brief in respect of Ground Seven (paras 191-222) makes no reference to any factual areas where the Trial Chamber may have erred and as such this ground of appeal in respect of Port Loko should be rejected on that ground alone.

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[299] ***Kupreškić* Appeals Judgement**, para 334.
[300] *Ibid.*
[301] TF1-334, Transcript , 14 June 2005, p 47.
[302] TF1-184, Transcript, 30 September 2005, p 9.

(c) Superior responsibility of Kanu

(i) Bombali District

5.76 This part of this Response Brief responds to Kanu's Fifth Ground of Appeal.

The Trial Chamber was correct to consider whether the AFRC had an effective military structure

5.77 In Ground 5 of his appeal, the appellant Kanu also attacks the judgment of the Trial Chamber finding him responsible as a superior. Among Kanu's complaints are that the Trial Chamber was wrong in considering whether the AFRC had an effective structure within which one might assess whether the appellant had the ability to exercise effective control. As the appellant saw the Trial Chamber's exercise, it was an exercise in assignment of collective responsibility upon the AFRC, a share of which was then impermissibly apportioned to the appellant Kanu by association.[303]

5.78 It is submitted that the appellant Kanu's complaint is without merit, as a matter of law and as a matter of common sense.

5.79 The Trial Chamber was correct in considering whether the AFRC had an effective military structure as it did in Part VIII of the Judgment.[304]

5.80 As a matter of law, the Trial Chamber's approach is entirely consistent with the logic of the doctrine of 'responsible command' prescribed in article 1(1) of the Additional Protocol II (1977) to the Geneva Conventions 1949, which informs article 3 of the Statute of the Special Court. Article 1(1) of Additional Protocol II provides:

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all [non-international armed conflicts] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to

[303] ***Kanu* Appeal Brief**, paras 5.6 and 5.7
[304] **Trial Chamber's Judgement**, paras 538 *et seq.*

> carry out sustained and concerted military operations and to implement this Protocol.

5.81 The principle of responsible command has indeed been accorded a place in the jurisprudence of command responsibility. Notable in this connection is the statement of the ICTY Appeals Chamber in the *Hadžihasanović Command Responsibility Decision*, saying as follows:

> The Appeals Chamber recognizes that there is a difference between the concepts of responsible command and command responsibility. The difference is due to the fact that the concept of responsible command looks to the duties comprised in the idea of command, whereas that of command responsibility looks at liability flowing from breach of those duties. But, as the foregoing shows, the elements of command responsibility are derived from the elements of responsible command.[305]

5.82 Indeed, the ICTY Appeals Chamber did observe in that decision that '[t]he basis of the commander's responsibility lies in his obligations as commander of troops making up an organised military force under his command …'[306]

5.83 It is thus appropriate for a Trial Chamber to ascertain whether there was in fact 'an organised military force', as part of the inquiry whether a commander had effective control over that force or elements of it.

5.84 Quite apart from the foregoing, it is also a matter of common sense that particular commanders in an organised military force will find it easier to maintain and exercise effective control over troops under their individual commands, where effective control by the officer cadre is part of the general culture of that military force. It is perfectly reasonable then for the trier of fact to make appropriate inquiries for purposes of noting or eliminating such as a feature of the case.

5.85 While this consideration did partly motivate the Trial Chamber's inquiry into the structure and effectiveness of the AFRC,[307] it is quite clear that the Trial Chamber was very careful to not take a positive conclusion in this regard as a

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[305] ***Hadžihasanović* Interlocutory Appeal Decision,** para 22.
[306] *Ibid*, para 20.
[307] See **Trial Chamber's Judgement**, para 540.

conclusive proof of effective control on the part of the appellant Kanu and his fellow commanders.[308]

5.86 In particular, the Trial Chamber did properly and amply investigate the question of effective control on the part of the appellant Kanu as well as his activities, contrary to the allegation he made in paragraph 5.8 of his Brief. The evidence which the Trial Chamber reviewed revealed not only that the appellant Kanu was a man of influence within the AFRC, but also that he had effective control. The evidence of appellant Kanu's influence includes the following:

- he was one[309] of a select group of 17 people[310] who had plotted and executed the 1997 AFRC coup;
- he was an 'Honourable'[311]
- he was a member of the AFRC Supreme Council;[312]
- he was present at the coordination meetings between high level members of the AFRC and the RUF in Freetown;[313]
- with Sam Bockarie, he was seen and heard addressing a meeting at Koidu community centre during the junta period; during which they declared that they were in control of the Government and wanted the support of the youth;[314]
- he was seen and heard addressing a meeting in Koidu; during which he encouraged the cleaning and upkeep of the town;[315]
- he was Chief of Staff;[316]
- in addition to being Chief of Staff, he was also the AFRC's third-in-command when they were in Freetown;[317]
- he was the officer who relayed orders down from Brima who was the AFRC commander-in-chief;[318]

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[308] See **Trial Chamber's Judgement,** paras 540, 786 and 787.
[309] **Trial Chamber's Judgement**, para 507.
[310] *Ibid*, para 299.
[311] *Ibid*, para 508. The title of 'honourable' was conferred upon each of the 17 coup plotters and was not merely a title denoting respect; *ibid*, para 299.
[312] *Ibid*, para 508. This was the governing council of the AFRC government. It had both legislative and executive powers and was responsible for the day-to-day decision making of the AFRC Government: *ibid*, para 300.
[313] *Ibid*, para 510.
[314] *Ibid.*
[315] *Ibid.*
[316] *Ibid*, paras 522, 531 and 2071.
[317] *Ibid*, para 522.

- he was a senior commander of the AFRC fighting force;[319]
- he was the senior commander of the AFRC in charge of abducted civilians;[320]
- he was a Brigadier-General within the AFRC;[321]
- he was based at the headquarters of the AFRC[322] and was a member of the headquarters group;[323] and
- he was almost always at the side of Brima.[324]

5.87 Indeed the foregoing attributes do clearly show that the appellant was a man of substantial influence within the AFRC. While influence *per se* is not synonymous with effective control,[325] influence is a factor to be considered in an inquiry into the existence of effective control.[326]

5.88 Beyond the fact of his influential position within the AFRC, there is concrete evidence that the appellant Kanu also had effective control within the AFRC. The evidence in this regard includes the following:

- the appellant Kanu led an operation to Gbinti to push back ECOMOG forces occupying that town;[327]
- apart from the mere fact of leading the Gbinti operation (which alone shows effective control), certain details about that successful operation are also revealing of effective control: they include the following:
  - ⇒ he unilaterally revised the operational plan of attack previously agreed upon at the AFRC headquarters at Rosos;
  - ⇒ he issued a new order further to his revised plan;
  - ⇒ the troops under him obeyed the new order;

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[318] *Ibid.* There is evidence of Kanu identifying himself in a radio broadcast during the junta period as the Chief of Staff and stated that the army had taken over the government of President Kabbah and their commander was Lieutenant General Alex Tamba Brima: *ibid*, para 531.
[319] *Ibid*, para 526.
[320] *Ibid.*
[321] *Ibid*, para 531.
[322] *Ibid*, para 534.
[323] *Ibid*, para 2038.
[324] *Ibid*, para 534.
[325] ***Čelebići* Appeal Judgement**, para 266.
[326] ***Brđanin* Trial Judgement**, para 281.
[327] **Trial Chamber's Judgement**, para 2037.

⇒ upon successfully attacking the town and beating back ECOMOG forces, his soldiers wrote adulating graffiti on the town walls announcing, 'Five-Five in town';

- he was one of the commanders who led the troops into Karina;[328]
- he was one of the leaders of the troops that attacked Bornoya;[329]
- during the AFRC advance on Freetown, he commanded the fighters who undertook the operation to attack Tumbo;[330]
- he demonstrated methods of limb-amputation to AFRC troops,[331] following which the practice of amputations caught on;[332]
- he reissued an order to murder civilians at a mosque, which order was duly executed;[333]
- at the Kissy Mental Home, he ordered his fighters to go to Eastern Freetown and amputate 200 civilians; the order was duly carried out;[334]
- he ordered military police to remove decomposing dead bodies piling up in the vicinity of their headquarters at the State House and to take the bodies to the Connaught Hospital;[335] the order was obeyed;[336]
- upon receiving reports of advancing ECOMOG troops on the State House, he issued orders for the reinforcement of defences in a particular area; the order was obeyed;[337]
- following the reinforcement order described immediately above, he ordered the remaining troops to bring kerosene from the State House, and he ordered the troops to begin burning houses: both orders were duly carried out.[338]

5.89 These do amply show effective control on the part of the appellant Kanu.

5.90 In view of the foregoing, the submissions of the appellant Kanu must be rejected when he contends that the Trial Chamber erred in law for (a) considering the effectiveness and military structure of the AFRC, and (b) failing to consider the individual activities of the appellant and his ability to exert effective control over his subordinates.

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[328] *Ibid*, para 2038.
[329] *Ibid*, para 2039.
[330] *Ibid*, para 2073.
[331] *Ibid*, paras 2050 and 2053.
[332] *Ibid*, paras 2054, 2055 and 2061.
[333] *Ibid*, para 2059.
[334] *Ibid*, para 2060.
[335] *Ibid*, para 2073.
[336] Gibril Massaquoi, Transcript, 10 October 2005, p 13.
[337] **Trial Chamber's Judgement**, para 2074.
[338] *Ibid*, para 2074.

5.91 The appellant's appeal in this regard must therefore fail.

The AFRC had a well-developed chain of command, an effective planning and orders process and a functioning disciplinary system

5.92 It is submitted that contrary to the submissions of the appellant Kanu, made in the remainder of his arguments for Ground Five, the record amply supported the Trial Chamber's finding that the AFRC had a well-developed chain of command, an effective planning and orders process and a functioning disciplinary system.

5.93 The evidence in this regard includes those referred to by the Trial Chamber for purposes of that finding as it was made in paragraph 600 of the judgment and in related paragraphs.

The remainder of the Kanu's submission in his Ground Five are at odds with the need to appraise the evidence in a cumulative way

5.94 In an effort to attack the Trial Chamber's finding of effective control on the part of the appellant, the appellant appears to concede that there are indeed instances of proof of effective control on his part. He contends, however, that those instances must have no evidential value other than for the specific event to which they relate.

5.95 It is submitted that the force of this submission is defeated by the dictate that a 'tribunal of fact must never look at evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of all the evidence in each case which must be considered.'[339]

5.96 At any rate, it has been demonstrated above that the appellant had effective control over his troops.

(ii) Freetown and the Western Area

5.97 This part of this Response Brief responds to Kanu's Ground Six.

[339] ***Kupreškić* Appeal Judgement**, para 334.

5.98 The submissions of the appellant Kanu made as to Ground 6 of his Appeal Brief are essentially similar to those made as to his Ground 5. The difference is that Ground 5 relates to Bombali District, while Ground 6 relates to Freetown and Western Area.

5.99 The Prosecution submissions in response to Ground 5 are, with necessary variation, hereby recalled for purposes of Ground 6.

5.100 At any rate, it is submitted that the Trial Chamber made no error of fact or law that either resulted in a miscarriage of justice or invalidated the judgment.

6. Other alleged errors of fact

(a) Individual responsibility of Brima for murder and/or extermination in Bombali District

6.1 This part of this Response Brief responds to Brima's Fifth Ground of Appeal.

6.2 The arguments made by the appellant Brima under Ground 5 of his Appeal Brief is repetitive of issues that he had unsuccessfully raised elsewhere; such as his claim of alibi (paragraphs 121 and 122) and alleged contradictory evidence of the Prosecution Witnesses (paragraphs 123 and 124).

6.3 Beyond that, Brima's arguments under Ground 5 are vague and random reflections on the case, with no precise focus on an appealable issue.

6.4 The Prosecution urges that these submissions do not show any error of fact or law, such as to occasion the intervention of the Appeals Chamber.

(b) Individual responsibility of Kamara for killings in Karina

6.5 This part of this Response Brief responds to Kamara's First Ground of Appeal.

6.6 Under this ground of appeal, Kamara takes issue with his conviction for ordering the murder of five young females by deliberately burning them alive together with a house in Karina. The arguments made by the appellant Kamara are based on his repeated argument that the evidence on the point was contradictory.

6.7 The Prosecution has already discussed that issue elsewhere in this response brief. It is not necessary to repeat the Prosecution's argument here.

6.8 Beyond that challenge to the evidence, the appellant Kamara has not engaged any issue involving a distinct appeal of the Trial Chamber's discussion of the law relating to the concept of 'ordering.'

6.9 At any rate, it is submitted that the Trial Chamber's appreciation of the law and the evidence upon which the appellant was convicted for ordering the crime in question do not reveal any appealable error of law or fact.

(c) Individual responsibility of Kamara for aiding and abetting

(i) Introduction

6.10 This part of this Response Brief responds to Kamara's Fifth and Sixth Grounds of Appeal.

6.11 Under Grounds 5 and 6 of his Appeal Brief, the appellant Kamara takes issue with his conviction on the charges of having aided and abetted the extermination and murder as crimes against humanity and war crimes, committed at Fourah Bay, Freetown and the Western Area. Similarly, he complains against his conviction on the charge of aiding and abetting the war crime of mutilation of civilians in Freetown and the Western Area.

6.12 The thrust of his arguments are (a) that the Trial Chamber had applied 'a wider standard of liability instead of the stricter standard' for purposes of responsibility for aiding and abetting; and (b) there is insufficient evidential support for the convictions.

6.13 As a legal proposition, the appellant Kamara essentially submits that the liability for aiding and abetting requires 'strict actual knowledge.' In other words, 'not only must the aider and abettor know that his acts provide support to another's offence, but he must know the specifics of that offence.'[340]

6.14 In support of this contention, the appellant cites dicta from the ICTY Appeals Chamber saying as follows: 'it is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that [...] the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal.'[341]

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[340] ***Kamara* Appeal Brief**, para 164.

[341] See ***Krnojelac* Appeal Judgement**, para 51; and ***Aleksovski* Appeal Judgement**, para 162.

6.15 It is submitted that the appellant is over-interpreting the jurisprudence of the ICTY Appeals Chamber so cited. Awareness of 'the essential elements of the crime' committed by the principal contemplates a different level of knowledge than 'strict actual knowledge' of the principal perpetrator's offence or knowledge of 'the specifics of that offence'.

6.16 Indeed the stricture in the level of knowledge proposed by the appellant clashes with the axiom that ignorance of the law is no defence. Yet, this is engage by an incautious interpretation of the ICTY Appeals Chamber's dictum that the aider and abettor must be aware of the 'essential elements of the crime.'

6.17 Similarly, the appellant's submission is negated by the accepted axiom that wilful blindness does not negate *mens rea*.[342] A classic case in which wilful blindness was found not to have negated *mens rea* is the *Zyklon B* Case[343] of the Nuremberg era. In that case the British Military Court at Hamburg tried Bruno Tesch, the owner of the firm of Tesch and Stabenow, and two other officials of his firm (Karl Weinbacher and Joachim Drosihn) for having supplied poison gas used to kill inmates at the Auschwitz-Birkenau concentration camp. Weinbacher was Tesch's Procurist or second-in-command and Drosihn was the firm's chief gassing technician. The firm was in the business of supplying poison gas, gassing equipment and technical knowledge for vermin extermination. But the firm's customers included the SS who took delivery under the pretext of a delousing and disinfection programme, but actually used the gas to exterminate concentration camp inmates.

6.18 The case for the Prosecution was that knowingly to supply the gas to the SS which used it for the mass extermination of Allied civilian nationals was a war crime, and that the people who did it were war criminals for putting the means to commit the crime into the hands of those who actually carried it out.

6.19 According to the Prosecution theory of the case, over a period of time the three accused must have known of this wholesale extermination of human beings in the eastern concentration camps by the SS using Zyklon B gas; and that, having

[342] See for instance, ***Aleksovski* Judgement on Appeal by Anto Nobilo**, para 45.
[343] ***Trial of Tesch and Ors*** (1946), 1 Law Reports of Trials of War Criminals, United Nations War Crimes Commission, vol I [London, HMSO, 1947].

acquired this knowledge, they continued to arrange supplies of the gas to the SS in ever-increasing quantities, until in the early months of 1944 the consignment per month to Auschwitz concentration camp was nearly two tons.

6.20 The Defence claimed that the accused were unaware of the use to which the gas was to be put. The Prosecution admitted that there was no direct evidence that the accused knew that the SS was using the gas to exterminate inmates. But, they emphasised, the real strength of the case for the Prosecution was the general atmosphere and conditions of the firm itself. This included the fact that the accused were such prudent and competent men of business that it must have occurred to them that the size of the gas deliveries to the SS was not simply for delousing clothes or disinfecting buildings.

6.21 Drosihn also pleaded that the supply of gas was beyond his control. Tesch and Weinbacher were condemned to death. Drosihn was acquitted.[344]

6.22 This case defeats the suggestion that it is necessary to show that an aider and abettor had 'strict actual knowledge' of the principal perpetrator's offence or knowledge of 'the specifics of that offence'.

(ii) The killing of civilians at Fourah Bay

6.23 This part of this Response Brief responds specifically to Kamara's Fifth Ground of Appeal.

6.24 At paragraph 167 of the Kamara Appeals Brief it is contended firstly that the Trial Chamber erred when it failed to clearly state the evidential support of the appellant in aiding and abetting.

6.25 The Prosecution submits that this contention is without foundation. Notably in this regard, paragraph 1940 of the Trial Judgement states as under:

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

[344] Parts of the text of this summary may be found at http://www.ess.uwe.ac.uk/WCC/zyklonb.htm#PROSECUTION.

> his presence would assist the commission of the crime by the perpetrators.

6.26 Thus, the support which Kamara gave is clearly stated. Namely, Kamara's position of authority (as second in command only to Brima during the Freetown invasion) and his presence at the scene. Further at paragraph 1939 of the Trial Judgment the Trial Chamber found that Kamara partook in the attack and *not only was he present during the commission of the crimes but he either personally participated in the crimes or failed to admonish the troops who were committing the crimes:*

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

6.27 It is clear from the Trial Chamber's findings that Kamara's presence and position of authority is the link between the support given by Kamara and the commission of the crimes.

6.28 At paragraph 175 of the Kamara Appeal Brief, it is contended that the Trial Chamber erred in fact when it found that Kamara 'partook' in the attack. The Prosecution submits that the Trial Chamber made no such error as to invalidate the finding based on the applicable standards of a factual review as earlier set out in this judgement.

6.29 The Trial Chamber's actual findings on this incident are at paragraphs 919 to 926 of the Trial Judgement, the relevant parts of which read as follows:

> *Fourah Bay*
>
> 919. Witness TF1-334 testified that in Freetown in January 1999, after the troops lost State House and Eastern Police and while the troops were at Savage Square, 'Gullit' received information that the people of Fourah Bay had killed one of his soldiers. 'Gullit' announced that he would lead the AFRC troops to Fourah Bay to burn houses and kill people in retaliation. *The witness testified that troops including himself, 'Gullit', 'Bazzy', 'Five-Five',*

the Operation Commander, the Deputy Operation Commander and his superior "Commander A" moved to Fourah Bay. The troops attacked Fourah Bay and he observed a number of civilians being killed. *The witness testified that all of the commanders participated in the attack,* naming specifically 'Gullit' and 'Five-Five'. The troops then moved to Upgun. (Emphasis added).

[...]

921. Witness TF1-184 gave the most detailed account of an attack on Fourah Bay ordered by Brima in retaliation for the alleged killing of one of the soldiers by civilians in that area. He testified that he was at Ferry Junction, after the troops lost State House, with 'Gullit' and 'Five-Five' *and Kamara was nearby.* Upon receiving this information, 'Gullit' ordered a soldier named "Mines" to go to the SLRA to collect cutlasses. "Mines" subsequently returned with cutlasses, which he distributed to the troops with the assistance of one of the battalion commanders 'Changabulanga'. He described a demonstration of an amputation that 'Five-Five' gave for the troops at this point. (Emphasis added).

922. Brima then ordered the soldiers to move to the Upgun roundabout via Kissy Road. The witness testified that upon arrival at Upgun, the troops were summoned in a muster parade. 'Five-Five' and 'Gullit' held a discussion and then 'Five-Five' told the troops that 'Gullit' had said that the civilians should be taught a lesson. 'Five-Five' then ordered that any civilian the troops saw from Ross Road until Fourah Bay Road should be amputated and killed and the entire area should be burned down. *The witness stated that it was normal practice for the commanders to have a discussion, after which 'Five-Five', whom the witness referred to as the "army chief commander", would inform the troops on the details of the operation.*

923. According to the witness, the troops were then divided for the attack on Fourah Bay, with 'Five-Five' as the commander of one group and 'Bazzy' at Kissy Road. He then stated that after carrying out the orders, the troops were called back to where 'Gullit' was near Kissy Road.

924. The Kamara Defence submits that the testimonies of witnesses TF1-334, George Johnson and TF1-184 on the attack on Fourah Bay are inconsistent. The Trial Chamber accepts that there are discrepancies between the three accounts. Nonetheless, this does not mandate the dismissal of the entire testimony of each witness in relation to the attack on Fourah Bay. The Trial Chamber is of the view that the variations in the three accounts are explicable due to the passage of years since the events in question and the chaotic and stressful atmosphere existing at the relevant time, rather than bias on the part of witnesses George Johnson and TF1-334, as suggested by the Kamara Defence.[345] However, the Trial Chamber notes that neither witness

[345] **Kamara Final Brief**, para. 209.

George Johnson nor TF1-334 were cross-examined on their testimony regarding the incident. In addition, witness TF1-184's evidence was more detailed.

926. The Trial Chamber further finds, based on the detailed eye-witness account of witness TF1-184 which was not shaken in cross-examination in this regard, that the Accused Kanu reiterated the order to the assembled troops prior to the attack. While both witnesses TF1-334 and TF1-184 testified that the Accused Kanu went on the attack, the Trial Chamber is not satisfied that the Accused Kanu personally killed any civilians.

6.30 As can be seen from the above paragraphs, the Prosecution submits that although the Trial Chamber found TF1-184's evidence to be more detailed it did not dismiss the evidence of TF1-334. And at paragraph 924, the Trial Chamber explained how it treated the inconsistencies in the evidence of TF1-334 and TF1-167 on this incident.

6.31 The Prosecution submits that when the evidence of TF1-334 and TF1-184 are read together, as the Trial Chamber did, it is clear that Kamara was present at the scene and took part in the attack.

6.32 At paragraph 919 TF1-334 gave evidence that after Gullit (ie Brima) gave the orders to attack Fourah Bay, he and other commanders including Bazzy (Kamara) moved to Fourah Bay; and that *all of the commanders participated in the attack.* At paragraph 920 according to TF1-184 *Kamara was nearby when Gullit ordered the attack. At paragraph 923, the Trial Chamber reviewed evidence that the troops were divided for the attack, with Five-Five (ie Kanu) the commander of one group with Kamara at Kissy Road.*

6.33 From the above findings the Prosecution submits that the Trial Chamber did not err in fact by finding that Kamara was both present and partook in the attack

6.34 At this juncture, it is helpful to recall the credibility finding made by the Trial Chamber at paragraph 359, in respect of TF1-334. In the words of the Trial Chamber:

> 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.

(iii) Mutilation of civilians in Freetown and the Western Area

6.35 This part of this Response Brief responds specifically to Kamara's Sixth Ground of Appeal.

6.36 In essence at paragraphs 170 to 190 of Kamara's Appeal Brief, it is contended that the Trial Chamber erred in relying on the evidence of TF1-153 which Kamara asserts to be unreliable and uncorroborated.

6.37 The Kamara Appeals Brief, at paragraph 180 to 182, challenges the credibility of TF1-153 based on the inconsistency in his testimony and that it was not corroborated.

6.38 As already mentioned earlier in this brief the Trial Chamber in its section dealing with the evaluation of evidence explained how it would deal with inconsistencies. In this explanation, the Trial Chamber rightly explained that minor inconsistencies will not detract from credibility of a particular witness. The Prosecution submits that the discrepancies in TF1-153 are only minor, for example whether he saw Kamara at PWD or Shankandass. The essence of TF1-153's evidence had been given in sufficient detail. Furthermore, there is no doubt based on the Trial Chamber's findings that Kamara was present in Freetown during the invasion.

6.39 Furthermore with respect to hearsay and circumstantial evidence the TC made the following observations:

> 100. In addition to evidence of facts within the testifying witness's own knowledge, the Trial Chamber has also admitted hearsay evidence. Under Rule 89(C) of the Rules, the Trial Chamber has a broad discretion to admit relevant hearsay evidence. However, before determining whether to rely on hearsay evidence, the Trial Chamber has carefully examined such evidence taking into account that its source has neither been tested in cross-examination nor been the subject of an oath or solemn declaration.

> 101. In some instances, the Trial Chamber relied upon circumstantial evidence, *i.e.*, evidence surrounding an event from which a fact at issue may be reasonably inferred,[346] in order to determine whether or not a certain conclusion could be drawn. While individual pieces of evidence standing alone may well be insufficient to establish a fact, their cumulative effect may be revealing and decisive. Therefore, it is "no derogation of evidence to say that it is circumstantial."

6.40 In determining the credibility of witnesses the Trial Chamber was in the best position to do so. In this connection, it must be noted that the Trial Chamber had observed at paragraph 108 that:

> 108. When evaluating the credibility of witnesses who gave evidence *viva voce*, the Trial Chamber has taken into account a variety of factors, including their demeanour, conduct and character (where possible),[347] their knowledge of the facts to which they testified, their proximity to the events described, their impartiality, the lapse of time between the events and the testimony, their possible involvement in the events and the risk of self-incrimination, and their relationship with the Accused.

6.41 The Prosecution notes that witness TF1-153 had no motive to lie. He was not involved in the commission of any crimes or had any other reason to give false testimony.

6.42 The Prosecution submits that as regards TF1-153, as conceded at paragraph 178 of the Kamara Appeals brief, the Trial Chamber duly noted the inconsistencies between TF1 153's evidence. However, after applying its own criteria on the evaluation of evidence, the Trial Chamber reached the following conclusion on TF1-153's evidence:

> 386. The Brima Defence submits that witness TF1-153 was not credible or reliable, arguing that there were significant discrepancies between his evidence at trial and the evidence he provided to the Prosecution in a prior statement.[348] *Although the witness was not entirely clear in his examination in chief, the Trial Chamber finds that inconsistencies between the evidence he gave at trial and his prior statement to the Prosecution were not of sufficient gravity to cast doubt as to his credibility* (emphasis added).

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[346] ***Brđanin* Trial Judgement**, para. 35; ***Blagojević and Jokić* Trial Judgement**, para. 21.
[347] ***Blagojević and Jokić* Trial Judgement**, para. 23.
[348] ***Brima* Final Brief**, para. 191.

6.43 With regard to corroboration, the Trial Chamber stated as follows at paragraph 109 of its Trial Judgement:

> 109. In some instances, only one witness gave evidence on a material fact. As a matter of law, the testimony of a single witness on a material fact does not require corroboration. Nevertheless, the Trial Chamber has examined the evidence of a single witness with particular care before attaching any weight to it.

6.44 In view of the above evaluation of the witnesses in terms of their credibility and reliability (which exercise was carried out in respect of TF1-153) and its own caution regarding non-corroborated evidence, the Prosecution submits that this ground of Appeal was correctly decided by the TC and should be dismissed in its entirety.

(d) Individual responsibility of Kamara for enslavement crimes

6.45 This part of this Response Brief responds to Kamara's Second, Third and Fourth Grounds of Appeal.

6.46 Under these grounds of appeal, Kamara takes issue with the Trial Chamber's verdict that he was directly responsible under article 6(1) of the Statute, for planning the following offences:

(a) conscription of children and their use as soldiers [Ground 2];

(b) sexual slavery as outrages upon personal dignity [Ground 3]; and (c) abduction of civilians into slavery [Ground 4].

6.47 The gravamina of his complaint are that the Trial Chamber favoured a 'less strict' test to the concept of planning than that espoused by an ICTY Trial Chamber in *Brdjanin*; and, that the evidence did not support the conviction.

The Trial Chamber's cautious attitude towards the Brdjanin dictum was reasonable

6.48 Indeed in their judgment, the Trial Chamber had declined to follow the test of planning suggested by the Trial Chamber in the *Brdjanin* case where the following was said:

> As contended by the Prosecution, the Accused in the present case did not physically perpetrate any of the crimes established. Responsibility for 'planning' a crime could thus, according to the above definition, only incur if it was demonstrated that the Accused was substantially involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance. This knowledge requirement should not, however, be understood to mean that the Accused would have to be intimate with every detail of the acts committed by the physical perpetrators.[349]
>
> Although the Accused espoused the Strategic Plan, it has not been established that he personally devised it. The Accused participated in its implementation mainly by virtue of his authority as President of the ARK Crisis Staff and through his public utterances. Although these acts may have set the wider framework in which crimes were committed, the Trial Chamber finds the evidence before it insufficient to conclude that the Accused was involved in the immediate preparation of the *concrete crimes*. This requirement of specificity distinguishes 'planning' from other modes of liability. In view of the remaining heads of criminal responsibility, some of which more appropriately characterise the acts and the conduct of the Accused, the Trial Chamber dismisses 'planning' as a mode of liability to describe the individual criminal responsibility of the Accused.[350]

6.49 The dicta in *Brdjanin* require a careful consideration, especially in view of the particular facts of that case. They are that the Accused shared with the Bosnian Serb leadership support for the Strategic Plan, intended to link Serb-populated areas in Bosnia and Herzegovina together, to gain control over these areas and to create a separate Bosnian Serb state, from which most non-Serbs would be permanently removed.

6.50 The question of planning dictated by those facts then ought to be whether he was '*substantially involved at the preparatory stage* of that crime in the concrete form it took.' Or was his participation limited to the implementation—or execution, if you like—of a plan already made by one or more other person(s)? That was the question facing the ICTY Trial Chamber in the *Brdjanin* case. That question did not warrant a wider formulation of the test for the concept of planning.

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[349] ***Brđanin* Trial Judgement**, para 357.
[350] *Ibid*, para 358.

6.51 Similarly, it is unhelpful for the appellant to attempt to invoke the aid of an innocuous *obiter dictum* fleetingly made in *Akayesu* that: '[p]lanning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.'[351] That *Akayesu* statement simply cannot bear the weight of doctrine now sought to be imposed on it.

6.52 It is submitted therefore that the attitude of the Trial Chamber in the case at Bar was one of commendable caution.

6.53 It may be said, however, that a predominant concern in the analysis of the concept of planning is the emphasis on a view of responsibility arising from the following facts: (a) there is a consummated crime, and (b) the accused in question participated in the design of that consummated crime. As long as these two elements are clear from the facts, care must be taken to avoid an analysis of planning which overemphasises the degree of participation of the accused by an isolated view of such awkward catchphrases as 'designing the commission of a crime at both the preparatory phase and the execution phase.' Caution is particularly called for inasmuch as such overemphasis risks limiting responsibility for planning only to those viewed as the king-pins of the particular criminal plan. This will be an impractical view of the notion of participation in planning. In a brainstorming session, which planning often involves, the participant who suggested a implausible course of action that is rejected, thereby sharpening focus on the course of action eventually adopted, is very much a participant in the planning, as was the participant whose flash of inspiration suddenly shined the light on the right course of action. There is no miscarriage of justice in holding both participants responsible for planning the crime.

6.54 Similarly, it is no miscarriage of justice to hold responsible for the planning the introverted participant who merely nodded tacit approval to the bright idea that was implemented as the criminal plan.[352]

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[351] ***Akayesu* Trial Judgement**, para 480.
[352] See ***Kajelijeli* Trial Judgement,** para 761. See also ***Bagilishema* Trial Judgement**, para 30.

6.55 As well, in a crime that involved the coordination of different activities, the accused who was involved only in the planning of a discrete part of those activities is as much a participant in the planning of the crime, as was the person who coordinated the different activities.

6.56 Perhaps, one useful dictum to bear in mind in this connection is the statement of the International Military Tribunal at Nuremberg, as it dismissed the suggestion that complete dictatorship negates the responsibility of subordinates for common planning:

> The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.[353]

6.57 It is submitted that the Trial Chamber's analysis of the concept of planning in the case at Bar is entirely consistent with the general principle discernible from the foregoing statement. The evidence supporting the conviction for planning established Kamara's responsibility beyond a reasonable doubt.

(e) Individual responsibility of Kanu for enslavement crimes

6.58 This part of this Response Brief responds to Kanu's Ground Nine.

6.59 Under Ground 9 of his Appeal Brief, the appellant Kanu takes issue with his conviction on grounds that he participated in the planning of the enslavement

[353] ***United States & Ors v Goring & Ors,*** " Judgement" in Trial of the Major War Criminals before the International Military Tribunal Nuremberg (1947) vol 1, p. 226.

crimes. His predominant complaint, however, is that his conviction for planning these crimes is unsupported by evidence either at the general level of those crimes having been planned at all or at the level of his participation in any such plan.

6.60 The Prosecution submits that Kanu's complaint in this regard is without merit. To begin with, it is notable that he reasonably concedes, as the case law compels him to do,[354] that proof of planning may be established by reasonable inference drawn from the circumstances of the case—provided of course that such an inference leaves the resulting proposition beyond a reasonable doubt.[355]

The evidence shows the existence of planning and that Kanu participated in the planning

6.61 Against the background of the foregoing, it is notable that the appellant Kanu reasonably admits that the evidence establishes (the Prosecution adds *beyond a reasonable doubt*) that he *participated* in and *managed* a 'system' in which women were sexually enslaved, in which civilians were pressed into slave labour, and in which children were conscripted and used as soldiers.[356] He also reasonably admits that the system was elaborate and sustained, for the practices were 'so prevalent'[357] and 'across the board.'[358] Similarly, he reasonably admits that the 'system' in question involved giving military training to the child conscripts.[359]

6.62 To the foregoing admissions might be added the fact that it was established that the 'system' in question involved the following features among others: a commander who oversaw the system; a code of conduct (such as that no fighter was to covet his colleague's sexual slave); a disciplinary system (such as death for any fighter who coveted his colleagues sexual slave); and, a 'mammy queen' who investigated complaints of misbehaviour against a sexual slave and meted out prescribed punishments.

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[354] See ***Blaškić* Trial Judgement**, para 279; ***Kajelijeli* Trial Judgement**, para 761.
[355] ***Kanu* Appeal Brief**, para 9.4.
[356] *Ibid*, paras 9.1, 9.3, 9.4, 9.5 and 9.6.
[357] *Ibid*, para 9.4.
[358] *Ibid*, para 9.3.
[359] *Ibid*, para 9.6.

6.63 The foregoing factors together ineluctably point to the fact that such a system must have been planned, in such a manner as to have it operated as part of the *modus operandi* of the AFRC.

6.64 Such a planning needed not have occurred as a transaction discrete in time and place. It would still be planning subsequently to contemplate the revision of an existing plan or an activity in progress. Hence, the appellant is not assisted by his plea that the enslavement crimes in question 'were uncoordinated acts that became so prevalent that they had to be managed. It fell upon the Appellant in his capacity as the Chief of Staff in charge of the civilians to manage the situation within the AFRC.'[360] This admission alone amply justifies a reasonable inference that the appellant Kanu was involved in planning the crime from the point that the decision was taken to have him manage a system that involved the commission of those crimes.

6.65 Beyond that admission, however, there is ample evidence on the record from which it is inferable beyond a reasonable doubt that he was involved in the planning of those crimes. Those evidence include the following already reviewed in another context:

- he was a one[361] of a select group of 17 people[362] who had plotted and executed the 1997 AFRC coup;
- he was an 'Honourable';[363]
- he was a member of the AFRC Supreme Council:[364] this was the governing council of the AFRC government; it had both legislative and executive powers and was responsible for the day-to-day decision making of the AFRC Government;[365]
- he was present at the coordination meetings between high level members of the AFRC and the RUF in Freetown;[366]

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[360] *Ibid.*, para 9.4.
[361] **Trial Chamber's Judgement**, para 507.
[362] *Ibid.*, para. 299.
[363] *Ibid*, para. 509. The title of 'honourable' was conferred upon each of the 17 coup plotters and was not merely a title denoting respect; *ibid.*, para. 299.
[364] *Ibid.*, para. 508.
[365] *Ibid.*, para. 300.
[366] *Ibid.*, para. 510.

- with Sam Bockarie, he was seen and heard addressing a meeting at Koidu community centre during the junta period; during which they declared that they were in control of the Government and wanted the support of the youth;[367]
- he was seen and heard addressing a meeting in Koidu; during which he encouraged the cleaning and upkeep of the town;[368]
- he was Chief of Staff;[369]
- in addition to being Chief of Staff, he was also the AFRC's third-in-command when they were in Freetown;[370]
- he was the officer who relayed orders down from Brima who was the AFRC commander-in-chief;[371]
- he was a senior commander of the AFRC fighting force;[372]
- he was the senior commander of the AFRC in charge of abducted civilians;[373]
- he was a Brigadier-General within the AFRC;[374]
- he was based at the headquarters of the AFRC[375] and was a member of the headquarters group;[376] and
- he was almost always at the side of Brima.[377]

6.66 These evidence were already reviewed in relation to his ability to exert effective control over AFRC troops. While it was conceded that they only indicated that he was a man of influence in the AFRC, it is submitted that such a position of influence *taken together* with the admitted fact that he was given responsibility for managing the enslavement programme itself, amply justifies the inference that he was involved in the planning of that enslavement programme.

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[367] *Ibid.*, para. 510.
[368] *Ibid.*, para. 510.
[369] *Ibid.*, paras 522, 531 and 2071.
[370] *Ibid.*, para. 522.
[371] *Ibid.*, para. 522. There is evidence of Kanu identifying himself in a radio broadcast during the junta period as the Chief of Staff and stated that the army had taken over the government of President Kabbah and their commander was Lieutenant General Alex Tamba Brima: *ibid.*, para. 531.
[372] *Ibid.*, para. 526.
[373] *Ibid.*, para. 526.
[374] *Ibid.*, para. 531.
[375] *Ibid.*, para. 534.
[376] *Ibid.*, para. 2038.
[377] *Ibid.*, para. 534.

7. Alleged errors in sentencing: general matters

(a) The standard of review in an appeal against sentence

7.1 Sentencing, much like findings on credibility and assessment of evidence, is an area of adjudication in which an appellate court ought not lightly to interfere. It is an area in which a Trial Chamber enjoys a large measure of discretion. These principles have been settled in international criminal justice in virtue of statements such as the following made by the ICTR Appeals Chamber in *Kayishema and Ruzindana*:

> In considering the issue of whether a sentence should be revised, the Appeals Chamber notes that the degree of discretion conferred on a Trial Chamber is very broad. As a result, the Appeals Chamber will not intervene in the exercise of this discretion, unless it finds that there was a "discernible error" or that the Trial Chamber has failed to follow the applicable law. In this regard, it confirms that the weighing and assessing of the various aggravating and mitigating factors in sentencing is a matter primarily within the discretion of the Trial Chamber. Therefore, as long as a Trial Chamber does not venture outside its "discretionary framework" in imposing a sentence, the Appeals Chamber shall not intervene.[378]

7.2 The standards of review that are applicable in an appeal against sentence are well established in the case law of the Appeals Chamber of the ICTY and ICTR. The case law of the ICTY and ICTR affirms that:

> Similar to an appeal against conviction, an appeal from sentencing is a procedure of a corrective nature rather than a *de novo* sentencing proceeding. A Trial Chamber has considerable though not unlimited discretion when determining a sentence. As a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless "it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law." The test that has to be applied for appeals from sentencing is whether there has been a discernible error in the exercise of the Trial Chamber's discretion. As long as the Trial Chamber keeps within the proper limits, the Appeals Chamber will not intervene.[379]

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[378] *Prosecutor v Kayishema and Ruzindana*, "Judgment", ICTR-95-1-A, Appeals Chamber, 1 June 2001, ("***Kayishema* Appeal Judgement**"), para 337.

[379] ***Vasiljević* Appeal Judgement**, para. 9 (footnotes omitted).

7.3 The Appeals Chamber of the ICTY has further stated that:

> The Appeals Chamber has emphasised in previous judgements that sentencing is a discretionary decision and that it is inappropriate to set down a definitive list of sentencing guidelines. The sentence must always be decided according to the facts of each particular case and the individual guilt of the perpetrator. The Appeals Chamber has stated that a revision of a sentence on appeal can be justified where a Trial Chamber has committed a "discernible error" in the exercise of its sentencing discretion, and thus has ventured outside its discretionary framework in imposing sentence. In general, the Appeals Chamber will not impose a revised sentence unless it believes that the Trial Chamber has committed such an error.[380]

7.4 It is incumbent upon the appellant to establish the existence of such a "discernible error" in the exercise of the Trial Chamber's sentencing discretion.[381] An appellant cannot merely assert that a sentence was wrong, without demonstrating how the Trial Chamber either failed to follow the applicable law, or how it ventured outside its discretionary framework in imposing the sentence that it did.[382]

7.5 A Trial Chamber's decision may be disturbed on appeal if an appellant shows that the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account, in the weighing process involved in this exercise of the discretion.[383] However, it is insufficient to show that a different sentence was imposed in another case in which the circumstances were similar.[384] Rather, it must be shown, for instance, that the sentence imposed by the Trial Chamber "was so unreasonable and plainly unjust, in that it underestimated the gravity of the ... [convicted

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[380] ***Blaškić*** **Appeal Judgement**, para. 680 (footnotes omitted); see also ***Kvočka*** **Appeal Judgement**, para. 669.

[381] See, e.g., ***Kvočka*** **Appeal Judgement**, para. 669.

[382] ***Čelebići*** **Appeal Judgement**, para. 725. See also at para. 717: "Trial Chambers exercise a considerable amount of discretion (although it is not unlimited) in determining an appropriate sentencing. This is largely because of the over-riding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime."

[383] *Ibid.*, para. 780. See also ***Kupreškić*** **Appeal Judgement**, para. 457 ("The burden rests on an accused to demonstrate that the Trial Chamber abused this discretion in failing to take a certain factor or circumstance into account"); ***Semanza*** **Appeal Judgement**, paras. 312, 374.

[384] ***Vasiljević*** **Appeal Judgement**, para. 152.

person's] criminal conduct, that it [the Appeals Chamber] is able to infer that the Trial Chamber failed to exercise its discretion properly".[385]

7.6 It follows from the "corrective" nature of an appeal, and from the "waiver" principle, that an appellant cannot raise factors relevant to sentencing for the first time on appeal.[386]

(b) Deterrence and retribution as sentencing factors

7.7 This Section of this Part of this Response Brief responds to Kamara's Eleventh Ground of Appeal and Kanu's Ground Twelve.

7.8 Kamara argues that the Trial Chamber erred in paragraphs 14, 15 and 16 of the Trial Chamber's Judgement in giving undue prominence to retribution and deterrence as the main sentencing purposes in international criminal justice.[387] In particular, Kamara argues that the Trial Chamber erred in agreeing with the views expressed in ICTY and ICTR case law that "deterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law".[388]

7.9 The Prosecution submits that the Trial Chamber gave due consideration to all the sentencing objectives, in consonance with the jurisprudence of international criminal law. The treatment of sentencing objectives in paragraphs 13-18 of the Sentencing Judgement have not been shown to be inconsistent with the established case law of international criminal tribunals, which predominantly emphasise the purpose of deterrence and retribution. The Trial Chamber did not commit any error of law.

7.10 In furtherance of his submissions, the appellant offers a number of propositions. None of them was supported by any legal or sociological authority. Others are unclear in their meaning: in particular, the Prosecution is unsure of what the appellant meant by submitting as follows: "[T]he most potent deterrent against violations of international humanitarian law is not the length of the prison

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[385] ***Galic*** **Appeal Judgement**, para. 455.
[386] ***Kupreškić*** **Appeal Judgement**, paras. 410-414; ***Nikolić*** **Appeal Judgement**, para. 107.
[387] ***Kamara*** **Appeal Brief**, para. 252.
[388] ***Kamara*** **Appeal Brief**, para. 253.

sentence itself, but the subjective assessment of the offender as to the likelihood of his being indicted, arrested, tried and convicted".[389]

7.11 It is submitted that such propositions are insufficient to rattle the weight of authority upon which the Trial Chamber's sentencing judgment rests.

7.12 In Ground 12 (paragraphs 12.1 to 12.5) of his own Appeal Brief, the appellant **Kanu** also complains of undue emphasis on "the retributive aspects of punishment and pays no regard whatsoever to the rehabilitative element".[390]

7.13 The Prosecution submits that the Trial Chamber's sentencing gave due consideration to all the usual sentencing objectives and gave due weight to applicable ones.

7.14 There is no requirement in international criminal justice to ensure that sentencing in every case is pot-purée of all the sentencing objectives, notwithstanding that one or some of those objectives do not apply in a particular case, and not withstanding the absence of any empirical evidence in support of the objective which the convict will prefer the court to give dominant consideration. Indeed, the rehabilitative element *might*, in some instances apply in the circumstances of the Sierra Leone conflict, such as when the accused was a child-soldier; but they do not apply in every case. In view of the inhumanity of the crimes committed by the accused and under their specific orders, the sentences handed down by the Trial Chamber are entirely appropriate in the circumstances.

7.15 In particular, the Prosecution submits that the sentencing in this case does not 'negate the spirit of reconciliation and reconstruction' in Sierra Leone. It rather enhances that spirit. This is achieved by a sentencing that ensured that those most responsible for the atrocities in Sierra Leone are appropriately punished. This does not negate the ability and desire of Sierra Leoneans to move forward with rebuilding their lives and society, in a spirit of reconciliation with the plurality among them who were led into criminal activity by those most responsible for the atrocities.

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[389] ***Kamara* Appeal Brief**, para. 253.
[390] ***Kanu* Appeal Brief**, para 12.1.

7.16 Whether or not the spirit of reconciliation and reconstruction in Sierra Leone was negated cannot depend on the preferences of the convict himself expressed in his Appeal Brief and elsewhere.

(c) Reconciliation as a sentencing factor

7.17 This part of this Response Brief responds to Kamara's Twelfth and Thirteenth Grounds of Appeal.

7.18 In these grounds of appeal, Kamara also complains about his sentencing on grounds that the Trial Chamber had not given adequate weight to reconciliation as a sentencing objective. The preamble of United Nations Security Council Resolution 1315 (2000), which led to the establishment of the Special Court, and which is quoted in paragraph 13 of the Sentencing Judgement, stated that "in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace". In other words, it envisaged that reconciliation would be promoted by a "credible system of justice and accountability" that would "end impunity". It did not suggest that reconciliation could be promoted by the passing of sentences more lenient than would otherwise be appropriate, as a gesture of "reconciliation". Indeed, the passing of unduly lenient sentences by those found to have committed the gravest crimes could, in anything, undermine reconciliation.

7.19 In this connection, the Prosecution would recall its submissions made in response to the submissions made under Ground 12 of Kanu's Appeal Brief, as he also dealt with the theme of reconciliation. Furthermore, the Trial Chamber found that Kamara expressed no genuine remorse whatsoever for his crimes.[391]

7.20 In paragraph 268 of his Appeal Brief, the appellant Kamara submits, in particular, that Kamara's sentence is "tantamount to giving him the death

[391] **Sentencing Judgment**, para 91.

sentence". It is unclear whether the appellant's mistaken figure of his term of years is material to this characterisation of his punishment. He repeatedly mentions 'locking up Kamara for 60 years', when in fact he was sentenced only to 45 years.

7.21 At any rate, the sentence of term of years imposed on Kamara does not amount actually or notionally to a death sentence. A death sentence envisages a definitive termination of life, absolutely foreclosing any question of parole. A sentence of 45 years imprisonment for a 39 year old man,[392] especially with deduction of his 4-year pre-judgment detention,[393] leaves him with a reasonable chance of release from prison. He is thus afforded a useful opportunity to reflect on his life and how best to contribute to reconciliation in Sierra Leone, even from his jail cell.

7.22 Finally, at paragraph 270, the appellant Kamara urges a reduction of his sentence to a range of "15—20 years maximum, as was the case with persons convicted of the more egregious crime of genocide in Rwanda and elsewhere". In response, the Prosecution submits as follows.

7.23 First, the comparative ranking of genocide as 'the more egregious crime' for purposes of sentencing has been specifically rejected by the ICTR Appeals Chamber. According to the ICTR Appeals Chamber "there is no hierarchy of crimes under the Statute, ... all of the crimes specified therein are 'serious violations of international humanitarian law', capable of attracting the same sentence."[394]

7.24 Secondly, it is unhelpful to make global comparative statements of sentencing for genocide at the ICTR and elsewhere, as there are cases of life imprisonment imposed, imprisonment 'for the remainder of life' imposed, and imprisonment for varying terms of years imposed. But specific regard must be had to the particular facts of the case alluded to.

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[392] He was born on 7 May 1968 or 1970: **Trial Chamber's Judgment**, para 427. Using the earlier of these two dates, he was 39 years old at the time of his sentencing.

[393] **Sentencing Judgment**, p 36. His period of pre-judgment detention comes to four years, for he was arrested and detained on 29 May 2003: Trial Judgment, p. 597, para 2.

[394] ***Kayishema* Appeal Judgement**, para 367.

7.25 Thirdly, even at the ICTR, there are no concrete benchmarks that require imposition of exactly the same sentence for different crimes. The result is that different Trial Chambers have been known to impose different sentences for similar crimes. It is therefore unhelpful to take a view of ICTR sentencing practice as if it offers a certain guide to the term of years universally recognised at ICTR as appropriate for the particular case. In this connection, the following pronouncement by the ICTY Appeals Chamber in *Furundžija* is particularly instructive:

> In deciding to impose different sentences for the same type of crime, a Trial Chamber may consider such factors as the circumstances in which the offence was committed and its seriousness. While acts of cruelty that fall within the meaning of Article 3 of the Statute will, by definition, be serious, some will be more serious than others. The Prosecutor submits that sentences must be individualised according to the circumstances and gravity of the particular offence. The Appeals Chamber agrees with the statement of the Prosecutor that "the sentence imposed must reflect the inherent gravity of the accused's criminal conduct", which conforms to the statement of the Trial Chamber in the *Kupreškic* Judgement:
>
> > The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.

7.26 This statement has been endorsed by the Appeals Chamber in the *Aleksovski* Appeals Judgement, and there is no reason for this Chamber to depart from it.[395]

7.27 Equally instructive is the following pronouncement made in the same judgment, as the ICTY Appeals Chamber continued:

> The sentencing provisions in the Statute and the Rules provide Trial Chambers with the discretion to take into account the circumstances of each crime in assessing the sentence to be given. A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise, a Trial Chamber is limited only by the provisions of the Statute and the Rules.[396]

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[395] ***Furundžija* Appeal Judgment**, para 249.
[396] *Ibid.*, para. 250.

7.28 Fourthly, the Special Court for Sierra Leone is entitled to, and should, contribute to the development and enrichment of sentencing practice in international criminal justice, in accordance with its own views of what is appropriate sentences in particular cases. Such process of contribution may, in appropriate cases, require a refusal to follow a particular sentencing precedent at the ICTR or ICTY.

(d) The effect of the amnesty in the Lomé Agreement

7.29 This part of this Response Brief responds to Kanu's Twelfth and Thirteenth Grounds of Appeal.

7.30 As part of his submissions under Ground 12 of his Appeal Brief, the appellant Kanu argues that the sentencing of his client negated the spirit of the amnesty provisions of the Lomé Peace Agreement signed between the Government of Sierra Leone and the RUF on 7 July 1999. Notably, the appellant submits as follows: "While not a bar to the jurisdiction of the Special Court, the Amnesty Agreement that was signed between the Government of Sierra Leone and the warring factions, and the Truth and Reconciliation Process, should have instructed the court that the people of Sierra Leone, and *the international community, which overwhelmingly supported the initiatives*, were no longer entirely bent on retribution".[397] [Emphasis added.]

7.31 In response the Prosecution submits that the appellant has grossly ignored the effect of the amnesty clause of the Lomé Agreement, as well as the reaction of the international community to that agreement.

7.32 The relevant text of the Agreement appears as follows:

ARTICLE IX. PARDON AND AMNESTY

> 1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.
>
> 2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to

[397] ***Kanu* Appeal Brief**, para. 12.3.

> all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.
>
> 3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.[398]

7.33 Contrary to the assertions of the appellant, the international community never welcomed this blanket immunity even grudgingly, let alone 'overwhelmingly'. In fact the *international community* did promptly communicate its categorical rejection of the amnesty clause, through the concerted position of the United Nation expressed by its highest representative in the person of the incumbent Secretary General Kofi Annan. In his seventh report to the Security Council on the Observer Mission to Sierra Leone, he wrote as follows:

> As in other peace accords, many compromises were necessary in the Lomé Peace Agreement. As a result, some of the terms which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity, which inspired the creation of the United Nations Tribunals for Rwanda and the Former Yugoslavia, and the future International Criminal Court. Hence the instruction to my Special Representative to enter a reservation when he signed the peace agreement stating that, for the United Nations, the amnesty cannot cover international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law ...[399].

7.34 Indeed, that rejection of the amnesty clause was duly recalled by the UN Security Council in resolution 1315 (2000) on the situation in Sierra Leone in the following terms:

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[398] Available at <http://www.sierra-leone.org/lomeaccord.html>.

[399] **Seventh Report of the Secretary-General** on the United Nations Observer Mission in Sierra Leone, UN Doc S/1999/836, 30 July 1999, para 54.

> *Recalling* that the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law ...[400].

7.35 Beyond the united front against the amnesty clause, as expressed by the UN Secretary General, individual statements made at the Security Council by member States did not reveal great enthusiasm for the amnesty clause. The mood of the Security Council is best summed up by the statements of the representatives from the Gambia and the Netherlands. According to Ambassodor Jagne of the Gambia:

> He said that like most delegations, his was concerned about the blanket amnesty granted to the Revolutionary United Front. While that might not foster justice, "we understand the circumstances under which it was granted". The people of Sierra Leone had played their part; the rest of the international community should now play its part. It was for them to pursue and bring to justice those accused of war crimes.[401]

7.36 Perhaps, more instructively, the following remarks are attributed to Ambassador Walsum of the Netherlands:

> [T]here could be no doubt that the widespread, systematic killings, rape and amputations committed against civilians in Sierra Leone constituted massive violations of international human rights and humanitarian law. As noted by the Special Representative of the Secretary-General in the reservation attached to his signature of the Lomé accord, crimes against humanity, war crimes and other serious violations of international humanitarian law could not be covered by the Accord's amnesty provisions.
>
> He noted that paragraph 54 of the Secretary-General's report had placed his reservations in the wider context of the goal of ending the culture of impunity. International tribunals had been set up, or were being set up, precisely to remedy that culture of impunity and the Security Council owed it to the people of Sierra Leone to allow them recourse to the same remedies now open to victims of similar crimes elsewhere.

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[400] **Security Council resolution 1315 (2000)** on the situation in Sierra Leone, UN Doc S/RES/1315 (2000), adopted by the Security Council at its 4186th meeting, on 14 August 2000.

[401] **Report of 4035th Meeting of the UN Security Council,** 20 August 1999: available at < http://www.un.org/News/Press/docs/1999/19990820.sc6714.html>

> There was no peace without justice, he said. Without accountability for the heinous crimes committed in Sierra Leone, there would be no lasting peace in that country. It was hoped that the Commission of Inquiry recommended by the High Commissioner for Human Rights, and the Truth and Reconciliation Commission foreseen in the Lomé accord, would help bring forward the day when the people of Sierra Leone could confidently expect peace with justice.[402]

7.37 The following sundry remarks were also made by various representatives, while expressing a grudging acceptance of the Peace Agreement:

> United States: "The United States remained committed to the pursuit of accountability for serious violations of international humanitarian law, wherever they occurred ..."[403].
>
> United Kingdom: "[A] blanket amnesty for those who had committed appalling atrocities had rightly caused concern". [404]
>
> The Argentine Republic: "Granting a wide-ranging general amnesty raised very important question marks".[405]
>
> Namibia: "[L]ooking back into history, it should be evident that a new culture had to be learned -- a culture without impunity and adaptive to a new governance and the rule of law".[406]

7.38 It is therefore very wrong to assert that the international community had 'overwhelmingly supported' the amnesty clause of the Lomé Agreement.

7.39 Under Ground 13 of his Appeal Brief, the appellant Kanu submits, without any attempt at elaboration, that the amnesty clause of the Lomé Agreement should have been considered in mitigation.

7.40 Besides urging a disregard of that unelaborated submission, the Prosecution submits that the Amnesty Clause does not fall within the category of considerations usually considered in mitigation. The usual category of considerations comprises factors going to personal character or personal circumstances of the convict—matters qualifying as 'individual circumstances

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[402] *Ibid.*
[403] *Ibid.*
[404] *Ibid.*
[405] *Ibid.*
[406] *Ibid.*

of the convicted person' within the meaning of article 19(2) of the Statute of the Special Court. Things ordinarily recognised within this category include: good character; actions indicative of diminished responsibility (such as commission of the crime under a mental fog, duress or *in extremis*); actions indicative of acceptance of responsibility (such as voluntary surrender, plea of guilt or cooperation with the court); actions indicative of remorse; and, age.[407]

7.41 An attitude of entitlement to blanket amnesty does not indicate acceptance of responsibility or show of remorse. Therefore, rather than mitigate the sentence, it ought to aggravate it.

(e) The effect of Security Council resolution 1315 (2000)

7.42 This part of this Response Brief responds to Kanu's Thirteenth Ground of Appeal.

7.43 As part of his effort to argue that the international community had 'overwhelmingly supported' supported the amnesty clause, the appellant Kanu further submits that this overwhelming spirit of support is to be found in Security Council resolution 1315 (2000).

7.44 In response, the Prosecution submits that resolution 1315 (2000) is a robust statement of support for accountability and repudiation of impunity. It will suffice to have regard to the following preambular statements appearing in that resolution:

> *Reaffirming* the importance of compliance with international humanitarian law, and *reaffirming further* that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law,
>
> *Recognizing* that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to

[407] See generally ***Erdemović* Sentencing Judgment**, paras 16 and 17.

> the process of national reconciliation and to the restoration and maintenance of peace,[408]... [underlined emphases added].

7.45 It is clear then that not only does resolution 1315 confirm the United Nation's rejection of the amnesty clause of Lomé Agreement, it goes further to insist upon the visitation of justice to those responsible for the atrocities in Sierra Leone.

7.46 In the circumstances, resolution 1315 offers no reprieve of any kind to the convicts in this case.

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[408] **Security Council resolution 1315 (2000)** on the situation in Sierra Leone, UN Doc S/RES/1315 (2000), adopted by the Security Council at its 4186th meeting, on 14 August 2000.

8. Alleged errors in sentencing: the sentences imposed in this case

(a) The sentence imposed on Brima

8.1 This section of this Response Brief responds to Brima's Twelfth Ground of Appeal.

8.2 In this ground of appeal, Brima claims that the Trial Chamber "erred in law and in fact by imposing a global sentence of 50 years on the Accused which is excessively harsh and disproportionate and not in accordance with the sentencing practice and guidelines of the ICTY and ICTR thereby resulting in a miscarriage of justice".[409]

8.3 Contrary to what the Brima Appeal Brief appears to contend, the Trial Chamber in this case clearly did take into account the sentencing practices at the ICTY and ICTR. At paragraph 33 of the Sentencing Judgement, the Trial Chamber expressly stated that:

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

8.4 Earlier in the Sentencing Judgement, the Trial Chamber also noted that:

> The Kanu Defence proposes that the Trial Chamber should take into consideration the sentencing practice of the ICTY, as it is a basis for ICTR practice, and may provide the Trial Chamber with additional

[409] ***Brima* Appeal Brief**, para. 180.

> guidance. The Prosecution would appear to agree as it provided a chart on ICTY sentencing practice in Annex B of its Sentencing Brief.[410]

8.5 Although the Trial Chamber is expressly directed in Article 19(1) of the Statute of the Special Court to "as appropriate, have recourse to" the practice regarding prison sentences in the ICTR, the Prosecution submits that comparisons with sentences imposed by the ICTR are in practice of limited value. First, most indictments in cases before the Trial Chamber in the ICTR charge the accused with genocide, which is not a crime within the jurisdiction of the Special Court. In many cases before the ICTR, the penalty imposed for genocide has been life imprisonment,[411] which is not a sentence that the Special Court has the power to impose.[412] Furthermore, comparisons with sentences imposed in other cases (whether cases before the same or a different international criminal tribunal) are of their nature of limited assistance. As has been observed by the Appeals Chamber of the ICTY:

> As a general principle comparison with sentences imposed in other cases is often of limited assistance. While it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results.[413]

8.6 Furthermore, Trial Chambers of the ICTR commonly impose a single, global sentence on Accused convicted of multiple crimes, making it difficult or impossible to discern what sentence would have been considered appropriate for any one of those crimes considered in isolation.[414] A sentence imposed on an Accused in a case before the ICTR would therefore provide a meaningful comparison to an Accused in the present case only where the convicted person had been convicted of exactly the same combination of crimes in both cases,

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[410] **Sentencing Judgement**, para. 31 (footnote omitted).

[411] ***Akayesu* Trial Judgement**; ***Gacumbitsi* Appeal Judgement**; ***Kajelijeli* Judgement**; ***Kambanda* Trial Judgement**; ***Kamuhanda* Judgement**; ***Kayishema* Sentencing Order**; ***Musema* Judgement and Sentence**; ***Niyitegeka* Judgement**; ***Rutaganda* Trial Judgement**.

[412] See paragraphs 8.8-8.10 below.

[413] ***Čelebići* Appeals Judgement**, para. 719. See also ***Kamuhanda* Appeals Judgement**, para. 361.

[414] For instance, in the *Musema* case, Musema was convicted of one count of each genocide, extermination as a crime against humanity and rape as a crime against humanity and was sentenced to a single sentence of life imprisonment: ***Musema* Judgement and Sentence**.

and where the circumstances of the crimes and the personal circumstances of the convicted person were similar in both cases. No meaningful comparisons can be drawn simply by referring to the number of counts of particular crimes of which an accused at the ICTY or ICTR was convicted, and the sentence imposed. Furthermore, no meaningful comparisons can be drawn simply by referring to two or three of the very large number of sentences that have been imposed at the ICTY and ICTR, without establishing how the crimes and circumstances of the accused in those cases were comparable to the case of the relevant accused before the Special Court. As the ICTY Appeals Chamber has said:

> ... the precedential effect of previous sentences rendered by the International Tribunal and the ICTR is not only "very limited" but "also not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence". The reasons for this are clearly set out in the case law of the International Tribunal : (1) such comparison can only be undertaken where the offences are the same and committed in substantially similar circumstances; and (2) a Trial Chamber has an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime.[415]

8.7 Brima therefore cannot discharge his burden as an appellant in an appeal against a sentence (in relation to which, see paragraphs 7.1 to 7.6 above) merely by asserting, as he does at paragraph 181 of the Brima Appeal Brief, that the sentence imposed on him was high by comparison with sentences imposed at the ICTR and ICTY.

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[415] ***Babić* Sentencing Appeal Judgement**, para. 32 (footnotes omitted). See also at para. 33: "In the present case, the Appellant is not alleging that his case falls within a pattern or a line of sentences passed in similar circumstances for the same offences. He only refers to one case which in his view bears some similarities with his own. The finding of the Appeals Chamber in *Jelisić* was concerned with a comparison with a "line of sentences" and not with a comparison with one single case. Furthermore, the Appeals Chamber emphasises that, as a general principle, comparisons with other cases as an attempt to persuade the Appeals Chamber to either increase or reduce the sentence are of limited assistance: the differences are often more significant than the similarities and the mitigating and aggravating factors dictate different results. In this case, even assuming that the two cases were so similar as to be meaningfully comparable, the Appellant's sentence is not so out of reasonable proportion with Plavsic's sentence so as to suggest capriciousness or excessiveness. The Appeals Chamber will therefore not engage in a comparison between these two cases." (Footnote omitted.) See further at para. 70.

8.8 Paragraph 182 of the Brima Appeal Brief argues that the sentence imposed on him by the Trial Chamber was "tantamount for all practical purposes to a sentence to life imprisonment", which is a sentence that the Trial Chambers of the Special Court have no power to impose. It is true that under Article 19(1) of the Statute of the Special Court, a Trial Chamber only has the power to impose a sentence of "imprisonment for a specified number of years". This provision can be contrasted with the corresponding provisions of the Statutes of the ICTY and ICTR which state more generally that "The penalty imposed by the Trial Chamber shall be limited to imprisonment",[416] and the Rules of the ICTY and ICTR which state that "A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life".[417]

8.9 This point was raised before the Trial Chamber during the sentencing proceedings, and must be taken to have been considered by the Trial Chamber. At the sentencing hearing, the Prosecution submitted that:

> ... the Prosecution denies that the recommended sentences are intended to be an underhand way of imposing a life sentence which the Special Court has no power to impose. ... The recommended sentences in the Prosecution filing reflect what the Prosecution considered appropriate to the criminal responsibility of the accused and their personal circumstances. The recommended sentences were not based on what the Prosecution calculated to be necessary to keep the accused in prison for the rest of their lives.[418]

8.10 The Prosecution submits that the purpose of Article 19(1) of the Special Court's Statute is to ensure that the sentence imposed on the Accused is a fixed sentence that is appropriate in all of the circumstances of the case, and to avoid a situation in which the length of the sentence served would depend on the arbitrary factor of the age of the convicted person at the time that sentence is imposed (in other words, to avoid the situation in which a young person sentenced to life imprisonment would in practice probably serve a longer sentence than if the accused had been much older at the time that sentence is imposed). The purpose of Article 19(1) is not to ensure that a convicted person,

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[416] **ICTY Statute**, Article 24(1); **ICTR Statute**, Article 23.
[417] **Rules of the ICTY**, Rule 101(A); **Rules of the ICTR**, Rule 101(A).
[418] Transcript, 16 July 2007, p. 16.

on their current projected life expectancy, will have a given amount of their life remaining after their sentence has been served. If this were the effect of Article 19(1) it would in fact have a result that is contrary to its purpose, since it would mean that a convicted person who is old would have to have a much shorter sentence imposed than a young person convicted of the same crimes in the same circumstances. The Prosecution submits that Brima has not established that the sentence imposed by the Trial Chamber was motivated by an intention to ensure that Brima would spend the rest of his life in prison, rather than motivated by the intention to fix a sentence that was appropriate in all of the circumstances.

8.11 Paragraphs 183 to 192 of the Brima Appeal Brief argue that the Trial Chamber did not give sufficient weight to the mitigating circumstances in Brima's case. In fact, the Trial Chamber gave express consideration to the submissions of the parties in respect of mitigating circumstances in Brima's case.[419] It is open to a Trial Chamber to conclude that the crimes of which an accused is convicted, and the aggravating factors, are so grave that the particular mitigating factors in the case are of little or even of no weight at all. The weight to be given to mitigating factors in a particular case is a matter for the Trial Chamber to determine. An appellant cannot, simply by asserting that the Trial Chamber should have given "more weight" to mitigating circumstances, establish that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law, or that the Trial Chamber has committed a "discernible error" in the exercise of its sentencing discretion.

8.12 At paragraph 184 of the Brima Appeal Brief, it is argued that the Trial Chamber should have considered as mitigating circumstances Brima's lack of prior criminal convictions, his good reputation in the army without any court martial, and his contribution towards the peace process in Sierra Leone. The Trial Chamber expressly considered the latter two factors at paragraphs 64 and 65 of the Sentencing Judgement. As to Brima's claimed lack of prior criminal convictions, the Trial Chamber referred to Brima's submissions to this effect at paragraph 61 of the Sentencing Judgement, and it is therefore evidence that the

[419] **Sentencing Judgement**, paras. 58-63.

Trial Chamber thus took these submissions (and the submissions of the Prosecution) in relation to this matter into account. All of these three alleged mitigating factors were addressed by Brima and the Prosecution in their sentencing submissions.[420]

8.13 While the Trial Chamber was under a duty to give a "reasoned opinion in writing"[421] for the sentence that it ultimately imposed, this duty does not require the Trial Chamber to address in detail every aspect of every submission made by the parties in the proceedings before it. It has been held that:

> The Appeals Chamber recalls that every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule *98ter*(C) of the Rules. However, this requirement relates to the Trial Chamber's Judgement; ***the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial.*** The Appeals Chamber recalls that ***it is in the discretion of the Trial Chamber as to which legal arguments to address***. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. ***It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.*** There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective. Considering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail. ***If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings***. It is therefore not possible to draw any inferences about the quality of a judgement from the length of particular parts of a

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[420] **Prosecution Sentencing Brief**, paras 103-107; ***Brima*** **Sentencing Brief**, paras 14-43; Transcript, 16 July 2007, pp. 7, 10-11, 15, 24, 33-34 (Prosecution Submissions).

[421] Rule 88(C) of the Rules.

judgement in relation to other judgements or parts of the same judgement.[422]

8.14 Similar principles apply in relation to the duty of the Trial Chamber to give reasons for the sentence that it imposes.[423]

8.15 The Prosecution submits that Brima has not established that the Trial Chamber did not give full consideration to the submissions made by the parties in respect of the alleged mitigating factors. Brima cannot discharge his burden on appeal merely by asserting that the Trial Chamber should have given these factors more weight.

8.16 The Brima Appeal Brief claims, at paragraph 185, that the Trial Chamber erroneously and falsely declared that Brima's dependants will be taken care of by other relatives" and that Brima's wife depends on his pension. The Prosecution submits that the Trial Chamber did not falsely declare this, and no reference to any such declaration is given by Brima. At paragraph 49 of the Sentencing Judgement, the Trial Chamber expressly refers to the submission made by Brima "that the Trial Chamber must take into account the culture of Sierra Leone, where family responsibilities are paramount, emphasising that Brima has six children and two wives as dependants". At paragraph 51 of the Sentencing Judgement, the Trial Chamber then found "that nothing in Brima's personal circumstances justifies any mitigation of his sentence".

8.17 It is true that the Prosecution, in its sentencing submissions, stated that Brima "has four living brothers and numerous sisters who would be in a position to care for both his mother and his own family members as is the tradition in Sierra Leone" and that "his wife will be able to care for Brima's children for which she has the benefit of Brima's military pension".[424] However, Brima responded to this submission in his own sentencing submissions, in which he stated that his pension was being collected without authorisation by a Lance Corporal

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[422] ***Kvočka* Appeal Judgement**, para. 23 (footnotes omitted, emphasis added). See also at paras. 24-25, 368 ("... the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during trial"), 398, 447, 466. See also, for instance, ***Brđanin* Appeal Judgement**, paras. 39, 94-95

[423] ***Kamuhanda* Appeal Judgement**, paras. 344-349.

[424] **Prosecution Sentencing Brief**, para. 90.

Sullayman, that his wife is unemployed, that she lives on handouts from well wishers and a small amount that Brima earns in the Detention Unit, and that in his culture, Brima still has responsibilities for dependants despite his incarceration. Brima has not established that the Trial Chamber failed to give appropriate consideration to his submissions in this respect.

8.18 Paragraph 186 of the Brima Appeal Brief argues that the Trial Chamber did not give sufficient weight to his previous good military record. However, as that paragraph acknowledges, the Trial Chamber did expressly take this into account.[425] Again, Brima does not discharge his burden as an appellant in an appeal against sentence merely by asserting that the Trial Chamber should have given this more weight.

8.19 Paragraphs 187 to 191 of the Brima Appeal Brief make the point that there is no exhaustive list of factors that may be taken into account in sentencing, which was expressly recognised by the Trial Chamber in paragraph 25 of the Sentencing Judgement, which is quoted in paragraph 187 of the Brima Appeal Brief. The Prosecution submits that this affirms that the Trial Chamber was aware of the scope of its sentencing discretion as a matter of law, and these paragraphs of the Brima Appeal Brief do nothing to advance Brima's argument.

8.20 Paragraphs 188-189 of the Brima Appeal Brief refer to the Trial Chamber's finding, in paragraphs 64 and 65 of the Sentencing Judgement, that "The Trial Chamber does not consider Brima's service in the Army without incident to be a mitigating factor as this was merely his duty" and that "Brima's alleged acts of philanthropy and alleged involvement in the Commission for the Consolidation of Peace are not mitigating factors". The Brima Appeal Brief argues that the Trial Chamber thereby erred, but does not state how the Trial Chamber is said to have erred. From the context of these paragraphs in the Brima Appeal Brief, Brima appears to suggest that the Trial Chamber considered that such matters were incapable of constituting mitigating circumstances. The Prosecution submits that the Trial Chamber did not so find, but rather, that the Trial Chamber considered that on the evidence before it, these alleged matters were

[425] See **Sentencing Judgement**, para. 61.

not mitigating in the circumstances of this particular case. It is submitted that this is clear when the Trial Chamber's findings are considered in the light of the submissions of the parties on these matters. The Prosecution submits that Brima has not discharged his burden as an appellant in an appeal against sentence in establishing that the Trial Chamber erred in so concluding.

8.21 Paragraphs 192 and 193, and 200-201, of the Brima Appeal Brief again merely repeat the assertion that the Trial Chamber failed to give sufficient weight to certain factors, without suggesting that the Trial Chamber failed to take them into account, and without establishing that the Trial Chamber thereby committed an error in exercising its discretion, or failed to follow applicable law, or that the Trial Chamber has committed a "discernible error" in the exercise of its sentencing discretion. Brima points to no other relevant factor that the Trial Chamber failed to take into account.

8.22 Paragraphs 195 to 196 of the Brima Appeal Brief argue that the Trial Chamber erred in considering certain matters both as going to the determination of the gravity of the crimes of which he was convicted, as well as going to the determination of aggravating circumstances, thus leading to a "double counting" of these matters in the determination of sentence. The Prosecution submits that this argument should be rejected. In its sentencing submissions, the Prosecution said clearly that:

> ... factors used to determine the gravity of the offence may not also be factors considered in aggravation of the crimes: double-counting is impermissible.[426]

8.23 The Trial Chamber in the Sentencing Judgement said at paragraph 23 of the Sentencing Judgement that:

> ... where a factor has already been taken into account in determining the gravity of the offence, it cannot be considered additionally as an aggravating factor and *vice versa*.

8.24 Given the Trial Chamber's express acknowledgement of this principle, it cannot be assumed that the Trial Chamber impermissibly double counted in this way.

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[426] **Prosecution Sentencing Brief**, para. 43. See also at para. 68, and footnote 254.

8.25 At paragraph 53 of the Sentencing Judgement, the Trial Chamber merely refers to submissions made by the Prosecution that certain matters were aggravating factors. In paragraph 55 of the Sentencing Judgement, the Trial Chamber merely noted that "The Trial Chamber agrees that all the factors submitted by the Prosecution are aggravating factors". However, in view of the Trial Chamber's express acknowledgement that double counting is impermissible, it must be accepted that the Trial Chamber did not take any of the matters listed in paragraph 55 of the Sentencing Judgement into account as aggravating factors if it had already taken them into account in paragraph 45 of the Sentencing Judgement in determining the gravity of the crimes. In paragraphs 55-57 of the Sentencing Judgement, the Trial Chamber goes on to specify the particular matters that it took into account as aggravating factors, namely Brima's position as overall commander of the troops (in relation to the crimes for which he is responsible under Article 6(1) of the Statute), the use by Brima of tactics of extreme coercion to force his subordinates to engage in criminal conduct, Brima's zealous participation in some of the crimes, the prolonged period of time over which the enslavement crimes were committed, the vulnerability of the victims and the targeting of places of worship or sanctuary. The Trial Chamber did not refer to any of these matters specifically in paragraph 45 of the Sentencing Judgement when considering the gravity of the crimes. The only one of the factors mentioned in the part of the Sentencing Judgement dealing with aggravating factors (paragraph 57) that was also specifically mentioned in paragraph 45 of the Sentencing Judgement is the vulnerability of victims. However, when the references to the vulnerability of victims in paragraphs 45 and 57 of the Sentencing Judgement respectively are read in context, it is submitted that the former refers to the victims of sexual crimes and the latter refers to the victims of enslavement crimes. It is therefore submitted that the argument concerning double counting should be rejected.

8.26 Paragraph 197 of the Brima Appeal Brief argues that the Trial Chamber gave insufficient weight to rehabilitation and reconciliation as sentencing purposes. In relation to rehabilitation, the Trial Chamber said that "International criminal

tribunals have noted that unlike the case in domestic courts, rehabilitation cannot be considered as a predominant consideration in determining a sentence, as the sentencing aims of national jurisdictions are different from the aims of international criminal tribunals".[427] The Prosecution submits that this is correct in law, and that Brima has not established that the Trial Chamber erred in failing to give this factor more weight. In relation to reconciliation, the Prosecution refers to the submissions in paragraphs 7.7to 7.21 above.

8.27 Paragraphs 194 and 198-204 of the Brima Appeal Brief argue that the sentence imposed in this case was excessive compared with sentences imposed at the ICTY and ICTR. For the reasons given in paragraphs 8.1 to 8.7 above, the Prosecution submits that comparisons with sentences imposed by the ICTR and ICTY are of limited value. Nevertheless, the Prosecution makes the following observations in relation to the practice regarding prison sentences in the ICTR.

8.28 Paragraph 199 of the Brima Appeal Brief argues that "In ICTR a long term of imprisonment is equated to 30 years and not 50 years". The Prosecution submits that this is not correct. In many cases at the ICTR, the Accused have been sentenced to life imprisonment.[428] While the Special Court does not have the power to impose a sentence of life imprisonment, this does not mean that in drawing comparisons with sentences imposed at the ICTR, regard can only be had to those cases where life imprisonment was not imposed. At the ICTY also, for instance, in the *Galić* case, a sentence of 20 years' imprisonment was increased by the Appeals Chamber on appeal to life imprisonment.

8.29 In paragraphs 202 to 204 of the Brima Appeal Brief, Brima argues that the sentence imposed by Trial Chamber in this case was considerably longer than the sentence imposed in the *Akayesu* case before the ICTR, and the *Krajisnik* and *Martinovic* cases before the ICTY.

8.30 The limited utility of comparisons with sentences imposed by the ICTR and ICTY has already been noted. For such comparisons to be meaningful, it would be necessary to draw a comparison with an accused before the ICTR or ICTY

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[427] **Sentencing Judgement**, para. 17, referring to ***Deronjić* Appeal Judgement**, paras 136-137.
[428] See Annex A to the **Prosecution Sentencing Brief**

who had been convicted of the same combination of crimes of the same gravity, whose role in the commission in those crimes was similar, who had similar aggravating and mitigating circumstances, and whose personal and other circumstances were also similar. The Brima Appeal Brief does not attempt to show that the comparisons that it draws are in any way relevant comparisons.

8.31 While relatively low sentences have been imposed in the ICTY and ICTR in some cases, it is necessary to consider the precise role of the accused on whom the sentence was imposed. To give an example from the ICTY, Dragan Jokić was convicted of murder, extermination and persecutions for his role in the Srebrenica massacre, and was sentenced to nine years' imprisonment only. However, he was convicted under Article 7(1) of the ICTY Statute (= Special Court Statute, Article 6(1)) only, for having played a limited role as an aider and abetter, and he personally took no active part in the massacre. His role consisted essentially of deploying earth moving equipment of an engineering brigade of the army for the purposes of digging mass graves.[429] Such a case bears no similarities to the circumstances of the present case.

8.32 This can be contrasted for instance with the case of Stanislav Galić, whose sentence of 20 years' imprisonment was increased by the Appeals Chamber of the ICTY to life imprisonment. He was found guilty of crimes committed during the siege of Sarajevo which terrorised the entire population of that city over a protracted period.[430]

8.33 The case of Goran Jelisić provides another contrast. He pleaded guilty to plunder, cruel treatment of four victims and the murder of 13 victims and was sentenced to 40 years' imprisonment. He only pleaded not guilty to genocide and the genocide charge was dismissed at the Rule 98 stage.[431] That sentence was upheld on appeal.[432] Unlike the accused in the present case, he was not convicted on the basis of any command responsibility and unlike the accused in

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[429] ***Blagojević and Jokić*** **Appeal Judgement**, paras 196-199.
[430] ***Galić*** **Appeal Judgement**, especially paras 448-450, 454-456, Disposition.
[431] ***Jelisić*** **Trial Judgement**, especially paras 4 -17, 138-139.
[432] ***Jelisić*** **Appeal Judgement**, especially paras 1-5, Disposition.

this case he pleaded guilty. But for these factors it can be expected that the sentence in the Jelisić case would have been higher.

8.34 Neither of these examples provides particularly close analogies to the present case but they demonstrate the precedents from other international criminal tribunals do not indicate low sentences for crimes under international law.

8.35 In particular, the comparison made with the sentence imposed in the Krajisnik case is not an appropriate comparison, because that case is presently on appeal before the Appeals Chamber of the ICTY, and no final judgement has yet been given in that case.[433]

8.36 Paragraph 205 of the Brima Appeal Brief states that Brima "associates mutatis mutandi" with the submissions made in the Kamara Appeal Brief in relation to Kamara's Ninth to Twelfth Grounds of Appeal. These arguments are addressed in the Prosecution's response below to those grounds of appeal of Kamara in the relevant sections of this Response Brief.

8.37 This Brima's Twelfth Ground of Appeal should therefore be rejected.

(b) The sentence imposed on Kamara

(i) Alleged failure to consider mitigating circumstances

8.38 This section of this Response Brief responds to Kamara's Ninth Ground of Appeal.

8.39 In this ground of appeal, Kamara takes issue with the Trial Chamber's finding at paragraph 80 of the Sentencing Judgement "that nothing in Kamara's personal circumstances justifies any mitigation of his sentence", and at paragraph 91 of the Sentencing Judgement "that there are no mitigating circumstances in Kamara's case".

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[433] Compare ***Nikolić* Sentencing Appeal Judgement**, para. 51.

8.40 The gist of Kamara's argument is that the Trial Chamber is *required* under Article 19(2) of the Statute to consider mitigating factors in sentencing,[434] and that the Trial Chamber erred in law in failing to take mitigating circumstances into account.

8.41 However, it clearly cannot be the case that the Trial Chamber is bound to accept whatever submissions the Defence makes with regard to mitigating factors in sentencing, and to reduce the sentence that would otherwise be imposed accordingly. The Trial Chamber must, of course, give the Defence an opportunity to address it on the question of any mitigating circumstances that the Defence claims should be taken into account. After considering those submissions, the Trial Chamber is however entitled to make the finding of fact that the alleged mitigating circumstances have not been proved on the evidence. If it finds that alleged mitigating circumstances have been proved on the evidence, the Trial Chamber must then decide what weight if any to give these circumstances. It would be open to the Trial Chamber to conclude that although the alleged circumstances have been proved on the evidence, they are not, in fact, circumstances that warrant a mitigation of the sentence. Alternatively, if the Trial Chamber finds that the circumstances do warrant a mitigation of sentence, it is a matter for the Trial Chamber to determine in its discretion what weight to give these circumstances in the determination of the overall sentence.

8.42 The question whether the alleged mitigating circumstances have been proved to exist is a question of fact. It is established that the burden is on the Defence to prove the existence of any mitigating factors in accordance with a balance of probabilities standard.[435] Where a convicted person appeals against the Trial Chamber's findings in this respect, his burden on appeal is that applicable to an alleged error of fact, namely, he must prove that the finding of the Trial

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[434] See ***Kamara* Appeal Brief**, para. 238 (2nd para. numbered 238). In fact, it is not Article 19(2) of the Statute but Rule 101(B)(ii) of the Rules. Article 19(2) of the Statute provides only that "the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person".

[435] ***Naletilić* and *Martinović* Appeal Judgement**, para. 592; ***Blaskić* Appeal Judgement**, para. 697; ***Kajelijeli* Appeal Judgement**, para. 294; **Sentencing Judgement**, para. 9.

Chamber was one that was not open to any reasonable trier of fact on the evidence before it.

8.43 If the Trial Chamber finds that the alleged circumstances have been proved as a matter of fact, the question whether the circumstances warrant any mitigation of sentence, and if so, what weight they should be given, is a matter within the sentencing discretion of the Trial Chamber.[436] There is no requirement in law that particular circumstances must always be treated as mitigating by the Trial Chamber, or that the Trial Chamber must always accord them a particular weight. For instance, circumstances such as the youth of the convicted person, or the fact that the convicted person has dependants to support, might be accorded particular weight in the case of a low-level perpetrator of a single crime who was acting under the influence of others, but might be considered to warrant no mitigation in the case of a high level perpetrator who was the main instigator and prime mover of very grave crimes committed on a large scale.[437] Where a convicted person appeals against the Trial Chamber's findings as to the weight (if any) to be given to a particular factor as mitigating, his burden on appeal is that applicable to an alleged error in sentencing discretion, he must prove that the Trial Chamber has committed a "discernible error" in the exercise of its sentencing discretion, and thus has ventured outside its discretionary framework in imposing sentence.[438]

8.44 In Kamara's case, the Trial Chamber expressly considered the submissions that he made regarding his personal circumstances,[439] and regarding alleged mitigating circumstances.[440]

8.45 When the Trial Chamber found, at paragraph 80 of the Sentencing Judgement "that nothing in Kamara's personal circumstances justifies any mitigation of his sentence", the Trial Chamber did not thereby state that it had declined to consider the submissions made by Kamara with respect to his personal

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[436] ***Blaskić*** **Appeal Judgement**, para. 696; ***Kajelijeli*** **Appeal Judgement**, para. 294; ***Čelebići*** **Appeal Judgement**, paras. 777, 780; ***Jelisić*** **Appeal Judgement**, para. 122; ***Serushago*** **Appeal Judgement**, para. 23; ***Blagojević and Jokić*** **Trial Judgement**, para. 838; ***Strugar*** **Trial Judgement**, para. 465.

[437] Compare, for instance, ***Blagojević and Jokić*** **Trial Judgement**, para. 855.

[438] See paragraph 7.1-7.6 above; ***Jelisić*** **Appeal Judgement**, paras. 122, 126, 131.

[439] **Sentencing Judgement**, para. 79.

[440] **Sentencing Judgement**, para. 90.

circumstances. Rather, the Trial Chamber indicated that it had considered his submissions, and those of the Prosecution, and that having considered these submissions, it had found nothing in his personal circumstances that, in the circumstances of the case as a whole, would warrant any mitigation in sentence.

8.46 Similarly, when the Trial Chamber found at paragraph 91 of the Sentencing Judgement "that there are no mitigating circumstances in Kamara's case", the Trial Chamber similarly was expressing a conclusion that, having given due consideration to the submissions of the parties with respect to mitigating circumstances, it found that the circumstances invoked by Kamara, to the extent that they were accepted, did not warrant any mitigation of sentence.

8.47 Paragraph 238 of the Kamara Appeal brief complains that the Trial Chamber made these findings in a "cavalier manner". Paragraph 239 of the Kamara Appeal Brief argues that the Trial Chamber, by "summarily dismissing" the alleged mitigating factors, suggested that they were "not worth examining".

8.48 The Prosecution submits that it cannot be concluded from the brevity of the Trial Chamber's reasoning that it did not give full consideration to the submissions of the parties in respect of the individual circumstances of the Accused and in respect of mitigating factors. It is submitted that the conclusion of the Trial Chamber must be read in the context of the Sentencing Judgement as a whole. The Trial Chamber found in the Sentencing Judgement that "The crimes for which Kamara was convicted were heinous, deliberate, brutal and targeted very large number of unarmed civilians and had a catastrophic and irreversible impact on the lives of the victims and their families".[441] It found that "In relation to his criminal responsibility the Trial Chamber finds that the crimes committed by his subordinates were crimes of the most serious gravity and Kamara's failure to prevent or punish the commission of these crimes must be considered correspondingly grave".[442] It found that "The Trial Chamber is satisfied that the crimes committed by Kamara or by his subordinates affected a

[441] **Sentencing Judgement**, para. 72.
[442] **Sentencing Judgement**, para. 73.

very large number of victims".[443] It also found that there were significant aggravating circumstances in Kamara's case.[444] The Prosecution submits that it is clear from a reading of the Sentencing Judgement as a whole that the Trial Chamber considered that the crimes for which Kamara was convicted were so grave, and on such a large scale, that considerations such as his difficult early years, previous good service in the armed forces, alleged participation in activities to enhance peace and reconciliation in Sierra Leone, and responsibilities for dependants did not, in all of the circumstances of the case, warrant any mitigation of sentence.

8.49 The Prosecution submits that this was a conclusion that was reasonably open to the Trial Chamber. When the Trial Chamber's conclusion in respect of this issue is considered in the context of the Sentencing Judgement as a whole, and in the context of the submissions of the parties that the Trial Chamber took into account in reaching that conclusion, there is nothing "disturbing" or otherwise inadequate in the Trial Chamber's reasoning.[445] It is submitted that Kamara has not established that the Trial Chamber has committed a "discernible error" in the exercise of its sentencing discretion, and thus has ventured outside its discretionary framework in imposing sentence.

8.50 Paragraphs 239-242 of the Kamara Appeal Brief appear to raise a further complaint that the Trial Chamber somehow suggested that it would only consider mitigating factors that are directly related to the offence in question. Kamara submits that mitigating factors do not have to be directly related to the offence, and that unrelated matters such as co-operation with the Prosecutor, a guilty plea or expressions of remorse may also be taken into account.

8.51 The Prosecution submits that there is no basis for this Defence submission. The Trial Chamber nowhere suggested that it would only consider a factor as mitigating if it was directly related to the offence. The Trial Chamber expressly acknowledged, at paragraph 25 of the Sentencing Judgement, that mitigating factors could include such matters as (i) expression of remorse or a degree of

[443] **Sentencing Judgement**, para. 74.
[444] **Sentencing Judgement**, paras. 82-88.
[445] Compare ***Kamuhanda* Appeal Judgement**, para. 348.

acceptance of guilt; (ii) voluntary surrender; (iii) good character with no prior criminal convictions; (iv) personal and family circumstances; (v) the behaviour or conduct of the accused subsequent to the conflict; (vi) duress and indirect participation; (vii) diminished mental responsibility; (viii) the age of the accused; (ix) assistance to detainees or victims; and (x) in exceptional circumstances, poor health. Items (i), (ii), (iii), (iv), (v) and (x) in this list, at the very least, are matters totally unrelated to the offence in question. This Defence complaint must therefore be rejected.

8.52 Finally, in paragraph 242 of the Kamara Appeal Brief, it is argued that Kamara expressed remorse when he broke into tears and begged for leniency, and that the Trial Chamber erroneously stated in paragraph 91 of the Sentencing Judgement that Kamara failed to express any genuine remorse whatsoever for his crimes".

8.53 As to the claim of Kamara "breaking in tears", this is not reflected in the transcript. The Prosecution has reexamined the video recording of the sentencing hearing, and from this it is also apparent to the Prosecution that it is not the case that Kamara broke into tears. As to the claim of Kamara "begging for leniency", what Kamara actually said at the sentencing hearing was as follows:

> Your Honour, I thank you very much for the good work that you have done. Your Honour, I am just a young Sierra Leonean. I joined this army to fight for my people. I did not join the army to fight against my people.
>
> My Lord, I am not Charles Taylor or Johnny Paul Koroma or Foday Sankoh, for me to bear the greatest responsibility. I am just a sergeant in the army, My Lord, but I believe in the experience that you have, I rely on your experiences, My Lord. I know that you will be able to deliver justice, My Lord, and I stand for reconciliation, My Lord.
>
> And finally, My Lord, all those that suffered in this war, who lost their lives, I am sorry for them, My Lord. I thank you very much.[446]

8.54 In order to be taken into account as a mitigating factor in sentencing, the remorse expressed by an accused must be real and sincere.[447] The Prosecution

[446] Transcript, 16 July 2007, pp. 58-59.

submits that it was open to a reasonable trier of fact to conclude that this statement by Kamara was not a genuine expression of remorse. Indeed it would be appropriately construed as a denial that he was one of those bearing the greatest responsibility for the crimes in question. Begging for leniency at a sentencing hearing after conviction can in any event reasonably be characterised by a Trial Chamber as an expression of concern by an Accused for his or her own personal interests in receiving a lower sentence, rather than a genuine expression of remorse. Begging for leniency and expressing remorse are two different things.

8.55 Kamara's Ninth Ground of Appeal should therefore be rejected.

(ii) Alleged disproportionality of sentence

8.56 This section of this Response Brief responds to Kamara's Tenth Ground of Appeal.

8.57 In this ground of appeal, Kamara contends that the sentence imposed on him was in all of the circumstances of the case "excessive and disproportionate".

8.58 Paragraphs 244-245 of the Kamara Appeal Brief argue that the Special Court does not have the power to impose a sentence for the remainder of the convicted person's life, and that it therefore cannot impose a sentence for a fixed number of years that in practice would amount to a convicted person spending the remainder of his or her life in prison.

8.59 This argument has already been addressed by the Prosecution in paragraphs 8.8-8.10 above, and should be rejected for the reasons there given.

8.60 Paragraphs 246-251 of the Kamara Appeal Brief argue that the sentence imposed on Kamara was disproportionate when compared with sentences imposed by the ICTR, and gives examples of sentences imposed in three cases before the ICTR in order to seek to demonstrate this. This argument has already

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[447] ***Blaskić* Appeal Judgement**, para. 705.

been addressed by the Prosecution in paragraphs 8.1 to 8.7 and 8.27 to 8.28 above, and should be rejected for the reasons there given.

8.61 In particular, the *Serushago* case is clearly distinguishable given that Serushago pleaded guilty at his initial appearance to all counts (except the charge of rape as a crime against humanity which was subsequently withdrawn by the Prosecution).[448] Serushago had also surrendered voluntarily, and was found to have publicly expressed remorse.[449]

8.62 Kamara's Tenth Ground of Appeal should therefore be rejected.

(c) The sentence imposed on Kanu

(i) Alleged failure to consider "greatest responsibility"

8.63 This section of this Response Brief responds to Kanu's Ground Fourteen.

8.64 In this ground of appeal, Kanu argues that even if it is not a jurisdictional requirement under Article 1(1) of the Statute that the convicted person must be one of the "persons bearing the greatest responsibility", the Trial Chamber should take into account as a mitigating factor in sentencing that the Accused was not one of those bearing the greatest responsibility.

8.65 This argument should be rejected since it is necessarily implicit in the Trial Chamber's Judgement that the Trial Chamber found that Kanu was one of those bearing the greatest responsibility within the meaning of Article 1(1) of the Statute.[450] The Prosecution submits that this is indeed the case, for the reasons given in Section 2(b) of this Response Brief.

8.66 Furthermore, it is inherent in the Statute and the Rules that the Trial Chamber is called upon to impose a sentence that reflects the gravity of the offences and the overall culpability of the offender so that it is both just and appropriate.[451] If there are others who bear greater responsibility for crimes committed in the

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[448] ***Serushago* Appeal Judgement**, para. 2.
[449] *Ibid.*, para. 7.
[450] **Trial Chamber's Judgement**, paras. 655-659.
[451] See ***Čelebići* Appeal Judgement**, paras. 429-430, referred to in **Sentencing Judgement**, para. 12.

armed conflict in Sierra Leone, it is to be presumed that if convicted and sentenced by the Special Court, they would (all else being equal) have a higher sentence imposed. There is no basis in logic, principle or in the case law that would require the sentence that would otherwise be appropriate to be discounted on the basis that there are others who bear greater responsibility. The criminal culpability of a convicted person is not to be measured by a comparison with the alleged acts of other persons known and unknown to the Trial Chamber.[452]

8.67 As the Trial Chamber found in this case (correctly it is submitted), "The Trial Chamber considers that Kanu's position as third in command of the armed forces was not a lowly one. He was not a foot soldier nor was he subject to duress. The fact that there were two person's superior to him does not lessen his culpability for crimes committed and does not mitigate his sentence"[453]

8.68 Kanu's Ground Fourteen should therefore be rejected.

(ii) Alleged failure to consider mitigating circumstances

8.69 This section of this Response Brief responds to Kanu's Ground Eleven.

8.70 Kanu contends in this ground of appeal that the Trial Chamber failed to give sufficient weight to mitigating factors in this case.

8.71 Paragraphs 11.3 to 11.5 of the Kanu Appeal Brief contend that the sentence imposed on Kanu amounts in practice to a life sentence. In response, the Prosecution relies on the submissions in paragraphs 8.8 to 8.10 and 8.28above.

8.72 In relation to Kanu's general submission that the Trial Chamber did not give sufficient weight to mitigating circumstances, the Prosecution relies on the submissions in paragraphs 8.11 to 8.20 above. The Prosecution submits that the Trial Chamber in its Sentencing Judgment considered all of the mitigating factors raised by Kanu and determined the appropriate weight to be given to them based on the gravity of the crimes of which Kanu was convicted together with the aggravating factors and all other relevant considerations. Nearly all of

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[452] ***Tadić* Trial Judgement**, paras. 70-72. See also
[453] **Sentencing Judgement**, para 116

these grounds of mitigation were raised in both Kanu's sentencing brief[454] and during Kanu's oral sentencing arguments.[455] An appeal against sentence is not a *de novo* sentencing hearing, and Kanu cannot simply repeat his sentencing submissions on appeal. In this ground of appeal, Kanu has not pointed to any discernible error whether in the exercise of the Trial Chambers discretion nor in its application of the law.

8.73 In response to paragraphs 11.6 to 11.8 of the Kanu Appeal Brief (dealing with Kanu's allegedly low position), the Prosecution notes that the Trial Chamber expressly found that Kanu did not hold a lowly position.[456] The Trial Chamber found in the Trial Judgment Kanu held a senior command position during the Bombali campaign and was third in command during the Freetown invasion.

8.74 In response to paragraph 11.9 of the Kanu Appeal Brief (dealing with the length of the trial proceedings), it is noted that in *Brdjanin*, the Trial Chamber took into account as credit the length of the Accused's detention at the time of his sentencing but did not qualify it as a mitigating factor.[457] In *Nikolic-Dragan*, the Trial Chamber stated that "the problem (of time lapse) has been discussed by the European Court of Human Rights, as well as in decisions of several national courts. Common to all leading decisions is that any disproportionate length of procedures may be considered as a mitigating factor in sentencing. [458] It ruled however that neither the length of time between the criminal conduct (in the 90's) and the judgement (2003) nor the time between arrest (2000) and judgement can be considered as a mitigating factor.[459] In *Mrdja,* the ICTY found that a period of 12 years between the commission of the crimes and sentencing proceedings was not so long as to consider it a factor for mitigation.[460]

8.75 Kanu was arrested in respect of the crimes for which he has been convicted in 2003 and his trial was completed at the end of 2006. A length of less than 3

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[454] ***Kanu* Sentencing Brief**
[455] Kanu's Oral submission's on Sentencing, Transcript, 16th July 2007, p59 to 91
[456] See paragraph 8.68 above.
[457] ***Brđanin* Trial Judgement**, para. 1134.
[458] ***Nikolić* Trial Judgement**, paras 269-270.
[459] *Ibid*, para 271, 273.
[460] ***Mrđja* Sentencing Judgement**, para. 104.

years between arrest and judgement cannot be regarded as a mitigating factor according to the above jurisprudence. This Trial Chamber therefore committed no discernible error in giving no weight to this ground of Appeal.

8.76 In response to paragraph 11.10 of the Kanu Appeal Brief (dealing with Kanu's role of "protecting" women), it is noted that the Trial Chamber found at paragraph 2095 of the Trial Chamber's Judgment that Kanu was not a protector of women, but rather an exploiter of women.[461] The Trial Chamber was correct to dismiss this argument as being contrary to the Trial Chamber's findings.[462]

8.77 Even if protection of vulnerable individuals by an accused person – for example where he assisted some of the detainees, or alleviated their suffering[463], or saved lives[464] - may constitute mitigating factors, it has been held that: "selective assistance is 'less decisive when one notes that criminals frequently show compassion for some of their victims even when perpetrating the most heinous of crimes.'"[465] The jurisprudence on 'selective assistance' is consistent: little if any weight.[466] It is submitted that Kanu has established no discernible error on the part of the Trial Chamber in this respect.

8.78 In response to paragraph 11.11 to 11.12 of the Kanu Appeal Brief (dealing with Kanu's family situation), it is submitted that the case law establishes that family circumstances may not be given any significant weight in a case of gravity.[467] The Trial Chamber expressly considered Kanu's submissions in respect of his family background, but found "nothing in Kanu's family background that would

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[461] **Trial Chamber's Judgement**, para. 2095: "The Trial Chamber is satisfied that the Accused Kanu planned, organized and implemented the system to abduct and enslave civilians which was committed by AFRC troops in Bombali and Western Area. It is further satisfied that the Accused Kanu had the direct intent to establish and implement the system of exploitation involving the three enslavement crimes, namely, sexual slavery, conscription and use of children under the age of 15 for military purposes, and abductions and forced labour."

[462] **Sentencing Judgement**, para. 130.

[463] *Bralo* Trial Judgment, para. 59.

[464] *Česić* Trial Judgment, para. 78 (citing other cases). See also HRW Book pp. 661 and 662.

[465] *Kvočka* Appeal Judgement, para. 693.

[466] See jurisprudence on HRW Book, p. 663.

[467] *Obrenović* Trial Judgment, paras. 139-140; *Nicolic-Momir* Trial Judgment, paras 169-170 (and in both of these cases the Accused had entered a guilty plea unlike Kanu); see also *Akayesu* Sentencing Judgment, p. 6-7; *Bisengimana* Trial Judgement, para. 180; *Niyitegeka* Trial Judgement, paras 491 and 500; *Serushago* Appeal Judgment, para 22.

mitigate his sentence". Kanu has not established any discernible error in this finding.

8.79 In response to paragraph 11.13 to 11.17 of the Kanu Appeal Brief (dealing with Kanu's alleged good character), the Prosecution submits that Kanu's arguments in this respect were given appropriate consideration by the Trial Chamber.[468] The Trial Chamber did not consider Kanu's service in the Army without incident to be a mitigating factor as his was merely his duty.

8.80 The ICTY Appeals Chamber in *Čelebići* has said that evidence as to character of the accused has been considered in both mitigation and aggravation.[469] It has been suggested that the good background of an accused may aggravate more than mitigate, since for a person of good background to commit serious crimes "requires an even greater evil will on his part than that for lesser men".[470] For similar reasons, the professional education and background of an accused may be an aggravating factor.[471] It is submitted that it is only in exceptional circumstances that previous good character can be considered as a factor in mitigation.[472]

8.81 There are no findings in the Trial Chamber's Judgment that Kanu was of good character as alleged in paragraph 11.14 of the Kanu Appeal Brief. As noted above, the Trial Chamber found that he was not a protector of the weak and defenceless but the person responsible for victims of enslavement including women and children.

8.82 Furthermore, the Prosecution submits that Kanu did not give "loyal and faithful" service to the army. The Trial Chamber found at paragraph 508 of the Trial Chamber's Judgment that Kanu was one of the soldiers who was involved in the May 1997 coup, and who in return for his participation in the coup was rewarded with a position on the AFRC Supreme Council. This was an act of

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[468] **Sentencing Judgement**, paras. 133-134.
[469] ***Čelebići* Trial Judgement**, para. 788.
[470] ***Tadić* Sentencing Judgement**, para. 59.
[471] ***Brđanin* Trial Judgement**, para. 1114; ***Simić* Judgement**, paras. 1084, 1095, 1108.
[472] ***Galić* Appeal Judgment**, para. 51.

high treason rather than loyalty. Lack of previous criminal convictions cannot be a factor accorded any great weight in a case of gravity.[473]

8.83 It is therefore submitted that Kanu has not established any discernible error in the Sentencing Judgement in this respect.

8.84 In response to paragraph 11.18 to 11.25 of the Kanu Appeal Brief (dealing with Kanu's alleged expression of remorse), the Prosecution notes that the Trial Chamber found "that the statement made by Kanu at the sentencing hearing failed to express any remorse whatsoever for his crimes".[474] The text of a part of that statement is set out in paragraph 11.18 of the Kanu Appeal Brief. The Trial Chamber's finding that this was not a genuine expression of remorse was a finding of fact, and Kanu has not established that this was a finding of fact that was not open to any reasonable trier of fact. Indeed, when Kanu's statement is examined, it is submitted that it would be difficult for any reasonable trier of fact to categorise it as a genuine expression of remorse. Indeed, rather than showing remorse, Kanu's statement could be seen as more of a denial of his responsibility for the crimes that he committed, as he claimed that he was of a low rank and was forced to obey orders (thereby denying the express findings of the Trial Chamber that he held a superior command responsibility and played an active role in events), and claimed that "We did not know. In Sierra Leone everybody was angry".[475]

8.85 Contrary to what Kanu appears to suggest, there is no requirement that every expression of remorse made before a Trial Chamber at the end of the trial in connection with sentencing must lead to a mitigation of sentence. The question of whether a statement is a genuine expression of remorse is, apart from anything else, not just a question of the actual words spoken. It is a question that needs to be assessed by the Trial Chamber having regard to the demeanour of the accused at the sentencing hearing and throughout the trial, and having regard to the circumstances of the case as a whole. It is the Trial Chamber that is placed to make that assessment.

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[473] ***Furundžija* Trial Judgement**, para. 284, ***Jelisić* Trial Judgement**, para. 124.
[474] **Sentencing Judgement**, para. 139.
[475] See the statement as quoted in paragraph 11.18 of the ***Kanu* Appeal Brief**.

8.86 Kanu's Ground Eleven should therefore be rejected.

(iii) Alleged failure to consider the general chaos in Freetown

8.87 This section of this Response Brief responds to Kanu's Ground Fifteen.

8.88 Kanu submits that the Trial Chamber failed to have regard to the general chaos in Freetown as a mitigating factor.

8.89 In paragraph 15.1 of the Kanu Appeal Brief, it is argued that "such consideration generally constitutes a mitigating factor". The Prosecution submits that this is not correct. In the *Blaškić* case, the ICTY Appeals Chamber stated that:

> A finding that a chaotic context might be considered as a mitigating factor in circumstances of combat operations risks mitigating the criminal conduct of all personnel in a war zone. Conflict is by nature chaotic, and it is incumbent on the participants to reduce that chaos and to respect international humanitarian law. . . . the Appeals Chamber sees no merit nor logic in recognizing the mere context of war itself as a factor to be considered in the mitigation of the criminal conduct of its participants.[476]

8.90 Even if the chaos of war might be considered as providing some mitigation in the case of a very low level perpetrator such as a common foot soldier who is caught up in the "maelstrom of violence",[477] it cannot be regarded as a mitigating factor in the case of a high level perpetrator who was one of those primarily responsible for creating the chaos that existed. The Trial Chamber found that Kanu was a high level perpetrator, and "that despite the deterioration of the situation in Freetown following the loss of State House by the renegade SLA, Kanu maintained effective control over his troops, he was aware of the crimes committed by his troops, and he took no steps to prevent or punish the troops under his command for the crimes they committed".[478] The Prosecution submits that Kanu has established no discernible error in the Trial Chamber's

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[476] ***Blaškić* Appeal Judgement**, para 710-711, confirmed in ***Bralo* Sentencing Judgement**, para. 51 and ***Banović* Judgement**, paras. 44, 48. See also ***Kunarac* Appeal Judgement**, para. 408.

[477] Compare ***Erdemović* Sentencing Judgement**, 5 March 1998, paras. 13-16.

[478] **Sentencing Judgement**, para. 124.

finding that "[t]he battlefield is always chaotic and therefore this fact cannot be considered as mitigating".[479] Kanu's Ground Fifteen should therefore be rejected.

(iv) Alleged failure to consider post-conflict conduct

8.91 This section of this Response Brief responds to Kanu's Ground Sixteen.

8.92 In this ground of appeal, Kanu claims that the Trial Chamber erred in failing to take into account his conduct after the conflict as a mitigating factor.

8.93 The Kanu Appeal Brief cites a number of cases from the ICTY in which post-conflict conduct into account as a mitigating factor in sentencing. However, contrary to what the Kanu Appeal Brief appears to suggest, there is no requirement that a Trial Chamber *must* take post-conflict conduct into account as a mitigating factor. The ICTY Appeals Chamber has emphasised in this context that "Leaving such considerations to the Trial Chambers, the Appeals Chamber recognized that they are 'endowed with a considerable degree of discretion in deciding on the factors which may be taken into account'".[480]

8.94 The Trial Chamber considered all of the submissions that Kanu made in respect of his post-conflict conduct.[481] However, it ultimately concluded that "Kanu was a professional soldier whose duty it was to protect the people of Sierra Leone. The fact that he instead attacked innocent and unarmed civilians is considered by the Trial Chamber to be an aggravating factor."[482] The Prosecution submits that Kanu has not established any discernible error in the fact that the Trial Chamber declined to treat Kanu's alleged post conflict conduct as a mitigating factor.

8.95 In particular, the Prosecution submits that a Trial Chamber is not bound to treat post-conflict conduct as a mitigating factor where it is not a significant and

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[479] *Ibid.*

[480] ***Blagojević and Jokić*** **Appeal Judgement**, para. 328, referring to ***Babić*** **Sentencing Appeal Judgement**, para. 43, quoting *Čelebići* Appeal Judgement, para. 780.

[481] **Sentencing Judgement**, paras. 100-104.

[482] **Sentencing Judgement**, para. 106.

genuine contribution to the public good, as opposed to self-serving conduct. It is submitted that Kanu's post-conflict conduct cannot be compared, for instance, with that of Biljana Plavšić who was found to have been "instrumental in ensuring that the Dayton Agreement was accepted and implemented in Republika Srpska" and to have "made a considerable contribution to peace in the region".[483]

8.96 In the case of Kanu, there is little if any evidence under oath on record which points to any positive post-war conduct of Kanu. Kanu cannot in an appeal against sentence seek to place before the Appeals Chamber evidence of his post-conflict conduct which was not before the Trial Chamber. Kanu in fact does not provide any evidence in his Appeal Brief of such post-conflict conduct, but merely makes factual assertions about it in his appeal submissions. However, in order to determine whether there is a discernible error in the sentence imposed by the Trial Chamber, consideration must be confined to the evidence that was before the Trial Chamber.

8.97 Apart from the evidence of TF1-334 of Kanu collecting the children from the Westside as alluded to in paragraph 16.5 of the Kanu Appeal Brief, there is no evidence on record given under oath concerning any positive post-war conduct by Kanu. Even a careful reading of the evidence of TF1-334 which Kanu relies on reveals that he did not actually release or negotiate the release of any children, rather he collected the children from the Westside on the instructions of Johnny Paul Koroma.

8.98 In Paragraph 16.5 of the Kanu Appeal Brief, reference is made to Defence Witness C1. However, the Prosecution submits that the statement of this witness cannot be relied upon as this witness was not called at trial. The statement of this witness was not given under oath, was not subject to cross examination, and is not evidence in the case. The Prosecution submitted in the oral arguments that this witness's statement is also manifestly unreliable.[484] The Trial Chamber refused to allow the Prosecution to adduce new evidence

[483] ***Plavšić* Trial Judgement**, para. 94.
[484] Prosecution Oral submission, Transcript, 16 July 2007, pp. 41 to 42.

relevant to sentencing at the sentencing stage of the proceedings,[485] and by parity of reasoning, the statement of Witness C1 which Kanu annexed to his Sentencing Brief and sought to rely on in sentencing should also be regarded as excluded. It is noted also for instance that while Kanu asserts in paragraph 16.6 of the Kanu Appeal Brief that he and others were "commended by the UN Special Envoy Francis Okello", there is no evidence of this.

8.99 The contentions in paragraphs 16.7 and 16.8 of the Kanu Appeal Brief are similarly unsupported by any evidence on record and are bare assertions made by the Appellant. At the oral sentencing hearings in this case, the Prosecution made the submission that:

> All of the accused claim credit for their post-war conduct in trying to bring about peace through their work with the CCP [Commission for the Consolidation of Peace]. The Prosecution submits that none of the accused played a positive or constructive role in the search for peace. Instead, the activities of the accused was motivated by self-interest and they were striving to get themselves and Johnny Paul Koroma back into positions of power and influence.[486]
>
> So let us be absolutely clear about this. None of the accused played any positive role in the search for peace after the war. They were seeking revenge against the RUF who they perceived had betrayed them at the Lome agreement. The RUF had become part of the government; the AFRC had not. Their role was purely in seeking personal power and, on a balance of probabilities, it can be said that they made no positive contribution to peace.[487]

8.100 The submissions made by the Prosecution at the oral sentencing hearing in this respect are not repeated here in full but are found in the transcript.[488] The Prosecution referred to relevant paragraphs of the Report of the Truth and Reconciliation Commission (TRC).

8.101 The Prosecution does not request the Appeals Chamber to decide between the competing theories of the Prosecution and Kanu. The Prosecution submits merely that Kanu's alleged contribution to peace in Sierra Leone is not

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[485] **Sentencing Judgement**, paras. 6-8.
[486] Transcript, 16 July 2007, p. 36.
[487] Transcript, 16 July 2007, p. 39.
[488] See Transcript, 16 July 2007, pp. 36-39.

supported by any evidence in the case, and is contested by the Prosecution, and was contested by the Prosecution before the Trial Chamber.

8.102 The Prosecution further submits that paragraph 16.7 of the Kanu Appeal Brief is misleading. Footnotes 232 and 233 of the Kanu Appeal Brief refer to the alleged desire to bring peace that was expressed after Kanu had participated in the illegal overthrow of the democratically elected Government of Sierra Leone but *before* the crimes of which Kanu was convicted had been committed. These references are therefore not relevant in respect of post-conflict conduct.

8.103 As to the alleged role of Kanu in the "8 May incident", there is again no evidence on the record of any positive contribution made by Kanu. On the contrary, the TRC Report cited in the Prosecutions oral sentencing submissions suggests that Kanu, Brima , Kamara and other former AFRC combatants played a negative role in the restoration of genuine peace.

8.104 Kanu's Ground Sixteen should therefore be rejected.

(v) Alleged failure to consider lack of military training

8.105 This section of this Response Brief responds to Kanu's Ground Seventeen.

8.106 In this ground of appeal, Kanu contends that the Trial Chamber erred in failing to take his alleged lack of military training into account as a mitigating factor. Again, the Trial Chamber expressly considered and rejected Kanu's submissions in this respect.[489]

8.107 Kanu refers to two judgements of the ICTY and ICTR respectively, at the Trial Chamber level only, in which lack of military training was taken into account as a mitigating factor in sentencing. However, these cases do not establish that lack of military training *must* be taken into account in sentencing.

8.108 In the *Naletilić and Martinović* case, the ICTY Appeals Chamber rejected a submission by a convicted person that the Trial Chamber had "erred in holding that his command role is an aggravating factor in sentencing" and that the Trial

[489] **Sentencing Judgement**, paras. 125-126.

Chamber failed to appreciate that "he was not a commander either by rank or by military training but rather by virtue of the circumstances in which he found himself at the time of the conflicts which developed first with the Serbs and later with the Muslims".[490] The Appeals Chamber in that case found that the Trial Chamber "considered the scope of Martinovic's position of authority, including his background, experience, rank, the size of his unit, and his tasks" and that it was "irrelevant whether his position of authority had been recently acquired at the time of the offences, so long as he possessed the position and abused it".[491]

8.109 The Trial Chamber found that Kanu joined the Sierra Leonean army in December 1990, and he had thus had some six and a half years' military experience by the time of the May 1997 coup. The Prosecution submits that the crimes that the Trial Chamber found Kanu to be responsible for were so grave and heinous that no person, even a lay person with no military experience at all, could consider the conduct in question to be in any way legal. The Prosecution submits that the situation of Kanu is different from that of, for instance, Naser Orić, in respect of whom the ICTY Trial Chamber found that an "enormous burden that was cast upon him at the age of 25 while the situation in Srebrenica was desperate" and that he had cast on him enormous responsibilities and problems that are usually carried by seasoned military commanders.[492]

8.110 Furthermore, even if it could be suggested that Kanu lacked military training, and that lack of military training may be a mitigating factor, this could only be a mitigating factor if the lack of training was shown to be a contributing factor to the commission of the crimes in question. The Prosecution submits that on the findings of the Trial Chamber, and the evidence before the Trial Chamber, there is no link between any lack of military training of Kanu and his role in the crimes of which he was convicted. It is submitted that Kanu has not established any discernible error in the Trial Chamber's sentencing in this respect. Accordingly, Kanu's Ground Seventeen should be rejected.

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[490] ***Naletilić and Martinović*** **Appeal Judgement**, para. 608.
[491] *Ibid.*, para. 609.
[492] ***Orić*** **Trial Judgement**, para. 757.

(vi) Alleged failure to consider ignorance of the law

8.111 This section of this Response Brief responds to Kanu's Ground Eighteen.

8.112 In this ground of appeal, Kanu argues that even if his ignorance of the criminality of the recruitment and use of child soldiers does not afford a complete defence to this crime, this ignorance of the law should be taken into account as a mitigating factor in sentencing.

8.113 The Trial Chamber considered this argument of Kanu in the Sentencing Judgement,[493] but found that:

> The Trial Chamber found in the instant case that young children were forcibly kidnapped from their families, often drugged and forcibly trained to commit crimes against civilians. In those circumstances, the Trial Chamber cannot accept that Kanu did not know that that he was committing a crime in recruiting and using these children for military purposes.[494]

8.114 In the Trial Chamber's Judgement, it further held that:

> The Trial Chamber is of the view that the AFRC fighting faction used children as combatants because they were easy to manipulate and program, and resilient in battle. In the instant case, the evidence is conclusive that most, if not all, of the children in question were forcibly abducted from their families or legal guardians. In addition to having been kidnapped, child soldiers described having been forced into hard labour and military training, and sent into battle, often on the frontlines. They were also beaten; forced to watch the commission of crimes against family members; injected with narcotics to make them fearless; compelled to commit crimes including rape, murder, amputation and abduction; used as human shields; and threatened with death if they tried to escape or refused to obey orders.[495]

8.115 The Trial Chamber further found that "Kanu had the direct intent to establish and implement the system of exploitation involving the three enslavement

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[493] **Sentencing Judgement**, paras. 127-128.
[494] **Sentencing Judgement**, para. 127.
[495] **Trial Chamber's Judgement**, para. 1275.

crimes, namely, sexual slavery, conscription and use of children under the age of 15 for military purposes, and abductions and forced labour".[496]

8.116 In the circumstance, the Prosecution submits that Kanu has not established that there is any discernible error in the Trial Chamber's Judgement in failing to accept that his alleged ignorance of the recruitment and use of child soldiers should be regarded as a mitigating factor in sentencing. Kanu's Ground Eighteen should therefore be rejected.

(vii) Alleged failure to consider "hierarchy of relative criminality"

8.117 This section of this Response Brief responds to Kanu's Ground Nineteen.

8.118 Kanu argues in this ground of appeal that the sentence imposed on him did not reflect the relative culpability of the three accused in this case given their "relative roles and respective positions of authority in the AFRC". In particular, Kanu emphasises that of the three Accused in this case, he was the most junior, and that it is therefore a miscarriage of justice that he should bear one of the heaviest sentences.

8.119 The Prosecution submits that this ground of appeal raises a similar argument to Kanu's Ground Fourteen, and the Prosecution relies on its submissions in response to that latter ground.

8.120 The Trial Chamber considered Kanu's arguments in this respect,[497] and found that: "The Trial Chamber considers that Kanu's position as third in command of armed forces was not a lowly one. He was not a foot soldier nor was he subject to duress. The fact that there were two persons superior to him does not lessen his culpability for crimes committed and does not mitigate his sentence."[498]

8.121 There is no principle of law that where several accused are convicted in respect of the same events, that the more junior of the accused must receive a lower sentence than the more senior of the accused. To give just one example, in the

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[496] **Trial Chamber's Judgement**, para. 2095.
[497] **Sentencing Judgement**, para. 115.
[498] **Sentencing Judgement**, para. 116.

Čelebići case, following the conclusion of all appellate proceedings, the lowest ranking of the accused, Esad Landžo, who was a guard in the Čelebići camp, received a sentence of 15 years' imprisonment, while Zdravko Mucić, the commander of the camp, received a sentence of 9 years' imprisonment.[499]

8.122 As the Trial Chamber found (correctly it is submitted), "The governing criteria is that the final or aggregate sentence should reflect the totality of the culpable conduct, or generally, that it should reflect the gravity of the offences and the overall culpability of the offender, so that it is both just and appropriate".[500]

8.123 The overall culpability of one offender in comparison to another offender depends on the specific facts of the case, and not on the question of the relative positions of the two offenders in the hierarchy of authority. In this case, the sentence imposed on Kanu was based on Kanu's own individual criminal culpability, and the sentences imposed on Brima and Kamara was based on theirs.

8.124 The Kanu Appeal Brief refers to the Tadić case, in which the low level of the Accused was taken into account in sentencing. However, Duško Tadić was an offender who held no position of authority. This case, which is a relatively isolated case, does not establish that sentences should differ according to the position of an accused in the hierarchy of authority. Rather, it can be seen as a reflection of the principle that sentences should "reflect the gravity of the offences and the overall culpability of the offender". In this specific case, given Tadić's low position, on the specific facts of the case this was found to limit his overall culpability. Having said that, the 20 year sentence imposed on Tadić was higher than sentences that have been imposed on various much more senior figures in the conflict in the former Yugoslavia, reflecting the specific circumstances of his individual case. In the present case, the Trial Chamber expressly found that Kanu held a senior position in the AFRC. It also clearly held that Kanu's position was lower in the hierarchy to that of Brima and Kamara. In imposing what it considered to be the appropriate sentence, the

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[499] ***Mucić* Sentencing Judgement**, para. 44; affirmed on appeal ***Mucić* Judgement on Sentence Appeal**, para. 61.

[500] **Sentencing Judgement**, para. 12.

Trial Chamber clearly took this into account. It cannot be suggested that the Trial Chamber was obliged to discount what it otherwise considered to be the appropriate sentence for Kanu to ensure that it would be less than the sentence imposed on Brima, who was superior to him in the AFRC hierarchy.

8.125 In short, Kanu cannot establish that there was a discernible error in the sentences imposed by the Trial Chamber merely by pointing out that Brima and Kamara were more senior figures within the AFRC than he was. Kanu's Ground Nineteen should accordingly be rejected.

9. Conclusion

9.1 For all of the reasons given above, the Prosecution submits that all of the grounds of appeal raised by all of the Convicted Persons should be rejected.

Filed in Freetown,
4 October 2007
For the Prosecution,

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APPENDIX A

TABLE OF DEFENCE GROUNDS OF APPEAL AND PROSECUTION RESPONSE

DEFENCE GROUNDS OF APPEAL	PART OF THIS RESPONSE BRIEF CONTAINING THE PROSECUTION RESPONSE
Brima Appeal Brief	
First Ground of Appeal	Part 2(a)
Fourth Ground of Appeal	Part 5(a)(i) Part 5(b)(i)
Fifth Ground of Appeal	Part 6(a)
Sixth Ground of Appeal	Part 5(a)(iii) Part 5(b)(ii)
Ninth Ground of Appeal	Part 4(a)
Tenth Ground of Appeal	Part 4(b)
Eleventh Ground of Appeal	Part 4(b)
Twelfth Ground of Appeal	Part 8(a)

Kamara Appeal Brief	
First Ground of Appeal	Part 6(b)
Second Ground of Appeal	Part 6(d)
Third Ground of Appeal	Part 6(d)
Fourth Ground of Appeal	Part 6(d)
Fifth Ground of Appeal	Part 6 (c)(i) and (ii)
Sixth Ground of Appeal	Part 6 (c)(i) and (iii)
Seventh Ground of Appeal	Part 5(b)
Eighth Ground of Appeal	Part 4(b)
Ninth Ground of Appeal	Part 8(b)
Tenth Ground of Appeal	Part 8(b)(ii)
Eleventh Ground of Appeal	Part 7(a) Part 7(b)
Twelfth Ground of Appeal	Part 7(c)
Thirteenth Ground of Appeal	Part 7(c)

Kanu Appeal Brief	
Ground One	Part 2(b)
Ground Two	Part 2(c)(i)
Ground Three	Part 4(b)
Ground Four	Part 4(b)
Ground Five	Part 5(c)(i)
Ground Six	Part 5(c)(ii)
Ground Seven	Part 3(a)
Ground Eight	Part 3(b)
Ground Nine	Part 6(e)
Ground Ten	Part 2(c)(ii)
Ground Eleven	Part 8(c)(ii)
Ground Twelve	Part 7(b)
Ground Thirteen	Part 7(d)
Ground Fourteen	Part 8 (c)(i)

Ground Fifteen	Part 8 (c)(iii)
Ground Sixteen	Part 8(c)(iv)
Ground Seventeen	Part 8(c)(v)
Ground Eighteen	Part 8(c)(vi)
Ground Nineteen	Part 8(c)(vii)

APPENDIX B

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

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
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)
Order to file Supplemental Pre-Trial Brief.	*Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-50, Order to the Prosecution to File a Supplemental Pre-Trial Brief and Revised Order for Filing of Defence Pre-Trial Briefs, 1 April 2004. Order to file Supplemental Pre-Trial Brief
Rebuttal Decision	*Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-582, Decision on Confidential Motion to Call Evidence in Rebuttal, 14 November 2006 . Rebuttal Decision
Kanu-Decision on Motions for Exclusion of Prosecution Witness Statements	*Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-101, Kanu-Decision on Motions for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Statements, 30 July 2004.
***Kanu*-Additional Motion for Exclusion of Prosecution**	*Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-36, *Kanu*-Additional Motion for Exclusion of Prosecution

Witness Statements	Witness Statements and Stay on Filing of Prosecution Witness Statement Pursuant to Rule 5 and 66 (A)(i), 19 March 2004.
	(ii) Other documents
***Brima* Appeal Brief**	Prosecutor v. *Brima, Kamara, Kanu*, SCSL-16A-650, "Brima Final Appeal Brief, 13 September 2007
***Kamara* Appeal Brief**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16A-649, "Kamara Appeal Brief", 13 September 2007
***Kanu* Appeal Brief**	*Prosecutor v. Brima, Kamara, Kanu,* SCSL-16A-647, "Kanu's Submissions to Grounds of Appeal", 13 September 2007
Prosecution Appeal Brief	Prosecutor v. *Brima, Kamara, Kanu*, SCSL-16A-648, "Appeal Brief of the Prosecution", 13 September 2007
Prosecution Final Trial Brief	Prosecutor v. *Brima, Kamara, Kanu*, SCSL-16-601, "Public Prosecution Final Brief, 1 December 2006
Motion for Exclusion of Prosecution Witness Statements.	*Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-40, Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statement Pursuant to Rule 5 and 66 (A)(i), 23 March 2004 Motion for Exclusion of Prosecution Witness Statements.
Motion for Exclusion of Prosecution Witness Statements and Stay on Filing	*Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-34, Kanu-Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statement Pursuant to Rule 5 and 66 (A)(i), 18 March 2004.

2. Other SCSL Case Law and Documents

***CDF* Subpoena Appeal Decision**	*Prosecutor v. Norman, Moinina Fofana and Allieu Kondewa,* SCSL-2004-14-688, "Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone" Appeals Chamber, 11 September 2006
***Fofana* Preliminary Motion Decision**	Prosecutor v. *Norman et al.*, SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, Trial Chamber, 3 March 2004,

***Taylor* Joint Decision on Adequate Facilities and Time**	Prosecutor v. Taylor, SCSL-01-164 Joint Decision on Defence Motions on Adequate Facilities and Adequate Time For the Preparation of Mr Taylor's Defence, 23 January 2007 Taylor Joint Decision on Adequate Facilities and Time.

3. ICTY Case Law and Documents

***Aleksovski* Appeal Judgement**	*Prosecutor v. Aleksovski*, IT-95-14/1-A, "Judgement", Appeals Chamber, 24 March 2000 http://www.un.org/icty/aleksovski/appeal/judgement/index.htm
***Aleksovski* Admissibility of Evidence Decision**	*Prosecutor v. Aleksovski*, IT-95-14/1, "Decision on Prosecutor's Appeal on Admissibility of Evidence", 16 February 1999 http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV36313.htm
***Blagojević and Jokić* Trial Judgement**	*Prosecutor v Blagojević and Jokić,* IT-02-60-T, "Judgement", 17 January 2005 http://www.un.org/icty/blagojevic/trialc/judgement/index.htm
***Blagogević* Reasons for Decision**	*Prosecutor v. Blagogević et al.* , IT-02-60-AR73.4, "Public and Redacted Reasons for Decision on Appeal by Vidoje Blagogević to Replace his Defence Team", 7 November 2003 http://www.un.org/icty/blagojevic/appeal/decision-e/031107.pdf
***Blaškić* Appeal Judgement**	*Prosecutor v. Blaškić,* IT-95-14-A, "Judgement", Appeals Chamber, 29 July 2004 http://www.un.org/icty/blaskic/appeal/judgement/index.htm
***Blaškić* Appeal Judgement – Partial Dissenting Opinion of Judge Weinberg de Roca**	*Prosecutor v. Blaškić,* IT-95-14-A, "Judgement", Appeals Chamber, 29 July 2004 http://www.un.org/icty/blaskic/appeal/judgement/index.htm
***Blaškić* Trial Judgement**	*Prosecutor v. Blaškić*, IT-95-14-T, "Judgement", Trial Chamber, 3 March 2000 http://www.un.org/icty/blaskic/trialc1/judgement/index.htm
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***Čelebići* Appeal Judgement**	*Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001 http://www.un.org/icty/celebici/appeal/judgement/index.htm
***Čelebići* Sentencing Appeal Judgement**	*Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-*Abis*, "Judgment on Sentence Appeal", Appeals Chamber, 8 April 2003 http://www.un.org/icty/celebici/appeal/judgement2/index.htm
***Čelebići* Trial Judgement**	*Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-T, "Judgement", Trial Chamber, 16 November 1998 http://www.un.org/icty/celebici/trialc2/judgement/index.htm
***Esad Landžo's* Motion**	*Prosecutor v. Delalić et al.*, IT-96-21-A, "Esad Landžo's Motion for Expedited Consideration", 15 September 1999 http://www.un.org/icty/celebici/appeal/order-e/90915MS39433.htm
***Deronjić* Appeal Judgement**	*Prosecutor v. Deronjic*, IT-02-61-A, "Judgement on Sentencing Appeal", Appeals Chamber, 20 July 2005 http://www.un.org/icty/brdjanin/trialc/decision-e/10626FI215879.htm
***Erdemović* Appeal Judgement - Separate Opinion of Judge MacDonald and Judge Vohrah**	*Prosecutor v. Erdemović*, IT-96-22, "Judgement" "Joint Separate Opinion of Judge MacDonald and Judge Vohrah", Appeals Chamber, 7 October 1997 http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojmcd971007e.htm
***Erdemović* Appeal Judgement - Separate and Dissenting Opinion of Judge Cassese**	Prosecutor v *Erdemovic*, IT-96-22, "Judgement" "Separate and Dissenting Opinion of Judge Cassese", Appeals Chamber, 7 October 1997 http://www.un.org/icty/erdemovic/appeal/judgement/erd-adojcas971007e.htm
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***Furundžija* Appeal Judgement**	*Prosecutor v. Furundžija*, IT-95-17/1, "Judgement", Appeals Chamber, 21 July 2000 http://www.un.org/icty/furundzija/appeal/judgement/index.htm

***Galić* Appeal Judgement**	*Prosecutor v. Galić,* IT-98-29-A, "Judgement", Appeals Chamber, 30 November 2006 http://www.un.org/icty/galic/judgment/gal-acj061130e.pdf
***Galić* Trial Judgement**	*Prosecutor v. Galić,* IT-98-29-T, "Judgement and Opinion", Trial Chamber, 5 December 2003 http://www.un.org/icty/galic/trialc/judgement/index.htm
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***Krnojelac* Appeal Judgment**	*Prosecutor v. Krnojelac*, IT-97-25-A, "Judgement", Appeals Chamber, 17 September 2003 http://www.un.org/icty/krnojelac/appeal/judgement/index.htm

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***Milošević* Reasons for Decision**	*Prosecutor v. Milosević*, IT-01-51-AR73, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder", 18 April 2002 http://www.un.org/icty/milosevic/appeal/decision-e/020418.htm
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APPENDIX C

Hard Copies of Authorities served pursuant to the SCSL Practice Direction on Filing of Documents

1574

UNITED NATIONS SECURITY COUNCIL

REPORT OF THE

SECRETARY-GENERAL ON THE

ESTABLISHMENT OF A SPECIAL COURT FOR

SIERRA LEONE

1575

United Nations S/2000/915

Security Council

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Report of the Secretary-General on the establishment of a Special Court for Sierra Leone

I. Introduction

1. The Security Council, by its resolution 1315 (2000) of 14 August 2000, requested me to negotiate an agreement with the Government of Sierra Leone to create an independent special court (hereinafter "the Special Court") to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.

2. The Security Council further requested that I submit a report on the implementation of the resolution, in particular on my consultations and negotiations with the Government of Sierra Leone concerning the establishment of the Special Court. In the report I was requested, in particular, to address the questions of the temporal jurisdiction of the Court; an appeals process, including the advisability, feasibility and appropriateness of an appeals chamber in the Special Court, or of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda; and a possible alternative host State, should it be necessary to convene the Special Court outside the seat of the Court in Sierra Leone, if circumstances so require.

3. Specific recommendations were also requested by the Security Council on the following issues:

(a) Any additional agreements that might be required for the provision of the international assistance necessary for the establishment and functioning of the Special Court;

(b) The level of participation, support and technical assistance of qualified persons required from Member States, including, in particular, States members of the Economic Community of West African States (ECOWAS) and the Commonwealth, and from the United Nations Mission in Sierra Leone (UNAMSIL) that would be necessary for the efficient, independent and impartial functioning of the Special Court;

(c) The amount of voluntary contributions of funds, equipment and services, including expert personnel from States, intergovernmental organizations and non-governmental organizations;

(d) Whether the Special Court could receive, as necessary and feasible, expertise and advice from the International Tribunals for the Former Yugoslavia and for Rwanda.

4. The present report, submitted in response to the above requests, is in two parts. The first part (chaps. II-VI) examines and analyses the nature and specificity of the Special Court, its jurisdiction (subject-matter, temporal and personal), the organizational structure (the Chambers and the nature of the appeals process, the offices of the Prosecutor and the Registry), enforcement of sentences in third States and the choice of the alternative seat. The second part (chaps. VII and VIII) deals with the practical implementation of the resolution on the establishment of the Special Court. It describes the requirements of the Court in terms of personnel, equipment, services and funds that would be required of States, intergovernmental and non-governmental organizations, the type of advice and expertise that may be expected from the two International Tribunals, and the logistical support and

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security requirements for premises and personnel that could, under an appropriate mandate, be provided by UNAMSIL. The Court's requirements in all of these respects have been placed within the specific context of Sierra Leone, and represent the minimum necessary, in the words of resolution 1315 (2000), "for the efficient, independent and impartial functioning of the Special Court". An assessment of the viability and sustainability of the financial mechanism envisaged, together with an alternative solution for the consideration of the Security Council, concludes the second part of the report.

5. The negotiations with the Government of Sierra Leone, represented by the Attorney General and the Minister of Justice, were conducted in two stages. The first stage of the negotiations, held at United Nations Headquarters from 12 to 14 September 2000, focused on the legal framework and constitutive instruments establishing the Special Court: the Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Special Court which is an integral part thereof. (For the texts of the Agreement and the Statute, see the annex to the present report.)

6. Following the Attorney General's visit to Headquarters, a small United Nations team led by Ralph Zacklin, Assistant Secretary-General for Legal Affairs, visited Freetown from 18 to 20 September 2000. Mr. Zacklin was accompanied by Daphna Shraga, Senior Legal Officer, Office of the Legal Counsel, Office of Legal Affairs; Gerald Ganz, Security Coordination Officer, Office of the United Nations Security Coordinator; and Robert Kirkwood, Chief, Buildings Management, International Tribunal for the Former Yugoslavia. During its three-day visit, the team concluded the negotiations on the remaining legal issues, assessed the adequacy of possible premises for the seat of the Special Court, their operational state and security conditions, and had substantive discussions on all aspects of the Special Court with the President of Sierra Leone, senior government officials, members of the judiciary and the legal profession, the Ombudsman, members of civil society, national and international non-governmental organizations and institutions involved in child-care programmes and rehabilitation of child ex-combatants, as well as with senior officials of UNAMSIL.

7. In its many meetings with Sierra Leoneans of all segments of society, the team was made aware of the high level of expectations created in anticipation of the establishment of a special court. If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities. The purpose of such a campaign would be both to inform and to reassure the population that while a credible Special Court cannot be established overnight, everything possible will be done to expedite its functioning; that while the number of persons prosecuted before the Special Court will be limited, it would not be selective or otherwise discriminatory; and that although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded first and foremost as victims. For a nation which has attested to atrocities that only few societies have witnessed, it will require a great deal of persuasion to convince it that the exclusion of the death penalty and its replacement by imprisonment is not an "acquittal" of the accused, but an imposition of a more humane punishment. In this public information campaign, UNAMSIL, alongside the Government and non-governmental organizations, could play an important role.

8. Since the present report is limited to an analysis of the legal framework and the practical operation of the Special Court, it does not address in detail specifics of the relationship between the Special Court and the national courts in Sierra Leone, or between the Court and the National Truth and Reconciliation Commission. It is envisaged, however, that upon the establishment of the Special Court and the appointment of its Prosecutor, arrangements regarding cooperation, assistance and sharing of information between the respective courts would be concluded and the status of detainees awaiting trial would be urgently reviewed. In a similar vein, relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.

II. Nature and specificity of the Special Court

9. The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements. Its applicable law includes international as well as Sierra Leonean law, and it is composed of both international and Sierra Leonean judges,[1] prosecutors and administrative support staff.[2] As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) which would be automatically applicable to its non-judicial, administrative and financial activities. In the absence of such a framework, it would be necessary to identify rules for various purposes, such as recruitment, staff administration, procurement, etc., to be applied as the need arose.[3]

10. The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. Consequently, it has the power to request at any stage of the proceedings that any national Sierra Leonean court defer to its jurisdiction (article 8, para. 2 of the Statute). The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.

11. Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific. Many of the legal choices made are intended to address the specificities of the Sierra Leonean conflict, the brutality of the crimes committed and the young age of those presumed responsible. The moral dilemma that some of these choices represent has not been lost upon those who negotiated its constitutive instruments.

III. Competence of the Special Court

A. Subject-matter jurisdiction

12. The subject-matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonean law. It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages. In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.

1. Crimes under international law

13. In its resolution 1315 (2000), the Security Council recommended that the subject-matter jurisdiction of the Special Court should include crimes against humanity, war crimes and other serious violations of international humanitarian law. Because of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such, the Security Council did not include the crime of genocide in its recommendation, nor was it considered appropriate by the Secretary-General to include it in the list of international crimes falling within the jurisdiction of the Court.

14. The list of crimes against humanity follows the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on article 6 of the Nürnberg Charter. Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused. Under the Statute of the International Criminal Court (ICC), though it is not yet in force, they are recognized as war crimes.

15. Other serious violations of international humanitarian law falling within the jurisdiction of the Court include:

(a) Attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities;

(b) Attacks against peacekeeping personnel involved in a humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict; and

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

16. The prohibition on attacks against civilians is based on the most fundamental distinction drawn in international humanitarian law between the civilian and the military and the absolute prohibition on directing attacks against the former. Its customary international law nature is, therefore, firmly established. Attacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime. Although established for the first time as an international crime in the Statute of the International Criminal Court, it was not viewed at the time of the adoption of the Rome Statute as adding to the already existing customary international law crime of attacks against civilians and persons hors de combat. Based on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection. The specification of the crime of attacks against peacekeepers, however, does not imply a more serious crime than attacks against civilians in similar circumstances and should not entail, therefore, a heavier penalty.

17. The prohibition on the recruitment of children below the age of 15, a fundamental element of the protection of children, was for the first time established in the 1977 Additional Protocol II to the Geneva Conventions, article 4, paragraph 3 (c), of which provides that children shall be provided with the care and aid they require, and that in particular:

> "Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".

A decade later, the prohibition on the recruitment of children below 15 into armed forces was established in article 38, paragraph 3, of the 1989 Convention on the Rights of the Child; and in 1998, the Statute of the International Criminal Court criminalized the prohibition and qualified it as a war crime. But while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.

18. Owing to the doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or "voluntary", the crime which is included in article 4 (c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as "conscripting" or "enlisting" connotes an administrative act of putting one's name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; (b) forced recruitment in the most general sense — administrative formalities, obviously, notwithstanding; and (c) transformation of the child into, and its use as, among other degrading uses, a "child-combatant".

2. Crimes under Sierra Leonean law

19. The Security Council recommended that the subject-matter jurisdiction of the Special Court should also include crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law. The crimes considered to be relevant for this purpose and included in the Statute are: offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offences relating to the wanton destruction of property, and in particular arson, under the 1861 Malicious Damage Act.

20. The applicability of two systems of law implies that the elements of the crimes are governed by the respective international or national law, and that the Rules of Evidence differ according to the nature of the crime as a common or international crime. In that connection, article 14 of the Statute provides that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable mutatis mutandis to proceedings before the Special Court, and that the judges shall have the power to amend or adopt additional rules, where a specific situation is not provided for. In so doing, they may be guided, as appropriate, by the 1965 Criminal Procedure Act of Sierra Leone.

B. Temporal jurisdiction of the Special Court

21. In addressing the question of the temporal jurisdiction of the Special Court as requested by the Security Council, a determination of the validity of the sweeping amnesty granted under the Lomé Peace Agreement of 7 July 1999 was first required. If valid, it would limit the temporal jurisdiction of the Court to offences committed after 7 July 1999; if invalid, it would make possible a determination of a beginning date of the temporal jurisdiction of the Court at any time in the pre-Lomé period.

1. The amnesty clause in the Lomé Peace Agreement

22. While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict,[4] the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

23. At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement ("absolute and free pardon") shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of resolution 1315 (2000).

24. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

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

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed.

2. Beginning date of the temporal jurisdiction

25. It is generally accepted that the decade-long civil war in Sierra Leone dates back to 1991, when on 23 March of that year forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party military rule of the All People's Congress (APC). In determining a beginning date of the temporal jurisdiction of the Special Court within the period since

23 March 1991, the Secretary-General has been guided by the following considerations: (a) the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded; (b) the beginning date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and (c) it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country. A temporal jurisdiction limited in any of these respects would rightly be perceived as a selective or discriminatory justice.

26. Imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court. The following alternative dates were therefore considered as realistic options:

(a) *30 November 1996* — the conclusion of the Abidjan Peace Agreement, the first comprehensive Peace Agreement between the Government of Sierra Leone and RUF. Soon after its signature the Peace Agreement had collapsed and large-scale hostilities had resumed;

(b) *25 May 1997* — the date of the coup d'état orchestrated by the Armed Forces Revolutionary Council (AFRC) against the Government that was democratically elected in early 1996. The period which ensued was characterized by serious violations of international humanitarian law, including, in particular, mass rape and abduction of women, forced recruitment of children and summary executions;

(c) *6 January 1999* — the date on which RUF/AFRC launched a military operation to take control of Freetown. The first three-week period of full control by these entities over Freetown marked the most intensified, systematic and widespread violations of human rights and international humanitarian law against the civilian population. During its retreat in February 1999, RUF abducted hundreds of young people, particularly young women used as forced labourers, fighting forces, human shields and sexual slaves.

27. In considering the three options for the beginning date of the temporal jurisdiction of the Court, the parties have concluded that the choice of 30 November 1996 would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court. It would also ensure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction. The choice of 25 May 1997 would have all these advantages, with the disadvantage of having a political connotation, implying, wrongly, that the prosecution of those responsible for the most serious violations of international humanitarian law is aimed at punishment for their participation in the coup d'état. The last option marks in many ways the peak of the campaign of systematic and widespread crimes against the civilian population, as experienced mostly by the inhabitants of Freetown. If the temporal jurisdiction of the Court were to be limited to that period only, it would exclude all crimes committed before that period in the rural areas and the countryside. In view of the perceived advantages of the first option and the disadvantages associated with the other options, the date of 30 November 1996 was selected as the beginning date of the temporal jurisdiction of the Special Court, a decision in which the government negotiators have actively concurred.

28. As the armed conflict in various parts of the territory of Sierra Leone is still ongoing, it was decided that the temporal jurisdiction of the Special Court should be left open-ended. The lifespan of the Special Court, however, as distinguished from its temporal jurisdiction, will be determined by a subsequent agreement between the parties upon the completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources. In setting an end to the operation of the Court, the Agreement would also determine all matters relating to enforcement of sentences, pardon or commutation, transfer of pending cases to the local courts and the disposition of the financial and other assets of the Special Court.

C. Personal jurisdiction

1. Persons "most responsible"

29. In its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those "who bear the greatest responsibility for the commission of the crimes", which is understood as an indication of a limitation on the number of accused by reference to

their command authority and the gravity and scale of the crime. I propose, however, that the more general term "persons most responsible" should be used.

30. While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.

31. Within the meaning attributed to it in the present Statute, the term "most responsible" would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of "Brigadier" was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.

2. Individual criminal responsibility at 15 years of age

32. The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.

33. The solution to this terrible dilemma with respect to the Special Court[5] could be found in a number of options: (a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility; (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.

34. The question of child prosecution was discussed at length with the Government of Sierra Leone both in New York and in Freetown. It was raised with all the interlocutors of the United Nations team: the members of the judiciary, members of the legal profession and the Ombudsman, and was vigorously debated with members of civil society, non-governmental organizations and institutions actively engaged in child-care and rehabilitation programmes.

35. The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objection to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved. While the extent to which this view represents the majority view of the people of Sierra Leone is debatable, it nevertheless underscores the importance of the child rehabilitation programme and the need to ensure that in the prosecution of children presumed responsible, the rehabilitation process of scores of other children is not endangered.

36. Given these highly diverging opinions, it is not easy to strike a balance between the interests at stake. I am mindful of the Security Council's recommendation that only those who bear "the greatest responsibility" should be prosecuted. However, in view of the most horrific aspects of the child combatancy in Sierra Leone, the employment of this term would not necessarily exclude persons of young age from the jurisdiction of the Court. I therefore thought that it would be most prudent to demonstrate to the Security Council for its consideration how provisions on

prosecution of persons below the age of 18 — "children" within the definition of the Convention on the Rights of the Child — before an international jurisdiction could be formulated.[6] Therefore, in order to meet the concerns expressed by, in particular, those responsible for child care and rehabilitation programmes, article 15, paragraph 5, of the Statute contains the following provision:

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

37. Furthermore, the Statute of the Special Court, in article 7 and throughout the text, contains internationally recognized standards of juvenile justice and guarantees that juvenile offenders are treated in dignity and with a sense of worth. Accordingly, the overall composition of the judges should reflect their experiences in a variety of fields, including in juvenile justice (article 13, para. 1); the Office of the Prosecutor should be staffed with persons experienced in gender-related crimes and juvenile justice (article 15, para. 4). In a trial of a juvenile offender, the Special Court should, to the extent possible, order the immediate release of the accused, constitute a "Juvenile Chamber", order the separation of the trial of a juvenile from that of an adult, and provide all legal and other assistance and order protective measures to ensure the privacy of the juvenile. The penalty of imprisonment is excluded in the case of a juvenile offender, and a number of alternative options of correctional or educational nature are provided for instead.

38. Consequently, if the Council, also weighing in the moral-educational message to the present and next generation of children in Sierra Leone, comes to the conclusion that persons under the age of 18 should be eligible for prosecution, the statutory provisions elaborated will strike an appropriate balance between all conflicting interests and provide the necessary guarantees of juvenile justice. It should also be stressed that, ultimately, it will be for the Prosecutor to decide if, all things considered, action should be taken against a juvenile offender in any individual case.

IV. Organizational structure of the Special Court

39. Organizationally, the Special Court has been conceived as a self-contained entity, consisting of three organs: the Chambers (two Trial Chambers and an Appeals Chamber), the Prosecutor's Office and the Registry. In the establishment of ad hoc international tribunals or special courts operating as separate institutions, independently of the relevant national legal system, it has proved to be necessary to comprise within one and the same entity all three organs. Like the two International Tribunals, the Special Court for Sierra Leone is established outside the national court system, and the inclusion of the Appeals Chamber within the same Court was thus the obvious choice.

A. The Chambers

40. In its resolution 1315 (2000), the Security Council requested that the question of the advisability, feasibility and appropriateness of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda should be addressed. In analysing this option from the legal and practical viewpoints, I have concluded that the sharing of a single Appeals Chamber between jurisdictions as diverse as the two International Tribunals and the Special Court for Sierra Leone is legally unsound and practically not feasible, without incurring unacceptably high administrative and financial costs.

41. While in theory the establishment of an overarching Appeals Chamber as the ultimate judicial authority in matters of interpretation and application of international humanitarian law offers a guarantee of developing a coherent body of law, in practice, the same result may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals, without imposing on the shared Appeals Chamber the financial and administrative constraints of a formal institutional link. Article 20, paragraph 3, of the Statute accordingly provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the Yugoslav and the Rwanda Tribunals; article 14, paragraph 1, of the Statute provides that the Rules of Procedure and Evidence of the Rwanda Tribunal shall be applicable mutatis mutandis to the proceedings before the Special Court.

42. The sharing of one Appeals chamber between all three jurisdictions would strain the capacity of the already heavily burdened Appeals Chamber of the two Tribunals in ways which could either bring about the collapse of the appeals system as a whole, or delay beyond acceptable human rights standards the detention of accused pending the hearing of appeals from either or all jurisdictions. On the assumption that all judgements and sentencing decisions of the Trial Chambers of the Special Court will be appealed, as they have been in the cases of the two International Tribunals, and that the number of accused will be roughly the same as in each of the International Tribunals, the Appeals Chamber would be required to add to its current workload a gradual increase of approximately one third.

43. Faced with an exponential growth in the number of appeals lodged on judgements and interlocutory appeals in relation to an increasing number of accused and decisions rendered, the existing workload of the Appeals Chamber sitting in appeals from six Trial Chambers of the two ad hoc Tribunals is constantly growing. Based on current and anticipated growth in workload, existing trends[7] and the projected pace of three to six appeals on judgements every year, the Appeals Chamber has requested additional resources in funds and personnel. With the addition of two Trial Chambers of the Special Court, making a total of eight Trial Chambers for one Appeals Chamber, the burden on the Yugoslav and Rwanda Appeals Chamber would be untenable, and the Special Court would be deprived of an effective and viable appeals process.

44. The financial costs which would be entailed for the Appeals Chamber when sitting on appeals from the Special Court will have to be borne by the regular budget, regardless of the financial mechanism established for the Special Court itself. These financial costs would include also costs of translation into French, which is one of the working languages of the Appeals Chamber of the International Tribunals; the working language of the Special Court will be English.

45. In his letter to the Legal Counsel in response to the request for comments on the eventuality of sharing the Appeals Chamber of the two international Tribunals with the Special Court, the President of the International Tribunal for the Former Yugoslavia wrote:

> "With regard to paragraph 7 of Security Council resolution 1315 (2000), while the sharing of the Appeals Chamber of [the two International Tribunals] with that of the Special Court would bear the significant advantage of ensuring a better standardization of international humanitarian law, it appeared that the disadvantages of this option — excessive increase of the Appeals Chambers' workload, problems arising from the mixing of sources of law, problems caused by the increase in travelling by the judges of the Appeals Chambers and difficulties caused by mixing the different judges of the three tribunals — outweigh its benefits."[8]

46. For these reasons, the parties came to the conclusion that the Special Court should have two Trial Chambers, each with three judges, and an Appeals Chamber with five judges. Article 12, paragraph 4, provides for extra judges to sit on the bench in cases where protracted proceedings can be foreseen and it is necessary to make certain that the proceedings do not have to be discontinued in case one of the ordinary judges is unable to continue hearing the case.

B. The Prosecutor

47. An international prosecutor will be appointed by the Secretary-General to lead the investigations and prosecutions, with a Sierra Leonean Deputy. The appointment of an international prosecutor will guarantee that the Prosecutor is, and is seen to be, independent, objective and impartial.

C. The Registrar

48. The Registrar will service the Chambers and the Office of the Prosecutor and will have the responsibility for the financial management and external relations of the Court. The Registrar will be appointed by the Secretary-General as a staff member of the United Nations.

V. Enforcement of sentences

49. The possibility of serving prison sentences in third States is provided for in article 22 of the Statute. While imprisonment shall normally be served in Sierra Leone, particular circumstances, such as the security

risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory, may require their relocation to a third State.

50. Enforcement of sentences in third countries will be based on an agreement between the Special Court[9] and the State of enforcement. In seeking indications of the willingness of States to accept convicted persons, priority should be given to those which have already concluded similar agreements with either of the International Tribunals, as an indication that their prison facilities meet the minimum standards of conditions of detention. Although an agreement for the enforcement of sentences will be concluded between the Court and the State of enforcement, the wishes of the Government of Sierra Leone should be respected. In that connection, preference was expressed for such locations to be identified in an East African State.

VI. An alternative host country

51. In paragraph 7 of resolution 1315 (2000), the Security Council requested that the question of a possible alternative host State be addressed, should it be necessary to convene the Special Court outside its seat in Sierra Leone, if circumstances so required. As the efforts of the United Nations Secretariat, the Government of Sierra Leone and other interested Member States are currently focused on the establishment of the Special Court in Sierra Leone, it is proposed that the question of the alternative seat should be addressed in phases. An important element in proceeding with this issue is also the way in which the Security Council addresses the present report, that is, if a Chapter VII element is included.

52. In the first phase, criteria for the choice of the alternative seat should be determined and a range of potential host countries identified. An agreement, in principle, should be sought both from the Government of Sierra Leone for the transfer of the Special Court to the State of the alternative seat, and from the authorities of the latter, for the relocation of the seat to its territory.

53. In the second phase, a technical assessment team would be sent to identify adequate premises in the third State or States. Once identified, the three parties, namely, the United Nations, the Government of Sierra Leone and the Government of the alternative seat, would conclude a Framework Agreement, or "an agreement to agree" for the transfer of the seat when circumstances so required. The Agreement would stipulate the nature of the circumstances which would require the transfer of the seat and an undertaking to conclude in such an eventuality a Headquarters Agreement. Such a principled Agreement would facilitate the transfer of the seat on an emergency basis and enable the conclusion of a Headquarters Agreement soon thereafter.

54. In the choice of an alternative seat for the Special Court, the following considerations should be taken into account: the proximity to the place where the crimes were committed, and easy access to victims, witnesses and accused. Such proximity and easy access will greatly facilitate the work of the Prosecutor, who will continue to conduct his investigations in the territory of Sierra Leone.[10] During the negotiations, the Government expressed a preference for a West African alternative seat, in an English-speaking country sharing a common-law legal system.

VII. Practical arrangements for the operation of the Special Court

55. The Agreement and the Statute of the Special Court establish the legal and institutional framework of the Court and the mutual obligations of the parties with regard, in particular, to appointments to the Chambers, the Office of the Prosecutor and the Registry and, the provision of premises. However, the practical arrangements for the establishment and operation of the Special Court remain outside the scope of the Agreement in the sense that they depend on contributions of personnel, equipment, services and funds from Member States and intergovernmental and non-governmental organizations. It is somewhat anomalous, therefore, that the parties which establish the Special Court, in practice, are dependent for the implementation of their treaty obligations on States and international organizations which are not parties to the Agreement or otherwise bound by its provisions.

56. Proceeding from the premise that voluntary contributions would constitute the financial mechanism of the Special Court, the Security Council requested the Secretary-General to include in the report recommendations regarding the amount of voluntary contributions, as appropriate, of funds, equipment and services to the Special Court, contributions in

personnel, the kind of advice and expertise expected of the two ad hoc Tribunals, and the type of support and technical assistance to be provided by UNAMSIL. In considering the estimated requirements of the Special Court in all of these respects, it must be borne in mind that at the current stage, the Government of Sierra Leone is unable to contribute in any significant way to the operational costs of the Special Court, other than in the provision of premises, which would require substantial refurbishment, and the appointment of personnel, some of whom may not even be Sierra Leonean nationals. The requirements set out below should therefore be understood for all practical purposes as requirements that have to be met through contributions from sources other than the Government of Sierra Leone.

A. Estimated requirements of the Special Court for the first operational phase

1. Personnel and equipment

57. The personnel requirements of the Special Court for the initial operational phase[11] are estimated to include:

(a) Eight Trial Chamber judges (3 sitting judges and 1 alternate judge in each Chamber) and 6 Appeals Chamber judges (5 sitting judges and 1 alternate judge), 1 law clerk, 2 support staff for each Chamber and 1 security guard detailed to each judge (14);

(b) A Prosecutor and a Deputy Prosecutor, 20 investigators, 20 prosecutors and 26 support staff;

(c) A Registrar, a Deputy Registrar, 27 administrative support staff and 40 security officers;

(d) Four staff in the Victims and Witnesses Unit;

(e) One correction officer and 12 security officers in the detention facilities.

58. Based on the United Nations scale of salaries for a one-year period, the personnel requirements along with the corresponding equipment and vehicles are estimated on a very preliminary basis to be US$ 22 million. The calculation of the personnel requirements is premised on the assumption that all persons appointed (whether by the United Nations or the Government of Sierra Leone) will be paid from United Nations sources.

59. In seeking qualified personnel from States Members of the United Nations, the importance of obtaining such personnel from members of the Commonwealth, sharing the same language and common-law legal system, has been recognized. The Office of Legal Affairs has therefore approached the Commonwealth Secretariat with a request to identify possible candidates for the positions of judges, prosecutors, Registrar, investigators and administrative support staff. How many of the Commonwealth countries would be in a position to voluntarily contribute such personnel with their salaries and emoluments is an open question. A request similar to that which has been made to the Commonwealth will also be made to the Economic Community of West African States (ECOWAS).

2. Premises

60. The second most significant component of the requirements of the Court for the first operational phase is the cost of premises. During its visit to Freetown, the United Nations team visited a number of facilities and buildings which the Government believes may accommodate the Special Court and its detention facilities: the High Court of Sierra Leone, the Miatta Conference Centre and an adjacent hotel, the Presidential Lodge, the Central Prison (Pademba Road Prison), and the New England Prison. In evaluating their state of operation, the team concluded that none of the facilities offered were suitable or could be made operational without substantial investment. The use of the existing High Court would incur the least expenditure (estimated at $1.5 million); but would considerably disrupt the ordinary schedule of the Court and eventually bring it to a halt. Since it is located in central Freetown, the use of the High Court would pose, in addition, serious security risks. The use of the Conference Centre, the most secure site visited, would require large-scale renovation, estimated at $5.8 million. The Presidential Lodge was ruled out on security grounds.

61. In the light of the above, the team has considered the option of constructing a prefabricated, self-contained compound on government land. This option would have the advantage of an easy expansion paced with the growth of the Special Court, a salvage value at the completion of the activities of the Court, the prospect of a donation in kind and construction at no

rental costs. The estimated cost of this option is $2.9 million.

62. The two detention facilities visited by the team were found to be inadequate in their current state. The Central Prison (Pademba Road Prison) was ruled out for lack of space and security reasons. The New England Prison would be a possible option at an estimated renovation cost of $600,000.

63. The estimated cost requirements of personnel and premises set out in the present report cover the two most significant components of its prospective budget for the first operational stage. Not included in the present report are the general operational costs of the Special Court and of the detention facilities; costs of prosecutorial and investigative activities; conference services, including the employment of court translators from and into English, Krio and other tribal languages; and defence counsel, to name but a few.

B. Expertise and advice from the two International Tribunals

64. The kind of advice and expertise which the two International Tribunals may be expected to share with the Special Court for Sierra Leone could take the form of any or all of the following: consultations among judges of both jurisdictions on matters of mutual interest; training of prosecutors, investigators and administrative support staff of the Special Court in The Hague, Kigali and Arusha, and training of such personnel on the spot by a team of prosecutors, investigators and administrators from both Tribunals; advice on the requirements for a Court library and assistance in its establishment, and sharing of information, documents, judgements and other relevant legal material on a continuous basis.

65. Both International Tribunals have expressed willingness to share their experience in all of these respects with the Special Court. They have accordingly offered to convene regular meetings with the judges of the Special Court to assist in adopting and formulating Rules of Procedure based on experience acquired in the practice of both Tribunals; to train personnel of the Special Court in The Hague and Arusha to enable them to acquire practical knowledge of the operation of an international tribunal; and when necessary, to temporarily deploy experienced staff, including a librarian, to the Special Court. In addition, the International Tribunal for the Former Yugoslavia has offered to provide to the Special Court legal material in the form of CD-ROMs containing motions, decisions, judgements, court orders and the like. The transmission of such material to the Special Court in the period pending the establishment of a full-fledged library would be of great assistance.

C. Support and technical assistance from UNAMSIL

66. The support and technical assistance of UNAMSIL in providing security, logistics, administrative support and temporary accommodation would be necessary in the first operational phase of the Special Court. In the precarious security situation now prevailing in Sierra Leone and given the state of the national security forces, UNAMSIL represents the only credible force capable of providing adequate security to the personnel and the premises of the Special Court. The specificities of the security measures required would have to be elaborated by the United Nations, the Government of Sierra Leone and UNAMSIL, it being understood, however, that any such additional tasks entrusted to UNAMSIL would have to be approved by the Security Council and reflected in a revised mandate with a commensurate increase in financial, staff and other resources.

67. UNAMSIL's administrative support could be provided in the areas of finance, personnel and procurement. Utilizing the existing administrative support in UNAMSIL, including, when feasible, shared facilities and communication systems, would greatly facilitate the start-up phase of the Special Court and reduce the overall resource requirements. In that connection, limited space at the headquarters of UNAMSIL could be made available for the temporary accommodation of the Office of the Prosecutor, pending the establishment or refurbishment of a site for the duration of the Special Court.

VIII. Financial mechanism of the Special Court

68. In paragraph 8 (c) of resolution 1315 (2000), the Security Council requested the Secretary-General to include recommendations on "the amount of voluntary contributions, as appropriate, of funds, equipment and

services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations". It would thus seem that the intention of the Council is that a Special Court for Sierra Leone would be financed from voluntary contributions. Implicit in the Security Council resolution, therefore, given the paucity of resources available to the Government of Sierra Leone, was the intention that most if not all operational costs of the Special Court would be borne by States Members of the Organization in the form of voluntary contributions.

69. The experience gained in the operation of the two ad hoc International Tribunals provides an indication of the scope, costs and long-term duration of the judicial activities of an international jurisdiction of this kind. While the Special Court differs from the two Tribunals in its nature and legal status, the similarity in the kind of crimes committed, the temporal, territorial and personal scope of jurisdiction, the number of accused, the organizational structure of the Court and the Rules of Procedure and Evidence suggest a similar scope and duration of operation and a similar need for a viable and sustainable financial mechanism.

70. A financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment. The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability. In entering into contractual commitments which the Special Court and, vicariously, the Organization might not be able to honour, the United Nations would expose itself to unlimited third-party liability. A special court based on voluntary contributions would be neither viable nor sustainable.

71. In my view, the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding. It is understood, however, that the financing of the Special Court through assessed contributions of the Member States would for all practical purposes transform a treaty-based court into a United Nations organ governed in its financial and administrative activities by the relevant United Nations financial and staff regulations and rules.

72. The Security Council may wish to consider an alternative solution, based on the concept of a "national jurisdiction" with international assistance, which would rely on the existing — however inadequate — Sierra Leonean court system, both in terms of premises (for the Court and the detention facilities) and administrative support. The judges, prosecutors, investigators and administrative support staff would be contributed by interested States. The legal basis for the special "national" court would be a national law, patterned on the Statute as agreed between the United Nations and the Government of Sierra Leone (the international crimes being automatically incorporated into the Sierra Leonean common-law system). Since the mandate of the Secretary-General is to recommend measures consistent with resolution 1315 (2000), the present report does not elaborate further on this alternative other than to merely note its existence.

IX. Conclusion

73. At the request of the Security Council, the present report sets out the legal framework and practical arrangements for the establishment of a Special Court for Sierra Leone. It describes the requirements of the Special Court in terms of funds, personnel and services and underscores the acute need for a viable financial mechanism to sustain it for the duration of its lifespan. It concludes that assessed contributions is the only viable and sustainable financial mechanism of the Special Court.

74. As the Security Council itself has recognized, in the past circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace in that country. In reviewing the present report and considering what further action must be taken, the Council should bear in mind the expectations that have been created and the state of urgency that permeates all discussions of the problem of impunity in Sierra Leone.

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Notes

[1] At the request of the Government, reference in the Statute and the Agreement to "Sierra Leonean judges" was replaced by "judges appointed by the Government of Sierra Leone". This would allow the Government flexibility of choice between Sierra Leonean and non-Sierra Leonean nationals and broaden the range of potential candidates from within and outside Sierra Leone.

[2] In the case of the Tribunals for the Former Yugoslavia and for Rwanda, the non-inclusion in any position of nationals of the country most directly affected was considered a condition for the impartiality, objectivity and neutrality of the Tribunal.

[3] This method may not be advisable, since the Court would be manned by a substantial number of staff and financed through voluntary contributions in the amount of millions of dollars every year.

[4] Article 6, paragraph 5, of the 1977 Protocol II Additional to the Geneva Conventions and Relating to the Protection of Non-international Armed Conflicts provides that:

> "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

[5] The jurisdiction of the national courts of Sierra Leone is not limited by the Statute, except in cases where they have to defer to the Special Court.

[6] While there is no international law standard for the minimum age for criminal responsibility, the ICC Statute excludes from the jurisdiction of the Court persons under the age of 18. In so doing, however, it was not the intention of its drafters to establish, in general, a minimum age for individual criminal responsibility. Premised on the notion of complementarity between national courts and ICC, it was intended that persons under 18 presumed responsible for the crimes for which the ICC had jurisdiction would be brought before their national courts, if the national law in question provides for such jurisdiction over minors.

[7] The Appeals Chamber of the International Tribunal for the Former Yugoslavia has so far disposed of a total of 5 appeals from judgements and 44 interlocutory appeals; and the Appeals Chamber of the Rwanda Tribunal of only 1 judgement on the merits with 28 interlocutory appeals.

[8] Letter addressed to Mr. Hans Corell, Under-Secretary-General, The Legal Counsel, from Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, dated 29 August 2000.

[9] Article 10 of the Agreement between the United Nations and the Government endows the Special Court with a treaty-making power "to enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court".

[10] Criteria for the choice of the seat of the Rwanda Tribunal were drawn up by the Security Council in its resolution 955 (1994). The Security Council decided that the seat of the International Tribunal shall be determined by the Council "having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy".

[11] It is important to stress that this estimate should be regarded as an illustration of a possible scenario. Not until the Registrar and the Prosecutor are in place will it be possible to make detailed and precise estimates.

Annex

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

Whereas the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

Whereas by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

Whereas the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court");

Now therefore the United Nations and the Government of Sierra Leone have agreed as follows:

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of two Trial Chambers and an Appeals Chamber.

2. The Chambers shall be composed of eleven independent judges who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by

the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a four-year term and shall be eligible for reappointment.

5. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a four-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecution of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a four-year term and shall be eligible for reappointment.

Article 5
Premises

The Government shall provide the premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

Article 6
Expenses of the Special Court[a]

The expenses of the Special Court shall ...

Article 7
Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take whatever action may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 8
Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 9
Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

[a] The formulation of this article is dependent on a decision on the financial mechanism of the Special Court.

Article 10
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 11
Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 12
Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 13
Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

Article 14
Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions.

Article 15
Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

Article 16
Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 17
Working language

The official working language of the Special Court shall be English.

Article 18
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions and the trial process of those already in custody shall then be initiated. While the judges of the Appeals Chamber shall serve whenever the Appeals Chamber is seized of a matter, they shall take office shortly before the trial process has been completed.

Article 19
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 20
Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal instruments for entry into force have been complied with.

DONE at [place] on [day, month] 2000 in two copies in the English language.

For the United Nations | For the Government of Sierra Leone

Enclosure

Statute of the Special Court for Sierra Leone

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

Article 1
Competence of the Special Court

The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

Article 2
Crimes against humanity

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

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

(h) Persecution on political, racial, ethnic or religious grounds;

(i) Other inhumane acts.

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

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

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 4
Other serious violations of international humanitarian law

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

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

Article 5
Crimes under Sierra Leonean law

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

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

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

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

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

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

(i) Setting fire to dwelling-houses, any person being therein to section 2;

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

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

Article 6
Individual criminal responsibility

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

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

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

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

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

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime.

2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.

3. In a trial of a juvenile offender, the Special Court shall:

(a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort;

(b) Constitute a "Juvenile Chamber" composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice;

(c) Order the separation of his or her trial, if jointly accused with adults;

(d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender's parent or legal guardian;

(e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile's identity, or the conduct of in camera proceedings;

(f) In the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

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

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

Article 9
Non bis in idem

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

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

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

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

Article 10
Amnesty

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

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) The Registry.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of eleven independent judges, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General");

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

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

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

4. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General, to be present at each stage of the trial, and to replace a judge, if that judge is unable to continue sitting.

Article 13
Qualification and appointment of judges

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

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

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

Article 14
Rules of Procedure and Evidence

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

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not

adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

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

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

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

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

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

Article 16
The Registry

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

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

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

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance

for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

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

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

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

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

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

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

Article 19
Penalties

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

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

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

Article 20
Appellate proceedings

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

(a) A procedural error;

(b) An error on a question of law invalidating the decision;

(c) An error of fact which has occasioned a miscarriage of justice.

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

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

Article 21
Review proceedings

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

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

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

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

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

Article 23
Pardon or commutation of sentences

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

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual report

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

1604

UNITED NATIONS SECURITY COUNCIL

LETTER DATED 22 DECEMBER 2000 FROM THE PRESIDENT OF SECURITY COUNCIL TO THE SECRETARY-GENERAL

1605

United Nations S/2000/1234

Security Council

Distr.: General
22 December 2000

Original: English

Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General

The members of the Security Council have carefully reviewed your report of 4 October 2000 on the establishment of a Special Court for Sierra Leone (S/2000/915). The Council members wish to convey their deep appreciation for the observations and recommendations set forth in your report.

The members of the Security Council reaffirm their support for resolution 1315 (2000) and its reiteration that the situation in Sierra Leone constitutes a threat to international peace and security. With the objective of conforming to resolution 1315 (2000) and related concerns, and subject to the agreement of the Government of Sierra Leone as necessary and appropriate, the members of the Council suggest that the draft Agreement between the United Nations and the Government of Sierra Leone and the proposed Statute of the Court be amended to incorporate the views set forth below.

1. *Personal jurisdiction.* The members of the Security Council continue to hold the view, as expressed in resolution 1315 (2000), that the Special Court for Sierra Leone should have personal jurisdiction over persons who bear the greatest responsibility for the commission of crimes, including crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. The members of the Security Council believe that, by thus limiting the focus of the Special Court to those who played a leadership role, the simpler and more general formulations suggested in the appended draft will be appropriate. It is the view of the members of the Council that the Truth and Reconciliation Commission will have a major role to play in the case of juvenile offenders, and the members of the Security Council encourage the Government of Sierra Leone and the United Nations to develop suitable institutions, including specific provisions related to children, to this end. The members of the Security Council believe that it is the responsibility of Member States who have sent peacekeepers to Sierra Leone to investigate and prosecute any crimes they may have allegedly committed. Given the circumstances of the situation in Sierra Leone, the Special Court would have jurisdiction over those crimes only if the Security Council considers that the Member State is not discharging that responsibility. Therefore, Council members propose the inclusion of language in the Agreement to be concluded between the United Nations and the Government of Sierra Leone and in the Statute of the Special Court to that effect.

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2. *Funding.* Pursuant to resolution 1315 (2000), members of the Security Council support the creation of a Special Court for Sierra Leone funded through voluntary contributions. Such contributions shall take the form of funds, equipment and services, including the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations. It is understood that you cannot be expected to create any institution for which you do not have adequate funds in hand for at least 12 months and pledges to cover anticipated expenses for a second year of the Court's operation.

In order to assist the Court on questions of funding and administration, it is suggested that the arrangements between the Government of Sierra Leone and the United Nations provide for a management or oversight committee which could include representatives of Sierra Leone, the Secretary-General of the United Nations, the Court and interested voluntary contributors. The management committee would assist the court in obtaining adequate funding, provide advice on matters of Court administration and be available as appropriate to consult on other non-judicial matters.

3. *Court size.* The members of the Security Council do not believe the creation of two Trial Chambers and the use of alternate judges as proposed in your report is necessary, at least not from the very outset. The Special Court should begin its work with a single Trial Chamber, with the possibility of adding a second Chamber should the developing caseload warrant its creation. Council members also question the provision in the draft Agreement and Statute calling for alternate judges. It should be noted in this connection that neither the International Tribunal for the Former Yugoslavia nor the International Criminal Tribunal for Rwanda employs alternate judges.

The members suggest the following further adjustments of a technical or drafting nature to the Agreement: Add an express provision to article 13 as a new subparagraph (d) under paragraph 2, concerning immigration restrictions; to article 14 concerning witnesses and experts; and to article 4 (c) of the Statute of the Court, modifying it so as to conform it to the statement of the law existing in 1996 and as currently accepted by the international community.

The members of the Security Council express their hope that you will concur with the proposals outlined above and adjust the draft Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Court as expeditiously as possible, along the above lines and as indicated in the attached annex.

(*Signed*) Sergey **Lavrov**
President of the Security Council

Annex

In consequence of the comments contained in the letter, it is suggested that consideration be given to adjustment of the "Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone" and the "Statute of the Special Court for Sierra Leone".

Agreement

Preamble

No change.

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of a Trial Chamber and an Appeals Chamber with a second Trial Chamber to be created if, after the passage of at least six (6) months from the commencement of the functioning of the Special Court the Secretary-General, the Prosecutor or the President of the Special Court so request. Up to two alternate judges shall similarly be appointed after six months if the President of the Special Court so determines.

2. The Chambers shall be composed of no fewer than eight (8) independent judges and no more than eleven (11) such judges who shall serve as follows:

(a) Three judges shall serve in the Trial Chamber where one shall be appointed by the Government of Sierra Leone and two judges appointed by the Secretary-General, upon nominations forwarded by States and in particular the Member States ...

(b) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (a) above;

(c) Former paragraph 2 (b).

3. *No change.*

4. *No change.*

5. If an alternate judge or judges have been appointed, in addition ...

Article 3

No change.

Articles 4 and 5

No change.

Article 6
Expenses of the Special Court

The expenses of the Court shall be borne by voluntary contributions from the international community. It is understood that the Secretary-General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations plus pledges equal to the anticipated expenses of the second 12 months of the Court's operation. It is further understood that the Secretary-General will continue to seek contributions equal to the anticipated expenses of the Court beyond its first 24 months of operation. Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Court.

Articles 7 to 12

No change.

Article 13

New paragraph 2 (d)

Immunity from any immigration restrictions during his or her stay as well as during his/her journey to the Court and back.

Article 14

... The provisions of article 13, paragraph 2 (a) and (d), shall apply to them.

Articles 15 to 20

No change.

Statute

Preamble

No change.

Article 1
Competence of the Special Court

(a) The Special Court shall, except as provided in subparagraph (b), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who,

in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

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

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

Articles 2 and 3

No change.

Article 4

... (*as is*)

(c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Articles 5 and 6

No change.

Article 7

Should any person who was at the time of the alleged commission of the crime below 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

Articles 8 to 10

No change.

Article 11

(a) The Chamber, comprising one or more Trial Chambers and an Appeals Chamber;

Article 12

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

[*consequential changes in paras. 1 (a) and 4*]

TRIAL OF GENERAL TOMOYUKI YAMASHITA

Source: Law Reports of Trials of War Criminals. Selected and Prepared by the United Nations War Crimes Commission. Volume IV. London: HMSO, 1948

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CASE NO. 21

TRIAL OF GENERAL TOMOYUKI YAMASHITA

UNITED STATES MILITARY COMMISSION, MANILA,

(8TH OCTOBER-7TH DECEMBER, 1945), AND THE SUPREME COURT OF THE UNITED STATES

(JUDGMENTS DELIVERED ON 4TH FEBRUARY, 1946).

Part I

Responsibility of a Military Commander for offences committed by his troops. The sources and nature of the authority to create military commissions to conduct War Crime Trials, Non-applicability in War Crime Trials of the United States Articles of War and of the provisions of the Geneva Convention relating to Judicial Proceedings. Extent of review permissible to the Supreme Court over War Crime Trials.

Tomoyuki Yamashita, formerly Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, was arraigned before a United States Military Commission and charged with unlawfully disregarding and failing to discharge his duty as commander to control the acts of members of his command by permitting them to commit war crimes. The essence of the case for the Prosecution was that the accused knew or must have known of, and permitted, the widespread crimes committed in the Philippines by troops under his command (which included murder, plunder, devastation, rape, lack of provision for prisoners of war and shooting of guerrillas without trial), and/or that he did not take the steps required of him by international law to find out the state of discipline maintained by his men and the conditions prevailing in the prisoner-of-war and civilian internee camps under his command. The Defence argued, *inter alia*, that what was alleged against , Yamashita did not constitute a war crime, that the Commission was without jurisdiction to try the case, that there was no proof that the accused even knew of the offences which were being perpetrated and that no war crime could therefore be said to have been committed by him, that no kind of plan was discernible in the atrocities. committed, and that the conditions under which Yamashita had had to work, caused in large part by the United States military offensive and by guerrilla activities, had prevented him from maintaining any adequate overall supervision even over the acts of such troops in the islands as were actually under his command.

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The evidence before the Commission regarding the accused's knowledge of, acquiescence in, or approval of the crimes committed by his troops was conflicting, but of the crimes themselves, many and widespread both in space and time, there was abundant evidence, which in general the Defence did not attempt to deny.

The Commission sentenced Yamashita to death and its findings and sentence were confirmed by higher military authority. When the matter came before the Supreme Court of the United States on a petition for certiorari and an application for leave to file a petition for writs of habeas corpus and prohibition, the majority of that Court, in a judgment delivered by Chief Justice Stone, ruled that the order convening the Commission which tried Yamashita was a lawful order under both United States and International Law, that the Commission was lawfully constituted, that the offence of which Yamashita was charged constituted a violation of the laws of war, and that the procedural safeguards of the United States Articles of War and of the provisions of the Geneva Prisoners of War Convention relating to Judicial Proceedings had no application to war crime trials.

Mr. Justice Murphy and Mr. Justice Rutledge dissented. Questions other than those already mentioned which were touched upon either in the majority judgment or in the two minority judgments were the following : the applicability or non-applicability to such proceedings as those taken against Yamashita of the safeguards provided by the United States Constitution and particularly of the Fifth Amendment thereto ; the extent of review permissible to the Supreme Court over war crimes trials ; and the alleged denial of adequate opportunity for the preparation of Yamashita's defence.

Yamashita was executed on 23rd February 1946.

[...]

Part II

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6. THE OPENING ADDRESS FOR THE PROSECUTION

After repeating the Charge facing the accused and emphasising that the former alleged a disregard of his duty to control the members of his

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command, the Prosecution made the following claim regarding General Yamashita's command :

" We will open our case with proof that the accused, Yamashita, was Commander of the Army Forces in the Philippines during the period stated in the charge-that is to say, from 9th October, 1944, to the time of surrender, September 1945 ; that in addition he commanded, as a part of those forces, or attached thereto, the so-called ' Kempei Tai ', or military police. We will show also that he had overall command of the prisoner-of-war camps and civilian internment camps, labour camps, and other

installations containing prisoners of war and other internees in all the Philippine Islands.

" We will show that his area or territory of command included all of the Philippine Islands, the entire area so known. We will show that at times he also commanded Navy forces and air forces, particularly when engaged as ground troops."

The Prosecutor then set out the essence of the case against the accused, in the following words :

" We will then show that various elements, individuals, units, organisations, officers, being a part of those forces under the command of the accused, did commit a wide pattern of widespread, notorious, repeated, constant atrocities of the most violent character ; that those atrocities were spread from the northern portion of the Philippine Islands to the southern portion ; that they continued, as I say, repeatedly throughout the period of Yamashita's command ; that they were so notorious and so flagrant and so enormous, both as to the scope of their operation and as to the inhumanity, the bestiality involved, that they must have been known to the accused if he were making any effort whatever to meet the responsibilities of his command or his position ; and that if he did not know of those acts, notorious, wide-spread, repeated, constant as they were, it was simply because he took affirmative action not to know. That is our case."

The Prosecutor made the following statement on the legal nature of the Commission and on the question of the applicability of the United States Articles of War (Footnote 1: See pp. 44-6 and 63-9.) to its proceedings :

" Furthermore, sir, the Articles of War do not apply to this Commission in any particular. It is so ruled by the Judge Advocate-General, and if the Commission or Defence so desires I will be glad to supply a copy of that recent ruling. The Articles of War are not binding upon, do not apply to this Commission.

" This Commission, sir, is not a judicial body ; it is an executive tribunal set up by, the Commander-in-Chief-more specifically, the Commanding General, AFWESPAC-for the purpose of hearing the evidence on this charge, and of advising him, along with the Commander-in-Chief of the Army Forces of the Pacific, as to the punishment, in the event that the Commission finds the charge to be sustained. It is an executive body, and not a judicial body."

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7. THE OPENING ADDRESS FOR THE DEFENCE

Before introducing evidence, the Defence made a short opening statement summarising the facts which they hoped to prove, and making the following claims in particular :

" Defence will show that the accused never ordered the commission of any crime or atrocity ; that the accused never gave permission to anyone to commit any crimes or atrocities ; that the accused had no knowledge of the commission of the alleged

crimes or atrocities ; that the accused had no actual control of the perpetrators of the atrocities at any time that they occurred, and that the accused did not then and does not now condone, excuse or justify any atrocities or violation of the laws of war.

" On the matter of control we shall elaborate upon a number of facts that have already been suggested to the Commission in our cross-examination of the Prosecution's witnesses :

1. That widespread, devastating guerilla activities created an atmosphere in which control of troops by high ranking officers became difficult or impossible

2. That guerilla activities and American air and combat activities disrupted communications and in many areas destroyed them altogether, making control by the accused a meaningless concept. And

3. That in many of the atrocities alleged in the Bill of Particulars there was not even paper control ; the chain of command did not channel through the accused at all. . . . "

You will see the picture of a General working under terrific pressure and difficulty, subject to last-minute changes in tactical plans ordered from higher headquarters, and a man who when he arrived in Luzon actually had command over less than half of the ground troops in the Island."

8. THE EVIDENCE BEFORE THE COMMISSION

As the President of the Commission pointed out, (Footnote 1: See pp.33-4.) the latter heard 286 witnesses and also accepted as evidence 423 exhibits of various kinds.

(i) *The Evidence for the Prosecution*

The evidence brought before the Commission established hundreds of incidents which included the withholding of medical attention from, and starvation of, prisoners of war and civilian internees, pillage, the burning and destruction of homes and public buildings without military necessity, torture by burning and otherwise, individual and mass execution without trial, rape and murder, all committed by members of the Japanese forces under the command of accused. These offences were widespread as regards both space and time.

By and large, the Defence did not deny that troops under the command of the accused had committed these various atrocities, and it is not therefore

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proposed to summarise in these pages the testimony and documents which were placed before the Commission regarding these offences.

By stipulation, it was agreed that the accused was from 9th October, 1944, to 3rd September, 1945, Commanding General of Japanese 14th Army Group, including the Kempei Tei, or Military Police in the Philippine Islands ; this stipulation was received in evidence.

Apart from claiming that the widespread nature of the offences described above must lead inevitably to the conclusion that they were planned by Yamashita, in view of his position of command, the Prosecution also produced evidence purporting more directly to show that the accused was implicated in the offences charged. This evidence is summarised in the following paragraphs.

Colonel Masatoski Fujishige, of the Japanese Army, testified that troops under. his command had operated in the Batangas Islands and part of the Laguna Province after 1st January, 1945. His commander was Lt.-General Yokoyama ; the latter, stated the witness, probably " might have " come under Yamashita's command. Masatoski admitted having instructed certain officers and non-commissioned officers under his orders to kill all who oppose the Emperor with arms, even women and children ; he had had orders to expedite the clearing of his area of guerrillas.

Narciso Lapus stated that he had been private secretary to the Philippine General Artemio Ricarte, who had supported and worked for the Japanese during their occupation of the Philippine Islands. During the period from October 1944 and 31st December, 1944, Ricarte maintained contact with Yamashita as Commander-in Chief of the Japanese forces in the Philippines. Ricarte told the witness that Yamashita, as the highest commander of the Japanese forces in the Philippines, had control over the army the navy and the air force. Four or five days after Yamashita arrived in the Philippines, Ricarte had a conversation with him, and on returning to his house, the latter told Lapus that Yamashita had issued a general order to all the commanders of the military posts in the Philippine Islands " to wipe out the whole Philippines, if possible," and to destroy Manila, since everyone in the Islands were either guerrillas or active supporters of the guerrillas ; wherever the population gave signs of favouring the Americans the whole population of that area should be exterminated. Yamashita subsequently rejected Ricarte's plea that he should withdraw these orders.

Joaquin Galang, who claimed to have been a friend of Ricarte, stated that in December 1944, Yamashita visited Ricarte, and the former rejected Ricarte's request that the order to kill all Philippine inhabitants and destroy Manila be revoked ; speaking through Ricarte's grandson as interpreter, Yamashita said : " An order is an order, it is my order, and because of that it should not be broken or disobeyed."

Hideo Nishiharu, who had been head of the Judge Advocate Section in the Headquarters of Yamashita in the Philippines, stated that on 14th December, 1944, he advised the accused that a large number of persons suspected of being guerrillas were in custody and that there was no time for trial. He suggested that the question of their punishment be left to military tribunal officers co-operating with the Military Police. Yamashita, said

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the witness, " offered no suggestions. He just nodded " and Nishiharu took this to signify assent. About 600 persons were thereupon executed without trial other than investigation by two officers.

Richard Sakakida stated that he had been an interpreter in the office of Yamashita's Judge Advocate. He testified that in the case of offences by Filipino civilians and

Americans, an investigation was made by the Japanese Military Police (Kempei Tai) and the record thereof was sent to the Court Martial Department ; the Judge Advocate assigned to the case and the Chief Judge Advocate would then decide on the verdict and sentence in advance of the trial. During December 1944, trial consisted merely in the accused signing his name and giving his thumb-print, in reading the charge to him and in sentencing him. In the event of death sentence being passed, the victim was not informed of this until arrival at the cemetery. In one week in December 1944, cases involving about 2,000 Filipinos accused of being guerrillas were so handled in Yamashita's headquarters. If Japanese soldiers were tried, however, witnesses for the accused were allowed to testify, and the accused was told of any death sentence at the time of trial. Japanese soldiers were tried and convicted of rape, but the witness could remember no convictions after October 1944.

Fermin Miyasaki, a Filipino citizen who had been employed by the Japanese Military Police as an interpreter, described the various methods of torture used by the " Cortabitarte Garrison " (the Southern Manila Branch of the Militarjr Police) during the period October to December 1944, on civilians suspected of being guerrillas or guerrilla sympathisers ; the witness then went on to state that in December 1944, Yamashita commended the Garrison in writing for their work " in suppressing guerrilla activities."

The Prosecution put in as evidence a certificate signed by Mr. James F. Bymes, Secretary of State of the United States of America, under date of 26th October, 1945, which included the following words:

" I further certify that, in response to proposals made by the Government of the United States through the Swiss Minister in Tokyo, the Swiss Minister telegraphed on 30th January, 1942, that the ' Japanese Government has informed me : ". . . Although not bound by the Convention relative treatment prisoners of war Japan will apply *mutatis mutandis* provisions of that Convention to American prisoners of war in its power." ' "

Filemon Castillejos, a Filipino, after describing the killing of three American prisoners of war by Japanese troops belonging to General Tajima's garrison, said that a Japanese Captain, a lieutenant and two soldiers had told him that the victims were killed because there was a telegram from Yamashita to General Tajima ordering that all the American prisoners in the Philippines be killed.

Paul Herinesen, a United States national who had been a prisoner of war in the Philippines, described how an American civilian internee, at the prison camp commandant's order, had been shot without trial while lying wounded on the guard-house floor. When protest was made by the internees, the commandant stated that he had had orders from Imperial Headquarters in Manila to shoot persons attempting to escape.

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(ii) *The Evidence for the Defence*

The following paragraphs set out the essential facts placed before the Commission by the Defence.

Denhichi Okoochi, who had been Supreme Commander of the naval forces in the Philippines, stated that he transferred to Yamashita tactical command of the navy and troops in Manila on 5th January, 1945, and that the accused retained this command until 24th August, 1945. The witness retained " administrative control " over these forces, that is to say control over " such things as personnel, supplies and so forth " but not the operational control, which was in Yamashita's hands.

Bislumino Romero, grandson of General Ricarte, stated that Galang was not stating the truth when he testified that Romero interpreted a conversation between Ricarte and Yamashita in the former's house ; he never interpreted any statement of the accused that " all Filipinos are guerrillas and even the people who are supposed to be under Ricarte," and the witness's grandfather had never made to Yamashita in the witness's presence any request that Yamashita should revoke an order to kill all Filipinos and destroy Manila.

Shizus Yokoyma, previously a Lieutenant-General in the Japanese Army under Yamashita, stated that the latter had issued no orders to him for the .killing of Filipino citizens or the destruction of property in Manila. The accused had warned him to be fair in all his dealings with the Filipino people. Yamashita had no power to discipline, promote, demote or remove members of the naval land forces.

Photostatic copies of parts of the issues of Manila Tribune for 4th, 17th and 26th November, 1944, and 31st January, 1945, which were put in as evidence by the Defence, showed that General Ricarte was active in assisting the Japanese and urging the Filipinos to resist the Americans. Official documents were put in as tending to prove that the Prosecution witnesses Lapus and Galang had been collaborators during the Japanese occupation of the Philippines.

Lieutenant-General Muto, Chief of Staff for Yamashita, appeared for the Defence. He stated that Yamashita had commanded the 11th Area Army with the duty to defend the entire Philippine Islands. Morale in the army was low and preparations for the defence were inadequate when the accused took over this task. Lack of knowledge of the Islands and the separation of commands prohibited the correction of deficiencies, and efforts to bring the independent commands under Yamashita's control required several months of negotiation. The accused had wanted to withdraw from Manila altogether and to fight in the mountains, but lack of transportation and reluctance on the part of certain of his officers had prevented him from taking this step, despite the orders which he gave that evacuation should take place. Only 1,500 to 1,600 of Yamashita's troops were in Manila at the time of the battle ; they had orders to maintain order and to protect supplies. Yamashita had no authority over the others. The witness had never heard of any order by Yamashita that non-combatant civilians be killed and Manila destroyed. Yamashita never visited any of the prisoner-of- war camps in the Philippines, but his policy was that prisoners should

be treated in accordance with the Geneva Convention. Prisoners were to be fed according to the same standards as Japanese soldiers, but reduced rations were inevitable due to food shortages. After complaints had been made to Yamashita concerning Japanese military police methods, he succeeded in having the Military Police Commander removed by the authorities in Tokyo. The witness denied that Colonel Nishiharu, Yamashita's Judge Advocate, had reported that there were one thousand guerrillas in custody and that there was no time to try them. In December, 1944, the Shimbu Army had power to try all suspected guerrillas and impose death sentences.

Lieutenant-Colonel Ishikawa of Yamashita's headquarters staff, who had been in charge of supply after 27th September, 1944, and inspected prisoner and internee camps, also stated that the prisoners' food was similar to that of the Japanese soldiers. An order from Tokyo, that prisoners be treated in a friendly manner and that as much food as possible be left behind for them should the Americans approach, was passed on by Yamashita. The witness, on his trips to the camps at Santo Tomas, Bilibid and Fort McKinley, had heard no reports of cruelty or ill-treatment. The accused required that any complaints filed by American prisoners of war and civilian internees should be brought to his attention.

Lieutenant-General Koh, who had been Commanding General of Prison and Internment Camps in the Philippines under Yamashita, also claimed that prison camps were operated under orders from Tokyo in accordance with the provisions of the Geneva Convention. The food given to prisoners of war and internees was inadequate, but the Japanese were likewise on reduced rations. Yamashita did not inspect the camps.

This witness gave evidence regarding conditions in the camps tending to show that they were as high as they could be in the circumstances. Lieutenant-General Shiyoku Kou, who had been in charge of two prisoner-of- war camps and three civilian internment camps, and John Shizuo Ohaski, an employee in one of the camps, were also called and gave similar evidence for the Defence.

The accused himself gave sworn evidence. He stated that, on his assuming command of the 14th Area Army on 9th October, 1944, he had but few experienced officers and he was short of all supplies, including food and transport. At first there were over 30,000 troops in the Islands who were not under his orders. These included the naval land forces in Manila, and when he did achieve control over these it was for operational and not for disciplinary purposes. He had unsuccessfully ordered the evacuation of Manila. He denied issuing orders for ill-treatment or torture of captives or having had reports of such offences, and his policy was to treat prisoners of war in the same way as his own troops in matters such as food. He had ordered that armed guerrillas be suppressed and had left the methods to be used to the discretion of his commanders. He denied that his Judge Advocate had ever told him that a large number of guerrillas would have to be disposed of without trial, for lack of time. The Commanding Generals of the 35th and Shimbu Armies had authority to pass death sentences on American prisoners of war tried in their areas without referring

the matter to the accused. The accused admitted, nevertheless, that he was responsible to the Southern Army for seeing that the proper procedure was followed ; communications were cut, however, and he did not always know about details.

The accused admitted that prisoner-of-war and civilian internment camps were under his command and claimed that all death sentences passed in the 14th Army required his approval ; the death sentences passed on guerrillas which he had approved in the Philippines were not more than 44 in number.

9. THE TYPES OF EVIDENCE ADMITTED

As was indicated by the President of the Commission (Footnote 1:see pp. 33-4), a wide variety of types of evidence was admitted during the course of the trial. A large number of objections were made by the Defence, not always unsuccessfully, to the admission of items of evidence, in particular to pieces of documentary evidence and to hearsay evidence.

When the case eventually came before the Supreme Court of the United States, Mr. Justice Rutledge, in his dissenting opinion (Footnote 2:See pp. 60-l and 62-3.), referred to a series of events which it would be appropriate to describe at this point. On 1st November, 1945, the President of the Commission ruled that the latter was unwilling to receive affidavits without corroboration by witnesses on any item in the Bills of Particulars. On 5th November, however, the Commission reversed this ruling and affirmed its prerogative of receiving and considering affidavits or depositions, if it chose to do so, " for whatever probative value the Commission believes they may have, without regard to the presentation of some partially corroborative oral testimony."

10. THE CLOSING ADDRESS FOR THE DEFENCE

Defence Counsel attacked the evidence of the Prosecution concerning some few of the alleged offences, but in general the Defence did not deny that the atrocities alleged by the Prosecution had actually taken place, and the principal aim of Counsel was to show that the accused was not legally responsible for these offences.

Great stress was placed on the' difficulties which had faced the accused on his taking command of the 14th Army Group on 9th October, 1944. It was claimed that :

" The 14th Army Group was subordinate to the Supreme Southern Command under Count Terauchi, whose headquarters was in Manila. The navy was under a separate and distinct command, subordinate only to the naval command in Tokyo. Subordinate to Count Terauchi's command, but parallel with the 14th Army Group, were the 4th Air Army, the 3rd Transport Command, and the Southern Army Communications Unit. Therefore, out of approximately 300,000 troops in

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Luzon, only 120,000 were under General Yamashita's command. An acute shortage of food existed, and the Japanese army was exceedingly short in both motor transport and gasolene. The accused found that the general state of affairs in the 14th Army

Group was very unsatisfactory. The Chief of Staff was ill, there were only three members of Kuroda's staff left in the headquarters, and the new members were not familiar with the conditions that existed in Luzon. The 14th Army Group was of insufficient strength to carry out the accused's mission, inasmuch as it was, in his opinion, about five divisions short of what would be required. His troops were of poor calibre and not physically up to standard requirements. The morale of his men was poor. In addition, a strong anti-Japanese feeling existed among the Filipino population. Preparations for defence were practically non-existent. . . .

" To unify the 14th Command, General Yamashita requested that 30,000 troops under the Southern Command be transferred to him. This was accomplished in the early part of December. The 4th Air Army came under his command on 1st January, 1945, the 3rd Maritime Transport Command came under his command during the period 15th January to 15th February of this year. The navy never came under his command, but the naval troops in the City of Manila came under the command of the 14th Army Group on 6th January for tactical purposes during landing operations only.

" This limited command . . . involved the right to order naval troops to advance or to retreat, but did not include the command of such things as personnel, discipline, billeting or supply. . . .

" **After th**e American victory on Leyte, the Japanese situation on Luzon became extremely precarious. The American blockade became more and more effective ; the shortage of food became critical. The American air force continually strafed and bombed the Japanese transportation facilities and military positions. General Yamashita, charged specifically with the duty of defending the Philippines, a task that called for the best in men and equipment, of which he had neither, continued to resist our army from 9th October to 2nd September of this year, at which time he surrendered on orders from Tokyo.

" The history of General Yamashita's command in the Philippines is one of preoccupation and harassment from the beginning to the end."

The Defence maintained that the Manila atrocities were committed by the naval troops, and that these troops were not under General Yamashita's command. How, it was asked, could he be held accountable for the actions of troops which had passed into his command only one month before, at a time when he was 150 miles away- troops whom he had never seen, trained or inspected, whose commanding officers he could not change or designate, and over whose actions he had only the most nominal control ?

In the submission of the Defence no kind of plan was discernible in the Manila atrocities : " We see only wild, unaccountable looting, murder and rape. If there be an explanation of the Manila story, we believe it lies in this : Trapped in the doomed city, knowing that they had only a few days at best to live, the Japanese went berserk, unloosed their pent-up fears and passions in one last orgy of abandon."

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It was pointed out that General Yamashita arrived in Manila on 9th October and left on 26th December. Until 17th November, General Yamashita was not even the highest commander in the City of Manila since his immediate superior, Count Terauchi, was there and in charge. It was Count Terauchi and not General Yamashita who was handling affairs concerning the civilian population, relations with the civil government and the discouragement and suppression of anti-Japanese activities. The crucial period, therefore, was from 17th November to 26th December, a matter of a mere five weeks, during which General Yamashita was in Manila and in charge of civilian affairs. Could it be seriously contended that a commander who was beset and harassed by the enemy and was staggering under a successful enemy invasion to the south and expecting at any moment another invasion in the north could in such a short period gather in all the strings of administration ? Even so, the accused took some steps in an attempt to curb the activities of the Japanese military police who were terrorising the civilian population.

Regarding the charges alleging the killings of prisoners of war, the submission of the Defence, in essence, was that Yamashita had not been shown to have known of, condoned, excused, permitted or ordered them ; sometimes there was no proof even of them having been committed by troops under his command.

The rest of the allegations as to prisoner-of-war camps had to do with treatment and, for the most part, the question of insufficient food. The Defence rested their argument in this connection on the seriousness of the general food situation in the Philippine Islands, which was aggravated by the United States offensive. The Defence claimed that the evidence had shown that, despite this situation, the prisoners of war got rations equal to those of the Japanese soldiers. The accused had done all he could to alleviate the food situation in the civilian internee and prisoner-of-war camps, and far from ordering all American prisoners of war executed, or ordering any prisoners of war executed, General Yamashita's orders were to turn them over to the American forces at the earliest available time.

The main submissions of the Defence relating to the military police and guerrilla situation in Manila were : first, that guerrillas were, in the eyes of International Law, subject to trial and execution if caught ; second, that International Law did not prescribe the manner or form of trial which must be given ; third, that the suspected guerrillas held in Manila in December, 1944, were tried in accordance with the provisions of Japanese military law and regulations ; fourth, that General Yamashita never ordered or authorised any deviation from the provisions of Japanese military law and regulations ; fifth, that the fact that the method of trial prescribed by Japanese military law and regulations is a summary one and not in accord with Anglo-Saxon conceptions of justice was immaterial, since International Law did not prescribe any

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THE ZYKLON B, CASE TRIAL OF BRUNO

TESCH AND TWO OTHERS

Source: Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume I, London, HMSO,1947

[Some sections have been highlighted provisionally until hyperlinks can be added to appropriate files. Page numbers precede text.]

CASE No. 9

THE ZYKLON B, CASE
TRIAL OF BRUNO TESCH AND TWO OTHERS

BRITISH MILITARY COURT, HAMBURG,
1ST-8TH MARCH, 1946

Complicity of German industrialists in the murder of interned allied civilians by means of poison gas.

A Question of Jurisdiction: The Nationality of the Victims
Questions of Substantive Law

The Crime Alleged
Civilians as War Criminals

Bruno Tesch was owner of a firm which arranged for the supply of poison gas intended for the extermination of vermin, and among the customers of the firm were the S.S. Karl Weinbacher was Tesch's Procurist or second-in-command. Joachim Drosihn was the firm's fist gassing technician. These three were accused of having supplied poison gas used for killing allied nationals interned in concentration camps, knowing that it was so to be used. The Defence claimed that the accused did not know of the use to which the gas was to be put ; for Drosihn it was also pleaded that the supply of gas was beyond his control. Tesch and Weinbacher were condemned to death. Drosihn was acquitted.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court consisted of Brigadier R. B. L. Persse, as President, and, as members, Lt. Col. Sir Geoffrey Palmer, Bart., Coldstream Gds., and Major S. M. Johnstone, Royal Tank Regt.

Capt. H. S. Marshall was Waiting Member.

C. L. Stirling, Esq., C.B.E., Barrister-at-Law, Deputy Judge Advocate General, was Judge Advocate.

Major G. I. D. Draper, Irish Guards, Judge Advocate General's Branch, HQ. B.A.O.R., was Prosecutor.

Three German Counsel appeared on behalf of the accused. Dr. O. Zippel, Dr. C. Stumme and Dr. A. Stegemann defended Tesch, Weinbacher and Drosihn respectively.

2. THE CHARGE

The accused, Bruno Tesch, Joachim Drosihn and Karl Weinbacher, were charged with a war crime in that they " at Hamburg, Germany, between 1st January, 1941, and 31st March, 1945, in violation of the laws and usages of war did supply poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used." The accused pleaded not guilty.

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3. THE CASE FOR THE PROSECUTION

The prosecuting Counsel, in his opening address, stated that Dr. Bruno Tesch was by 1942 the sole owner of a firm known as Tesch and Stabenow, whose activities were divided into three main categories. In the first place, it distributed certain types of gas and gassing equipment for disinfecting various public buildings, including Wehrmacht barracks and S.S. concentration camps. Secondly, it provided, where required, expert technicians to carry out these gassing operations. Lastly, Dr. Tesch and Dr. Drosihn, the firm's senior gassing technician, carried out instruction for the Wehrmacht and the S.S. in the use of the gas which the firm supplied. The predominant importance of these gassing operations in war-time lay in their value in the extermination of lice.

The chief gas involved was Zyklon B, a highly dangerous poison gas, 99 per cent. of which was prussic acid. The gas was manufactured by another firm. Tesch and Stabenow had the exclusive agency for the supply of the gas east of the River Elbe, but the Zyklon B itself went directly from the manufacturers to the customer.

The contention for the Prosecution was that from 1941 to 1945 Zyklon B was being supplied as a direct result of orders accepted by the accused's firm, Tesch and Stabenow. On that basis, the Zyklon B was going in vast quantities to the largest concentration camps in Germany east of the Elbe. In these same camps the S.S. Totenkopfverbande were, from 1942 to 1945, systematically exterminating human beings to an estimated total of six million, of whom four and a half million were exterminated by the use of Zyklon B in one camp alone, known as Auschwitz/Birkenau. In these concentration camps were a vast number of people from the occupied territories of Europe, including Czechs, Russians, Poles, French, Dutch and Belgians, and people from neutral countries and from the United States. The Prosecutor also claimed that over a period of time the three accused got to know of this wholesale extermination of human beings in the eastern concentration camps by the S.S. using Zyklon B gas, and that, having acquired this knowledge, they continued to arrange supplies of the gas to these customers in the S.S. in ever-increasing quantities, until in the early months of 1944 the consignment per month to Auschwitz concentration camp was nearly two tons.

The accused Weinbacher was a " Procurist " ; when Tesch was absent he was fully empowered and authorised to do all acts on behalf of his principal which his principal could have done. His position was of great importance, since his principal would travel on the business of the firm for as many as 200 days in the year. .

The case for the Prosecution was that knowingly to supply a commodity to a branch of the State which was using that commodity for the mass extermination of Allied civilian nationals was a war crime, and that the people who did it were war criminals for putting the means to commit. the crime into the hands of those who actually carried it out. The action of the accused was in violation of Article 46 of the Hague Regulations of 1907, to which the German government and Great Britain were both parties

4. THE EVIDENCE FOR THE PROSECUTION

Emil Sehm, a former bookkeeper and accountant employed by Tesch and Stabenow, supplied information, regarding the legitimate business activities of the firm and the positions of the three accused therein, which substantially bore out the opening statements of the Prosecutor on these points. He went on to state that in the Autumn of 1942 he saw in the files of the firm's registry one of the reports, dictated by Tesch, which gave accounts of his business journeys. In this travel report, Tesch recorded an interview with leading members of the Wehrmacht, during which he was told that the burial, after shooting, of Jews in increasing numbers was proving more and more unhygienic, and that it was proposed to kill them with prussic acid. Dr. Tesch, when asked for his views, had proposed to use the same method, involving the release of prussic acid gas in an enclosed space, as was used in the extermination of vermin. He undertook to train the S.S. men in this new method of killing human beings.

Sehm had written down a note of these facts and taken it away with him, but had burnt it the next day on the advice of an old friend, named Wilhelm Pook, to whom he had related what he had seen.

Dr. Marx, a German Barrister practising since 1934, who was called upon to define the status of a Procurist in German law, said :

" The procurist had the right to act in the name and on behalf of the firm. He is a man who, out of all the others mentioned in the law who have also the right to act on behalf of the firm, has most of these rights. He has the right to act on behalf of the firm and to conclude any transactions or any sort of act on behalf of the firm, and to conclude any transactions or any sort of legal proceedings in which the firm might find itself involved. One can say that anybody who has any sort of transactions with a man who holds the ' Procura ' and who is called the Procurist is in exactly the same position as if he had had that transaction with the head of the firm."

Erna Biagini, a former stenographer of the firm, who was also in charge of the registry, claimed to have read, in " approximately 1942," a travel report of Dr. Tesch which stated that Zyklon B could be used for killing human beings as well as vermin.

Anna Uenzelmann, a former stenographer of the firm, said that in about June 1942 Tesch, after he had dictated a travel report on returning from Berlin, had told her that Zyklon B was being used for gassing human beings, and had appeared to be as terrified and shocked about the matter as she was.

Karl Ruehmling, who had been a bookkeeper and assistant gassing master with the firm, said that Zyklon B was sent by the concern to the concentration camps at Auschwitz, Sachsenhausen and Neuengamme, but Auschwitz was sent the largest consignments.

Alfred Zaun, who was in charge of the firm's bookkeeping, said that, in his opinion, Auschwitz of all the concentration camps had received the most Zyklon B during the war.

Wilhelm Bahr, an ex-medical orderly at Neuengamme, described a prussic acid course which he had attended in the S.S. Hospital at Oranienburg in

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1942, and which Dr. Tesch had conducted. He said that he himself had gassed two hundred Russian prisoners of war in Neuengamme in 1942, using prussic acid gas, but that it was not Dr. Tesch who had taught him the procedure which he had applied.

Perry Broad, who had been a Rottenführer in the Kommandatur of the Auschwitz camp from June 1942 until early 1945, described how persons were gassed there with Zyklon B. The people being gassed, to his knowledge, at Auschwitz and Birkenau were German deportees, Jews from Belgium, Holland, France, North Italy, Czechoslovakia and Poland, and Gypsies.

Dr. Bendel, who had been a prisoner at Auschwitz and had acted as a doctor to the inmates, said that from February 1944 to January 1945 a million people had been killed there by Zyklon B.

The remaining Prosecution witnesses were a. member of a British war crimes investigation team, who identified pre-trial statements made by the accused ; Wilhelm Pook and his wife ; and five more employees of Tesch and Stabenow. The evidence of Pook and his wife supported that of Sehm to a degree, though not in every detail, but the fact that they had discussed the events of 1942 between his and their giving evidence was recognised by the Judge Advocate to be " undoubtedly unfortunate."

The Prosecution, acting in accordance with Regulation 8 (i) (a) of the Royal Warrant, submitted to the Court a sworn affidavit in which Dr. Diels, a former high-ranking German government official, stated that it was common knowledge in 1943 in Germany that gas was being used for killing people.

Among various other documents (Footnote: Of the various documents admitted as evidence in the trial (including five affidavits, and the pre-trial statements by all of the accused) the Secretariat of the United Nations War Crimes Commission has only been able to examine an extract from the affidavit of Dr. Diels.) Dr. Tesch's S.S. subscription card was produced before the Court ; the Defence pointed out, however, that this did not prove that Dr. Tesch had been an active member of the S.S.

5. THE OPENING STATEMENTS OF DEFENCE COUNSEL

(i) *Counsel for Tesch*

Before calling Tesch to the witness-box, his Counsel stated that he intended to prove to the court, first, that Tesch had no knowledge of the killing of human beings by means of Zyklon B ; secondly, that Zyklon B was delivered only for normal purposes of disinfection and for medical reasons ; thirdly, that parts of gas chambers were sold only for the purpose of exterminating vermin ; fourthly, that concentration camps got the gas only in amounts which were quite normal in relation to the number of inhabitants, and only for killing vermin ; and fifthly, that instruction courses were

held only according to the relevant laws and regulations, and again only for the purpose of teaching the method of exterminating vermin.

(ii) *Counsel for Weinbacher*

Dr. Stumme, defending Weinbacher, said that by the evidence which he would call, he would try to prove that Weinbacher had no knowledge of any note or report by Dr; Tesch to the effect that human beings were being killed by poison gas, and that until the capitulation of Germany he never

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had any reason to believe that Zyklon B was being used for any other purpose than the destruction of vermin.

(iii) *Counsel for Drosihn*

Counsel for Drosihn set out to prove, by the evidence which he called, first, that Dr. Drosihn had nothing to do with the business concerning the supply of gas ; secondly, that, being on journeys for considerable periods, he had only a very scanty knowledge of the activities of the business ; thirdly, that he heard about the gassing of human beings only after the capitulation of Germany ; and fourthly, that he never carried out instruction either in concentration camps or for S.S. personnel.

6. THE EVIDENCE FOR THE DEFENCE

(i) *Dr. Tesch*

All three accused gave evidence on oath. Dr. Tesch stated that he had heard nothing and had known nothing about human beings being killed in concentration camps with prussic acid. He denied ever having attended any conference, or having been approached by any official or military authority on the subject, or having written in any document that human beings should be killed by prussic acid. He specifically denied that he had made the remarks referred to by Anna Uenzelmann. He had never been to Auschwitz himself and had had no reason to believe that the camps were incorrectly run.

He did not think that deliveries to Auschwitz were very high because it was a large camp and, further, it " administered more camps in the General Government of Poland." He could not remember Dr. Drosihn ever having instructed S.S. men. Although the witness had paid subscriptions to both the S.S. and the Nazi Party, he had never been an active member of either. He thought that the passage in the travel report which Erna Biagini had read might have been a record of an answer put to him by a pupil.

Drosihn, stated Tesch, was a technical expert and was not concerned with the administration of the firm or the office. Weinbacher, however, had complete control when Tesch was away from the office.

(ii) *Karl Weinbacher*

This accused, giving evidence on oath, said that his work was, briefly, to look after the current business affairs in the absence of Dr. Tesch, seeing to the incoming and the outgoing mail, answering any queries, and confirming any orders received. He read some of Dr. Tesch's travel reports but not all, because there were too many ; in particular, he had not read any dealing with the possibility of destroying Jews with Zyklon B. Dr. Tesch had not mentioned any such possibility to him, nor had the witness heard during the war that Jews were being gassed. He had never been inside a concentration camp, nor had he received unfavourable reports during the war about such camps. He, too, stated that Drosihn had nothing to do with the business management. He could not agree that the S.S. would necessarily come to Dr. Tesch for advice on the extermination of human beings with Zyklon B, since, although Dr. Tesch was an expert on the use of the gas, there were plenty of books available on prussic acid.

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(iii) *Dr. Drosihn*

Drosihn claimed that his part in the activities of the firm consisted in collaborating on scientific issues, being in charge of the gassing, for instance, of ships in Hamburg docks, and examining delousing chambers to see whether they were working correctly. He spent about 150 to 200 days a year in travelling on business. He had been to check the working of the delousing chambers in Sachsenhausen and Ravensbruck and had been to Neuengamme ; but had neither been to Auschwitz, nor given instructions to the S.S. in any place. He knew nothing of the size of consignments of gas to Auschwitz. Contrary to Tesch's evidence, the witness claimed to have reported to him once that he had seen happening in the camps things that were contrary to human dignity.

(iv) *The Remaining Defence Witnesses*

Nine other witnesses called by the Defence did not add very substantially to the evidence before the Court. The subjects covered by their remarks included the character of Dr. Tesch, and the extent of general knowledge in Germany concerning the killing of Jews. *Inter alia,* they were called to prove that Zyklon B was widely used for the legitimate purpose of killing vermin. These witnesses were two Medical Officers from Hamburg, a doctor and two chemists employed by the German Hygiene Institute, a retired professor of the same institute, the Manager of the Disinfection Institute of Hamburg, a stenotypist formally employed by Tesch and Stabenow, and Dr. Stumme, one of the Defence Counsel, who gave evidence regarding the German law regarding State secrets.

7. THE CLOSING ADDRESSES OF THE DEFENCE COUNSEL

(i) *Counsel for Tesch*

In his closing address, Dr. Zippel, dealing with the point of law involved, submitted that, since the charge was not one of destroying human life but only of supplying the

means of doing so, such action would only be contrary to the laws and usages of war if the means supplied were necessarily intended to kill human beings. To supply a material which also had quite legitimate purposes was no war crime.(Footnote: The English translation of Dr. Zippel's speech subsequently contains the following passage :" I have two duties to perform. The first would be to try to prove that Tesch supplied this gas not knowing for what purposes it might be used. My second duty is that, even if he knew something about it, still the laws of this procedure would not suffice to find him guilty.")

Turning to the facts, Counsel claimed that while supplies of Zyklon B to the S.S. were large, it was the duty of the S.S. to see that the state of health in the eastern provinces was kept at a high level, and it was concerned not only with the Wehrmacht itself, but also with the state of health of those parts of the eastern provinces whose population was repatriated to Germany before the entry of Germany into war with Russia. Supplies were not too great to have been used wholly for legitimate purposes. Since 1944 the S.S. had had unlimited permission to use the gas for the destruction of vermin and the prevention of epidemics. He submitted that even in the concentration camps the gas was, at least at the beginning, used only for its legitimate purpose.

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Counsel then questioned whether the Zyklon B used at Auschwitz for killing human beings had been supplied by Tesch and Stabenow. The fact that Auschwitz was situated in the district for which the firm were the agents could not be decisive, for other firms were able to supply that district, especially since during the war the boundaries of the districts were not so much respected as before. Further, the S.S. had been active all over the occupied territories during the war and had had various means of securing the gas. So many people were killed by gassing in Auschwitz that the S.S. must necessarily have used sources other than Tesch and Stabenow.

Counsel observed that the witnesses who were called to prove that Dr. Tesch knew about the unlawful use of his gas had given different versions as to how he must or should have known about such use. He proceeded also to throw doubts on the reliability of Sehm, for instance, in view of a statement of his, denied by many other witnesses, that the files of the firm in which he had found the travel report were kept under lock and key. Miss Biagini had denied that she saw anything in this report about a conference with the High Command of the Wehrmacht or any propositions made by Dr. Tesch to this authority. None of the typists who could have typed the travel report in question knew of it or of any rumour in the office regarding it. Under the existing war-time regulations of secrecy, it seemed impossible that a man as careful as Tesch should have dictated a report on an interview with the High Command on such a secret matter, placed the report where anyone in the office could read it, as was the case with all travel reports, and then discussed the facts with his employees. Dr. Tesch had been shown to be a fair and honest man, and his concentration on his work explained why he had not heard any rumour which may have circulated Germany concerning the gassing of human beings. Regarding the large supplies of gas to Auschwitz in particular, Counsel submitted that Dr. Tesch was too busy to be expected to know what individual customers bought, and in any case the supply of Zyklon was not as important to the firm as were its gassing activities. Furthermore, Dr. Tesch had regarded Auschwitz as a transit camp needing therefore unusually

frequent delousing. Counsel concluded that Dr. Tesch knew nothing of the gassing of human beings either in Auschwitz or Neuengamme.

(ii) *Counsel for Weinbacher*

In his closing address, Dr. Stumme submitted that it had become clear during the trial that Weinbacher did not know that Zyklon B had been used for the killing of human beings. Not one of the witnesses could say really that Weinbacher had any knowledge of a travel report or any observation of Dr. Tesch that human beings had been killed by Zyklon B, or that Dr. Tesch had conversations with Weinbacher on such a subject. Nor had the trial shown that Weinbacher should have had reasonable suspicion, or grounds for suspicion, that Zyklon B had been used for the killing of human beings. Even if Dr. Tesch had written such a travel report as the one alleged, Weinbacher need not have read it, because he was a busy man, and witnesses had shown that many of the travel reports were filed and read by no one. Even Sehm claimed to have come across the particular report by accident, and Miss Biagini because she had to file it. He repeated Dr. Zippel's argument that Dr. Tesch would not write a State secret in a

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document which all the staff could read. If Sehm had found any other document, it must have been purely by accident ; and no such accident had happened to Weinbacher. In connection with the large supplies of gas which were sent to Auschwitz, Counsel pointed out that Weinbacher had stated on oath that he had never had. a summary of supplies to a single customer because this was left to the accountants. In any case, it had been shown that the quantity of Zyklon B needed for the killing of human beings was much smaller than that required for the killing of insects. The quantities of Zyklon B needed for killing half a million or even a million human beings stood in such small proportion to the quantities needed for the killing of insects that it would not have been noticed at all. Therefore, there had been no need for Weinbacher to have grown suspicious, since, claimed Counsel, he knew that Auschwitz was one of the biggest camps and a sort of transit camp. Counsel did not think, therefore, that it was correct to assume that the large quantity of Zyklon going to Auschwitz was any indication of the fact that human beings were being killed there. Supplies for Neuengamme were much lower than those for Auschwitz.

Dr. Stumme did not deal with the law involved, except for stating that Weinbacher, although a procurist, was still only an employee like Sehm and Miss Biagini, against whom no action was being taken, despite the knowledge which they were said to have had.

(iii) *Counsel for Drosihn*

Dr. Stegemann, in his closing address, confined his remarks to what concerned his client exclusively, while claiming the benefit of everything favourable to him which had already been said by the other Counsel. Every witness who was asked had said that the accused had had nothing whatever to do with the firm's business activities. He could not, therefore, for instance, have .known of the size of the consignments to Auschwitz. His relatively small salary showed his subordinate position. He was a zoologist, and first technical gassing master to the firm, and spent more than half the

year in travelling. When both Tesch and Weinbacher were away, Mr. Zaun had had the power of attorney, not Drosihn.

Both Dr. Tesch and Dr. Drosihn had said that the latter had never instructed S.S. men in the use of Zyklon B, and not even Sehm claimed that he knew anything about the alleged travel report. Drosihn had been away from the office for irregular periods, and was in no position to read Dr. Tesch's travel reports, which were in any case of no interest to him. Counsel denied that there had been general knowledge in Germany before the end of of the war about the gassing of Jews ; his client could not therefore have acquired such knowledge from rumours.

8. THE PROSECUTOR'S CLOSING ADDRESS

In his closing address, the prosecuting Counsel said that the possibility that some firm other than Tesch and Stabenow could have supplied Zyklon B to Auschwitz could be ruled out, as the latter had the monopoly in that area. The essential question was whether the accused knew of the purpose to which their gas was being put. Counsel admitted that the S.S. were under no restrictions as to the use they made of the gas, and that the direct knowledge which was available to Tesch as to that use was of the scantiest.

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due to the fear and secrecy in which the S.S. worked. He relied for his case on the evidence of Sehm, Miss Biagini and Miss Uenzelmann.

Counsel said that it was unbelievable that Dr. Tesch did not know that anything wrong went on in the concentration camps. Dr. Drosihn had said without hesitation that he saw things there which were not worthy of human dignity, and that he had said so to Tesch. It was also unbelievable that Dr. Tesch had no knowledge of the amounts of gas being supplied to the S.S. and to Auschwitz in particular, by a firm which was wholly his property. In 1942 and 1943 Auschwitz had been the firm's second largest customer. Dr. Tesch had no reason to believe that Auschwitz was a transit camp, and moreover he was too efficient a man to be duped by the S.S. Counsel completed his case against Tesch by casting doubt on his veracity by showing how contradictions existed between his statements and those of other witnesses on certain details unrelated to the main issue.

Dealing very shortly with Weinbacher's position, Counsel contended that all that Tesch knew must, from the nature of the inner organisation of the business, have also been known by Weinbacher. For 200 days in the year he was in sole control of the firm, with access to all the books, able to read the travel reports, indeed compelled to read the travel reports if he was to carry on the business properly during the periods when his principal was away.

Prosecuting Counsel claimed that Drosihn must to some extent have shared the confidence of Tesch and Weinbacher, even although his activities were confined to the technical side of the firm as opposed to the sales and bookkeeping side.

He concluded that, by supplying gas, knowing that it was to be used for murder, the three accused had made themselves accessories before the fact to that murder.

9. THE SUMMING UP OF THE JUDGE ADVOCATE

The Judge Advocate, in summing up the evidence before the Court, pointed out that the latter must be sure of three facts, first, that Allied nationals had been gassed by means of Zyklon B ; secondly, that this gas had been supplied by Tesch and Stabenow ; and thirdly, that the accused knew that the gas was to be used for the purpose of killing human beings. On points of law he did not think that the Court needed any direction.

After summarising the evidence of the Prosecution witnesses, the Judge Advocate said : " To my mind, although it is entirely a question for you, the real strength of the Prosecution in this case rests rather upon the general proposition that, when you realise what kind of a man Dr. Tesch was, it inevitably follows that he must have known every little thing about his business. The Prosecution ask you to say that the accused and his second-in-command Weinbacher, both competent business men, were sensitive about admitting that they knew at the relevant time of the size of the deliveries of poison gas to Auschwitz. The Prosecution then ask : "Why is it that these competent business men are so sensitive about these particular deliveries ? Is it because they themselves knew that such large deliveries could not possibly be going there for the purpose of delousing clothing or for the purpose of disinfecting buildings ? ".

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In Weinbacher's case, there was no direct evidence, either by way of conversation or of anything that he had written among the documents of the firm produced during the trial, which formed any kind of evidence specifically imputing knowledge to Weinbacher as to how Zyklon B was being used at Auschwitz. " But the Prosecution," said the Judge Advocate, " ask you to say that, in his case as in Tesch's case, the real strength of their case is not the individual direct evidence, but the general atmosphere and conditions of the firm itself. " The Judge Advocate asked the Court whether or not it was probable that Weinbacher would constantly watch the figures relating to a less profitable activity of the firm, particularly since he received a commission on profits as well as his salary.

The Judge Advocate emphasised Drosihn's subordinate position in the firm, and asked whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was being put could make him guilty.

10. THE VERDICT

Tesch and Weinbacher were found guilty.

Drosihn was acquitted.

11. THE SENTENCE

Counsel for Tesch, pleading in mitigation of sentence, said that if Tesch did know the use to which the gas was being put, and had consented to it, this happened only under enormous pressure from the S.S. Furthermore, had Tesch not co-operated, the S.S. would certainly have achieved their aims by other means. Tesch was merely an accessory before the fact, and even so, an unimportant one.

Counsel for Weinbacher pleaded that the Court should consider the latter's wife and three children ; that he as a business employee might have thought that the ultimate use of the gas was Tesch's responsibility ; and that if he had refused to supply Zyklon B the S.S. would immediately have handed him over to the Gestapo.

Nevertheless, subject to confirmation, the two were sentenced to death by hanging.

The sentences were confirmed and carried into effect.

B. NOTES ON THE CASE

1. A QUESTION OF JURISDICTION : THE NATIONALITY OF THE VICTIMS

The Prosecutor specified a number of Allied countries from which, he claimed, many of the persons gassed had originated. Wilhelm Bahr told how he himself had gassed two hundred Russians. Perry Broad mentioned Jews from Belgium, Holland, France, Czechoslovakia and Poland, among those gassed at Auschwitz. The Judge Advocate, in his summing up, stated that " among those unfortunate creatures undoubtedly there were many Allied nationals."

It was not alleged that British citizens were among the victims.

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The British claim to jurisdiction over the case could be based primarily on the fact that by the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on the 5th June, 1945, the four Allied Powers occupying Germany have assumed supreme authority therein. They have, therefore, become the local sovereigns in Germany. There is vested, then, in the United Kingdom authorities, administering the British Zone of Germany, the right to try German nationals for crimes of any kind wherever committed. The claim to jurisdiction is the stronger if, as in the present case, the criminal activities of the accused have been committed in the British Zone of Germany, by German residents of this Zone, although, of course, the crimes to which the accused were alleged to be accessories had their effect outside Germany, in Auschwitz, Poland.

British jurisdiction could further be based on either

(a) the general doctrine called Universality of Jurisdiction over War Crimes, under which every independent State has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed ; or

(b) the doctrine that the United Kingdom has a direct interest in punishing the perpetrators of crimes if the victim was a national of an ally engaged in a common struggle against a common enemy.

2. QUESTIONS OF SUBSTANTIVE LAW

(i) *The Crime Alleged*

Article 46 of the Hague Convention of 1907, concerning the Laws and Customs of War on Land, on which the case for the Prosecution was based, provides that " Family honour and rights, individual life and private property, as well as religious convictions and worship must be respected." This Article falls under the section heading, *Military Authority over the Territory of the Hostile State,* and was intended to refer to acts committed by the occupying authorities in occupied territory. In the trial of Tesch, the acts to which the accused were allegedly accessories before the fact were committed mainly at Auschwitz, in occupied Poland.

(ii) *Civilians as war criminals*

The decision of the Military Court in the present case is a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is. in a position to assist in their violation.

The activities with which the accused in the present case were charged were commercial transactions conducted by civilians. The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal.

TRIAL OF THE MAJOR WAR CRIMES

CRIMINALS

1637

TRIAL

OF

THE MAJOR WAR CRIMINALS

BEFORE

THE INTERNATIONAL MILITARY TRIBUNAL

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INTERNATIONAL MILITARY TRIBUNAL

THE UNITED STATES OF AMERICA, THE FRENCH REPUBLIC, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, and THE UNION OF SOVIET SOCIALIST REPUBLICS

--against--

HERMANN WILHELM GÖRING, RUDOLF HESS, JOACHIM VON RIBBENTROP, ROBERT LEY, WILHELM KEITEL, ERNST KALTENBRUNNER, ALFRED ROSENBERG, HANS FRANK, WILHELM FRICK, JULIUS STREICHER, WALTER FUNK, HJALMAR SCHACHT, GUSTAV KRUPP VON BOHLEN UND HALBACH, KARL DÖNITZ, ERICH RAEDER, BALDUR VON SCHIRACH, FRITZ SAUCKEL, ALFRED JODL, MARTIN BORMANN, FRANZ VON PAPEN, ARTHUR SEYSS-INQUART, ALBERT SPEER, CONSTANTIN VON NEURATH, and HANS FRITZSCHE, Individually and as Members of Any of the Following Groups or Organizations to which They Respectively Belonged, Namely: DIE REICHSREGIERUNG (REICH CABINET); DAS KORPS DER POLITISCHEN LEITER DER NATIONALSOZIALISTISCHEN DEUTSCHEN ARBEITERPARTEI (LEADERSHIP CORPS OF THE NAZI PARTY); DIE SCHUTZSTAFFELN DER NATIONALSOZIALISTISCHEN DEUTSCHEN ARBEITERPARTEI (commonly known as the "SS") and including DER SICHERHEITSDIENST (commonly known as the "SD"); DIE GEHEIME STAATSPOLIZEI (SECRET STATE POLICE, commonly known as the "GESTAPO"); DIE STURMABTEILUNGEN DER NSDAP (commonly known as the "SA"); and the GENERAL STAFF and HIGH COMMAND of the GERMAN ARMED FORCES, all as defined in Appendix B of the Indictment,

Defendants.

[...]

> "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment."

The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

The Law as to the Common Plan or Conspiracy

In the previous recital of the facts relating to aggressive war, it is clear that planning and preparation had been carried out in the most systematic way at every stage of the History.

Planning and preparation are essential to the making of war. In the opinion of the Tribunal aggressive war is a crime under international law. The Charter defines this offense as planning, preparation, initiation, or waging of a war of aggression "or participation in, a Common Plan or Conspiracy for the accomplishment. . . . of the foregoing". The Indictment follows this distinction. Count One charges the Common Plan or Conspiracy. Count Two charges the planning and waging of war. The same evidence has been introduced to support both Counts. We shall therefore discuss both Counts together, as they are in substance the same. The defendants have been charged under both Counts, and their guilt under each Count must be determined.

The "Common Plan or Conspiracy" charged in the Indictment covers 25 years, from the formation of the Nazi Party in 1919 to the end of the war in 1945. The Party is spoken of as "the instrument of cohesion among the Defendants" for carrying out the purposes of the conspiracy — the overthrowing of the Treaty of Versailles, acquiring territory lost by Germany in the last war and "Lebensraum" in Europe, by the use, if necessary, of armed force, of aggressive war. The "seizure of power" by the Nazis, the use of terror, the destruction of trade unions, the attack on Christian teaching and on churches, the persecution of Jews, the regimentation of youth — all these are said to be steps deliberately taken to carry out the common plan. It found expression, so it is alleged, in secret rearmament, the withdrawal by Germany from the Disarmament Conference and the League of Nations, universal military service, and seizure of the Rhineland. Finally, according to the Indictment, aggressive action was planned and carried out against Austria and Czechoslovakia in 1936-1938, followed by the

planning and waging of war against Poland; and, successively, against 10 other countries.

The Prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.

It is not necessary to decide whether a single master conspiracy between the defendants has been established by the evidence. The seizure of power by the Nazi Party, and the subsequent domination by the Nazi State of all spheres of economic and social life must of course be remembered when the later plans for waging war are examined. That plans were made to wage war, as early as 5 November 1937, and probably before that, is apparent. And thereafter, such preparations continued in many directions, and against the peace of many countries. Indeed the threat of war — and war itself if necessary — was an integral part of the Nazi policy. But the evidence establishes with certainty the existence of many separate plans rather than a single conspiracy embracing them all. That Germany was rapidly moving to complete dictatorship from the moment that the Nazis seized power, and progressively in the direction of war, has been overwhelmingly shown in the ordered sequence of aggressive acts and wars already set out in this Judgment.

In the opinion of the Tribunal, the evidence establishes the common planning to prepare and wage war by certain of the defendants. It is immaterial to consider whether a single conspiracy to the extent and over the time set out in the Indictment has been conclusively proved. Continued planning. with aggressive war as the objective, has been established beyond doubt. The truth of the situation was well stated by Paul Schmidt, official interpreter of the German Foreign Office, as follows:

> "The general objectives of the Nazi leadership were apparent from the start, namely the domination of the European Con- tinent, to be achieved first by the incorporation of all German speaking groups in the Reich, and secondly, by territorial expansion under the slogan "Lebensraum". The execution of these basic objectives, however, seemed to be characterized

> by improvisation. Each succeeding step was apparently carried out as each new situation arose, but all consistent with the ultimate objectives mentioned above."

The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who

execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.

Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit War Crimes and Crimes against Humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides:

> "Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit War Crimes and Crimes against Humanity, and will consider only the common plan to prepare, initiate, and wage aggressive war.

War Crimes and Crimes against Humanity

The evidence relating to War Crimes has been overwhelming, in its volume and its detail. It is impossible for this Judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented. The truth remains that War Crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied

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THE TOKYO MAJOR WAR CRIMES TRIAL

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The Tokyo Major War Crimes Trial

THE JUDGMENT, SEPARATE OPINIONS,
PROCEEDINGS IN CHAMBERS,
APPEALS & REVIEWS OF
THE INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST

Volume 101

The Judgment of the Tribunal (Part 1)

(Transcript Pages 48413 – 48880)
Thursday, 4th November – Friday, 5th November 1948

Annotated, compiled & edited
by
R. John Pritchard

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by

conclusion and the reasoning by which it is reached the Tribunal respectfully agrees.

The challenge to the jurisdiction of the Tribunal wholly fails.

(b) RESPONSIBILITY FOR WAR CRIMES AGAINST PRISONERS

Prisoners taken in war and civilian internees are in the power of the Government which captures them. This was not always the case. For the last two centuries, however, this position has been recognized and the customary law to this effect was formally embodied in the Hague Convention No. IV in 1907 and repeated in the Geneva Prisoner of War Convention of 1929. Responsibility for the care of prisoners of war and of civilian internees (all of whom we will refer to as "prisoners") rests therefore with the Government having them in possession. This responsibility is not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibility for the prisoners.

In the discharge of these duties to prisoners, governments must have resort to persons. Indeed, the

governments responsible, in this sense, are those persons who direct and control the functions of government. In this case and in the above regard we are concerned with the members of the Japanese Cabinet. The duty to prisoners is not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those persons who constitute the government. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties. In the case of the duty of governments to prisoners held by them in time of war those persons who constitute the government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.

In general the responsibility for prisoners held by Japan may be stated to have rested upon:

(1) Members of the government;

(2) Military or naval officers in command of formations having prisoners in their possession;

(3) Officials in those departments which were concerned with the well-being of prisoners;

(4) Officials, whether civilian, military, or naval, having direct and immediate control of

prisoners.

It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill treatment of prisoners if:

(1) They fail to establish such a system.

(2) If having established such a system, they fail to secure its continued and efficient working.

Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance.

Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:

(1) They had knowledge that such crimes

were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or

(2) They are at fault in having failed to acquire such knowledge.

If such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

A member of a Cabinet which collectively, as one of the principal organs of the government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission

of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill treatment of prisoners, is powerless to prevent future ill treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill treatment in the future.

Army or Navy Commanders can, by order, secure proper treatment and prevent ill treatment of prisoners. So can Ministers of War and of the Navy. If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.

Departmental officials having knowledge of ill treatment of prisoners are not responsible by reason of their failure to resign; but if their functions included the administration of the system of protection of prisoners and if they had or should have had knowledge of crimes and did nothing effective, to the extent of their powers, to prevent their occurrence in the future then they are responsible for such future crimes.

(c) THE INDICTMENT

Under the heading of "Crimes Against Peace" the Charter names five separate crimes. These are planning, preparation, initiation and waging aggressive war or a war in violation of international law, treaties, agreements or assurances; to these four is added the further crime of participation in a common plan or conspiracy for the accomplishment of any of the foregoing. The Indictment was based upon the Charter and all the above crimes were charged in addition to further charges founded upon other provisions of the Charter.

A conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime. Thereafter, in furtherance of the conspiracy, follows planning and preparing for such war. Those who participate at this stage may be

SECURITY COUNCIL RESOLUTION 1315(2000)

United Nations S/RES/1315 (2000)

Security Council

Distr.: General
14 August 2000

Resolution 1315 (2000)

Adopted by the Security Council at its 4186th meeting, on 14 August 2000

The Security Council:

Deeply concerned at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity,

Commending the efforts of the Government of Sierra Leone and the Economic Community of West African States (ECOWAS) to bring lasting peace to Sierra Leone,

Noting that the Heads of State and Government of ECOWAS agreed at the 23rd Summit of the Organization in Abuja on 28 and 29 May 2000 to dispatch a regional investigation of the resumption of hostilities,

Noting also the steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process, as required by Article XXVI of the Lomé Peace Agreement (S/1999/777) to contribute to the promotion of the rule of law,

Recalling that the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law,

Reaffirming the importance of compliance with international humanitarian law, and *reaffirming further* that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law,

Recognizing that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

Taking note in this regard of the letter dated 12 June 2000 from the President of Sierra Leone to the Secretary-General and the Suggested Framework attached to it (S/2000/786, annex),

Recognizing further the desire of the Government of Sierra Leone for assistance from the United Nations in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace,

Noting the report of the Secretary-General of 31 July 2000 (S/2000/751) and, in particular, *taking note* with appreciation of the steps already taken by the Secretary-General in response to the request of the Government of Sierra Leone to assist it in establishing a special court,

Noting further the negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone,

Acknowledging the important contribution that can be made to this effort by qualified persons from West African States, the Commonwealth, other Member States of the United Nations and international organizations, to expedite the process of bringing justice and reconciliation to Sierra Leone and the region,

Reiterating that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region,

1. *Requests* the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution, and *expresses* its readiness to take further steps expeditiously upon receiving and reviewing the report of the Secretary-General referred to in paragraph 6 below;

2. *Recommends* that the subject matter jurisdiction of the special court should include notably crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone;

3. *Recommends further* that the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone;

4. *Emphasizes* the importance of ensuring the impartiality, independence and credibility of the process, in particular with regard to the status of the judges and the prosecutors;

5. *Requests*, in this connection, that the Secretary-General, if necessary, send a team of experts to Sierra Leone as may be required to prepare the report referred to in paragraph 6 below;

6. *Requests* the Secretary-General to submit a report to the Security Council on the implementation of this resolution, in particular on his consultations and negotiations with the Government of Sierra Leone concerning the establishment of the special court, including recommendations, no later than 30 days from the date of this resolution;

7. *Requests* the Secretary-General to address in his report the questions of the temporal jurisdiction of the special court, an appeals process including the advisability, feasibility, and appropriateness of an appeals chamber in the special court or of sharing the Appeals Chamber of the International Criminal Tribunals for the Former Yugoslavia and Rwanda or other effective options, and a possible alternative host State, should it be necessary to convene the special court outside the seat of the court in Sierra Leone, if circumstances so require;

8. *Requests* the Secretary-General to include recommendations on the following:

(a) any additional agreements that may be required for the provision of the international assistance which will be necessary for the establishment and functioning of the special court;

(b) the level of participation, support and technical assistance of qualified persons from Member States of the United Nations, including in particular, member States of ECOWAS and the Commonwealth, and from the United Nations Mission in Sierra Leone that will be necessary for the efficient, independent and impartial functioning of the special court;

(c) the amount of voluntary contributions, as appropriate, of funds, equipment and services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations;

(d) whether the special court could receive, as necessary and feasible, expertise and advice from the International Criminal Tribunals for the Former Yugoslavia and Rwanda;

9. *Decides* to remain actively seized of the matter.

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YAMASHITA V. STYER

327 U.S. 1

Application of YAMASHITA.

YAMASHITA v. STYER, Commanding General, U. S. Army Forces, Western Pacific.

No. 61 Misc. and No. 672.

Argued Jan. 7, 8, 1946.
Decided Feb. 4, 1946.

1. War ⇐32

Congress, in the exercise of its constitutional power to define and punish offenses against the law of nations, of which the law of war is a part, has recognized the "military commission" appointed by military command, as it had previously existed in United States army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war. Espionage Act 1917, tit. 1, § 7, 50 U.S.C.A. § 38; Articles of War, arts. 2, 12, 15, 10 U.S.C.A. §§ 1473, 1483, 1486; U.S.C.A. Const. art. 1, § 8, cl. 10.

2. War ⇐32

Congress, by adoption of Article of War providing that jurisdiction conferred upon courts martial should not be construed as depriving military commissions, of concurrent jurisdiction of offenders which by law of war are triable by such commissions, adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts and as further defined and supplemented by the Hague Convention. Articles of War, art. 15, 10 U.S.C.A. § 1486.

3. Habeas corpus ⇐92(1)

On application for habeas corpus by one being tried by a military commission for an offense against the law of war, Supreme Court is not concerned with guilt or innocence of petitioner, but considers only the lawful power of commission to try petitioner for offense charged. U.S.C.A. Const. art. 1, § 8, cl. 10.

4. War ⇐32

Military tribunals, which Congress has sanctioned by the Articles of War, are not "courts" whose rulings and judgments are made subject to review by Supreme Court, but are tribunals whose determinations are reviewable by military authority, either as provided in military orders constituting such tribunals or as provided by Articles of War. Articles of War, 10 U.S.C.A. § 1471 et seq.; U.S.C.A. Const. art. 1, § 8, cl. 10.

5. Habeas corpus ⇐16

Where trial is by military tribunal, courts on habeas corpus may inquire whether detention complained of is within authority of those detaining petitioner, but cannot review action of military tribunal within its lawful authority to hear, decide, and condemn merely because military tribunal has made a wrong decision on disputed facts. Articles of War, 10 U.S.C.A. § 1471 et seq.; U.S.C.A. Const. art. 1, § 8, cl. 10.

6. Habeas corpus ⇐16
War ⇐32

Congressional sanction of trial of enemy aliens by military commission for offenses against the law of war recognizes right of accused to make a defense, does not foreclose right of accused to contend that constitution and laws withhold authority to proceed with trial, and does not withdraw duty and power of courts, by habeas corpus, to inquire into authority of commission. Articles of War, art. 15, 10 U.S.C.A. § 1486; Proclamation July 2, 1942, No. 2561, 10 U.S.C.A. § 1554 note; U.S.C.A. Const. art. 1, § 8, cl. 10.

7. Constitutional law ⇐79

Executive Department, unless there is a suspension of the writ, cannot withdraw from courts the power and duty of inquiry by habeas corpus into authority of a military commission. Article of War, art. 15, 10 U.S.C.A. § 1486.

8. War ⇐32

A military commission to try offenses against the law of war may be appointed by any field commander or by any commander competent to appoint a general court martial. Articles of War, arts. 8, 15, 10 U.S.C.A. §§ 1479, 1486; Proclamation July 2, 1942, No. 2561, 10 U.S.C.A. § 1554 note; U.S.C.A. Const. art. 1, § 8, cl. 10.

9. War ⇐32

Where military commission was appointed by Commander of the United States Armed Forces, Western Pacific, which command included the Philippine Islands, to try Commanding General of the Japanese Army in the Philippine Islands on a charge of violating the law of war, in keeping with presidential proclamation that enemy belligerents who violate the law of war should be subject to law of war and jurisdiction of military tribunals and pursuant to declaration of Potsdam, to which

the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities.[2]

[13] The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace. Here, peace has not been agreed upon or proclaimed. Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the law of war. The conduct of the trial by the military commission has been authorized by the political branch of the Government, by military command, by international law and usage, and by the terms of the surrender of the Japanese government.

The Charge. Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war. The charge, so far as now relevant, is that petitioner, between October 9, 1944 and September 2, 1945, in the Philippine Islands, "while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to

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control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he * * * thereby violated the laws of war."

Bills of particulars, filed by the prosecution by order of the commission, allege a a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner's command, during the period mentioned. The first item specifies the execution of "a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity." Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments.

[14] It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4, 28, 46, and 47, Annex to Fourth Hague Convention, 1907, 36 Stat. 2277, 2296, 2303, 2306, 2307. But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes

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on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

[15] It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose

See also trials cited in Colby, War Crimes, 23 Michigan Law Rev. 482, 496, 497.

[2] See cases mentioned in Ex parte Quirin, supra, 317 U.S. at page 32, 63 S.Ct. at page 13, 87 L.Ed. 3, note 10 and in 2 Winthrop, supra,* 1310, 1311, note 5; Modoc Indian Prisoners, 14 Op. Atty.Gen. 249.

to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

This is recognized by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." 36 Stat. 2295. Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out." 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commanders-in-chief of the belligerent

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armies to provide for the details of execution of the foregoing articles [of the convention], as well as for unforeseen cases." And, finally, Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

[16] These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals.[3] A like principle has been applied so as to impose liability on the United States in international arbitrations. Case of Jenaud, 3 Moore, International Arbitrations, 3000; Case of "The Zafiro," 5 Hackworth, Digest of International Law, 707.

[17, 18] We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution. There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances.[4]

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We do not here appraise the evidence on which petitioner was convicted. We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide. See Smith v. Whitney, 116 U.S. 167, 178,

[3] Failure of an officer to take measures to prevent murder of an inhabitant of an occupied country committed in his presence. Gen.Orders No. 221, Hq.Div. of the Philippines, August 17, 1901. And in Gen.Orders No. 264, Hq.Div. of the Philippines, September 9, 1901, it was held that an officer could not be found guilty for failure to prevent a murder unless it appeared that the accused had "the power to prevent" it.

[4] In its findings the commission took account of the difficulties "faced by the accused, with respect not only to the swift and overpowering advance of American forces, but also to errors of his predecessors, weakness in organization, equipment, supply * * *, training, communication, discipline and morale of his troops," and "the tactical situation, the character, training and capacity of staff officers and subordinate commanders, as well as the traits of character of his troops." It nonetheless found that petitioner had not taken such measures to control his troops as were "required by the circumstances." We do not weigh the evidence. We merely hold that the charge sufficiently states a violation against the law of war, and that the commission, upon the facts found, could properly find petitioner guilty of such a violation.

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UNITED NATIONS SECURITY COUNCIL

SEVENTH REPORT OF THE SECRETARY GENERAL ON THE UNITED NATIONS OBSERVER MISSION IN SIERRA LEONE

UNITED
NATIONS

S/1656

Security Council

Distr.
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S/1999/836
30 July 1999

ORIGINAL: ENGLISH

SEVENTH REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS OBSERVER MISSION IN SIERRA LEONE

I. INTRODUCTION

1. In my sixth report to the Security Council on the United Nations Observer Mission in Sierra Leone (UNOMSIL) dated 4 June 1999, I indicated my intention to revert to the Council with recommendations on an expanded UNOMSIL presence in Sierra Leone with a revised mandate and concept of operations in the event of a successful outcome to the negotiations between the Government of Sierra Leone and rebel representatives in Lomé (S/1999/645, paras. 52-57). By paragraph 4 of its resolution 1245 (1999) of 11 June 1999, the Security Council took note of my intention and underlined that security conditions should be considered in any further eventual deployment.

2. On 7 July 1999, representatives of the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) signed a peace agreement in Lomé after several weeks of negotiations (see S/1999/777). The present report sets out the main provisions of the agreement and contains recommendations for the immediate measures that should be taken to strengthen the Mission. Such measures would enable the United Nations to provide initial support to the process of implementation. Following discussions with all interested parties, I intend to submit additional recommendations to the Security Council on the overall activities of the United Nations, including the mandate and structure of a United Nations peacekeeping presence in the country.

II. STATUS OF THE PEACE PROCESS

3. As described in my report of 4 June 1999, peace negotiations between the Government of Sierra Leone and RUF began on 25 May 1999 in Lomé, Togo, hosted and mediated by President Gnassingbe Eyadema of Togo in his capacity as Chairman of the Economic Community of West African States (ECOWAS). The proceedings were supported by a Facilitation Committee consisting of the United Nations, the Organization of African Unity (OAU), ECOWAS and the Commonwealth of Nations under the chairmanship of the Minister for Foreign Affairs of Togo, Joseph Koffigoh, assisted by my Special Representative, Francis Okelo. The negotiations benefited from the active involvement and support of a number of international and national observers, including representatives of the

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Governments of Benin, Burkina Faso, Côte d'Ivoire, Ghana, Guinea, Liberia, Libyan Arab Jamahiriya, Mali, Nigeria, the United Kingdom of Great Britain and Northern Ireland, the United States of America, ECOWAS and OAU, as well as members of the humanitarian community, including the United Nations Humanitarian Coordinator in Sierra Leone. Representatives of Sierra Leonean civil society also provided support.

4. The Lomé Peace Agreement was signed by President Alhaji Ahmad Tejan Kabbah on behalf of the Government of Sierra Leone and by Corporal Foday Sankoh on behalf of the Revolutionary United Front of Sierra Leone, as well as by President Eyadema, President Compaore of Burkina Faso, President Taylor of Liberia, President Obasanjo of Nigeria and high-level representatives of Ghana, Côte d'Ivoire, ECOWAS, OAU, the Commonwealth of Nations and the United Nations.

5. My visit to Freetown on 8 July 1999 took place immediately after the signing of the agreement and allowed me to convey the hopes of the United Nations for its effective implementation and the return of lasting peace to Sierra Leone. During my recent travels in Africa, as well as during the OAU summit held at Algiers from 12 to 14 July 1999, I had the opportunity to hold extensive discussions with regional leaders on the peace process and on the ways and means to assist the people of Sierra Leone in achieving a lasting solution to the conflict in their country. I informed the Security Council of these discussions at its informal consultations of 27 July 1999.

Main provisions of the Lomé Peace Agreement

6. The agreement provides for the permanent cessation of hostilities, to be monitored at provincial and district levels through Ceasefire Monitoring Committees and, at the national level, through a Joint Monitoring Committee. Governance provisions include, inter alia, the transformation of RUF/SL into a political party and its access to public office; the creation of a broad-based Government of National Unity through cabinet appointments for representatives of RUF/SL; the creation of a Commission for the Consolidation of Peace to supervise the implementation of the peace agreement; the establishment of a Commission for the Management of Strategic Resources, National Reconstruction and Development, to be chaired personally by the leader of RUF/SL, Corporal Foday Sankoh, with the status of Vice-President of Sierra Leone; and the establishment of a Council of Elders and Religious Leaders to mediate any disputes arising from differences in the interpretation of the agreement.

7. The agreement provides for the pardon of Corporal Foday Sankoh and a complete amnesty for any crimes committed by members of the fighting forces during the conflict from March 1991 up until the date of the signing of the agreement; a review of the present Constitution of Sierra Leone; and the holding of elections in line with the Constitution, to be directed by a National Electoral Commission. I instructed my Special Representative to sign the agreement with the explicit proviso that the United Nations holds the understanding that the amnesty and pardon in article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.

8. Regarding post-conflict military and security issues, the agreement stipulates the revision of the mandate of the ECOWAS Monitoring Group (ECOMOG); a request for a new mandate for UNOMSIL; the encampment, disarmament, demobilization and reintegration of combatants; the restructuring and training of a new Sierra Leone armed forces; and the withdrawal of mercenaries.

9. Concerning humanitarian, human rights and socio-economic issues, the agreement provides for the release of all conflict-related prisoners and abductees; the resettlement of refugees and displaced persons; the guarantee and promotion of human rights, including the establishment of a Human Rights Commission and a Truth and Reconciliation Commission; the safe and unhindered access by humanitarian organizations to all parts of the country; the security of humanitarian goods and personnel; and post-war rehabilitation and assistance to victims of war.

10. Periodic reviews of the implementation of the agreement will be undertaken by a Joint Implementation Committee, consisting of members of the Commission for the Consolidation of Peace and the ECOWAS Committee of Seven on Sierra Leone, as well as the moral guarantors of the agreement, namely the Government of the Togolese Republic, the United Nations, OAU and the Commonwealth of Nations. The Joint Implementation Committee will be chaired by ECOWAS and meet at least once every three months. The first meeting of the Committee is planned to be held on 9 August 1999 in Freetown, on the occasion of the Ministerial Meeting of the ECOWAS Committee of Seven on Sierra Leone.

11. In accordance with the agreement, the parties have requested ECOWAS to revise the mandate of ECOMOG to cover four areas: peacekeeping; security of the State of Sierra Leone; protection of UNOMSIL; and protection of disarmament, demobilization and reintegration personnel. The Government is to request ECOWAS to provide troops from at least two additional contributing countries. The Security Council is to be requested to provide assistance in support of ECOMOG.

12. At the same time, a timetable is to be drawn up for the phased withdrawal of ECOMOG, to be closely linked to the creation and deployment of restructured national armed forces. However, the agreement also makes reference to a "neutral peacekeeping force comprising UNOMSIL and ECOMOG" (article XVI). The parties also request the Security Council to amend the mandate of UNOMSIL to enable it to undertake the various provisions outlined in the agreement.

Disarmament, demobilization and reintegration

13. Article XVI of the agreement calls for the encampment, disarmament, demobilization and reintegration process to start within six weeks from 7 July 1999. After the January 1999 invasion of Freetown, the World Bank and the Department for International Development of the United Kingdom recommended that the original disarmament, demobilization and reintegration programme be maintained only to deal with current ex-combatants, a second phase to be contingent on a peace agreement and the subsequent formulation of a revised disarmament, demobilization and reintegration plan. The first phase of the programme was completed on 14 July with the discharge of 1,408 ex-soldiers housed in Freetown.

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14. Prior to the signing of the peace agreement, representatives of the Department for International Development and the World Bank met with the delegations in Lomé to brief them on the basic assumptions underlying the revised disarmament, demobilization and reintegration programme, which is to assume responsibility for the needs of an estimated 33,000 to 40,000 combatants. The United Kingdom has pledged $10 million and the World Bank a further $9.1 million towards an estimated total requirement of $33 to $45 million for disarmament, demobilization and reintegration activities.

15. In addition, the World Bank has opened a multi-donor trust fund for disarmament, demobilization and reintegration and has called on donors to contribute. A proposal under review by the National Committee for Disarmament, Demobilization and Reintegration envisages the establishment of about 10 demobilization sites to cover the main areas where the respective fighting forces are currently deployed.

16. Obviously, an effective programme will play a key role in the success of the Sierra Leonean peace process, given the vast proliferation of small arms, the fractured nature of the fighting forces consisting of the ex-Sierra Leone Army, the Civilian Defence Forces (CDF) and RUF/SL, the extent of foreign intervention and the supply of weapons. The agreement stipulates that the present Sierra Leone Army be restricted to their barracks and their arms and ammunition placed under constant surveillance by the neutral peacekeeping force (referred to in para. 12 above) during the process of disarmament and demobilization, and that UNOMSIL shall be present at all disarmament and demobilization locations to monitor the process and provide security guarantees to all ex-combatants.

Human rights

17. The Lomé Peace Agreement contains three articles addressing commitments in the area of human rights, including the full protection and promotion of basic civil and political liberties recognized by the Sierra Leone legal system and contained in the declarations and principles of human rights adopted by the United Nations and OAU (article XXIV). The other articles provide, respectively, for the creation of an autonomous quasi-judicial national Human Rights Commission and the establishment of a Truth and Reconciliation Commission not later than 90 days from 7 July 1999.

18. While the Human Rights Commission is designed to strengthen the existing machinery for addressing grievances of the people of Sierra Leone with respect to human rights violations, the Truth and Reconciliation Commission will deal specifically with the question of human rights violations committed since the beginning of the armed conflict in 1991. It is intended to provide a forum for both victims and perpetrators to tell their stories and facilitate genuine healing and reconciliation. The Commission will also recommend measures for the rehabilitation of victims of human rights violations.

19. The Truth and Reconciliation Commission will be composed of a cross-section of the society of Sierra Leone, with the participation and technical support of the international community, and is expected to submit its report to the Government within 12 months after the commencement of its work.

20. The United Nations High Commissioner for Human Rights, Mrs. Mary Robinson, visited Sierra Leone on 24 and 25 June 1999, accompanied by a high-level delegation. In a statement dated 25 June 1999, the High Commissioner said that Sierra Leone required urgent international attention if it were to overcome its recent history of horrendous human rights abuses. In the same statement, she said that among the measures that could be taken in the short term were international assistance to document the human rights violations as a step towards accountability; increasing the number of human rights monitors in the country, and working with the Government and Sierra Leonean civil society to create a "human rights infrastructure" in the country. The High Commissioner, together with the Government of Sierra Leone, the National Commission for Democracy and Human Rights, representatives of civil society and my Special Representative, adopted the Human Rights Manifesto, which contains and reaffirms wide ranging commitments for immediate and sustained promotion and protection of human rights, such as the non-recruitment in the armed forces of children under the age of 18 years. The manifesto commits the United Nations to provide appropriate support to Sierra Leonean human rights institutions, as well as for other elements of technical assistance.

Protection of children

21. The agreement also refers to the vulnerability of the children of Sierra Leone, who have suffered disproportionately and on an unprecedented scale throughout the war and who require special attention to ensure their protection and welfare during the consolidation of peace. The agreement acknowledges the children's entitlement to special care and protection of their inherent right to life, survival and development.

III. POLITICAL, MILITARY AND SECURITY SITUATION

22. The Government has taken steps to ensure the acceptance of the agreement in Sierra Leone, including a personal address by President Kabbah to Parliament when the agreement was submitted for ratification, and the development of a sensitization campaign by the Information Ministry based on the translation of the agreement into several local languages. Internationally, President Kabbah took the initiative to travel to Conakry and brief President Lansana Conte personally about the events in Lomé and the contents of the agreement. He continued to mobilize support at the OAU summit in Algiers from 12 to 14 July, which was attended also by Corporal Foday Sankoh.

23. The Parliament of Sierra Leone unanimously ratified the peace agreement on 15 July. On 20 and 21 July, it adopted legislation necessary for the implementation of the agreement. This legislation paved the way for the transformation of RUF/SL into a political party, for the participation of senior members of RUF/SL to hold public office and for the establishment of the Commission for the Management of Strategic Resources, National Reconstruction and Development, to be chaired by Mr. Sankoh. Mr. Sankoh, for his part, indicated that he was ready to come to Freetown, pending arrangements for accommodation and security.

24. The military and security situation in Sierra Leone has improved significantly since the ceasefire agreement took effect on 24 May and has remained generally calm since the signing of the agreement. While some, mostly minor, ceasefire violations have occurred, including reports of rebel raids on villages, the number of incidents of open hostilities has dropped considerably. ECOMOG, CDF and RUF and former Armed Forces Revolutionary Council (AFRC) forces have generally remained within their areas of control.

25. RUF/SL and AFRC continue to dominate much of the Northern and Eastern Provinces. In the western parts of the country, their forces are concentrated in the areas west of the main highway from Freetown between Occra Hills, Port Loko and Kambia. The road to Guinea via Kambia is also controlled by RUF/SL and AFRC personnel, but they have assured UNOMSIL that an unhindered flow of traffic will be allowed.

26. A few military confrontations between CDF and RUF/SL-AFRC groups occurred in the northern, central and eastern parts of the country prior to the signing of the agreement, but there have been no reports of major combat since 7 July. However, both sides have continued to conduct troop movements throughout their respective areas of control. ECOMOG remains firmly in control of the Freetown peninsula and of a security cordon east of the capital, including the main highway providing access to Lungi and to Bo/Kenema, as well as Bumbuna and Kabala in the Northern Province.

27. ECOMOG continues to experience shortages of essential goods and supplies. The immediate requirements of ECOMOG include office equipment, various vehicles (trucks, ambulances, tankers), generators, communications equipment, helicopters, uniforms, medical supplies and other vital items. The Secretary-General of ECOWAS has requested me to impress on the Security Council and the international community the need to provide logistical and other necessary support for the deployment of additional ECOMOG troops, as envisaged in the agreement. The details of such support are still to be specified.

28. UNOMSIL has developed a system of reporting allegations of ceasefire violations and has shared all relevant information with the parties. To the extent possible, military observers have been dispatched to verify allegations in the areas accessible to them. UNOMSIL military observers have also been active in facilitating meetings between the parties on the ground in the accessible areas and have successfully mediated a number of disputes.

IV. HUMANITARIAN ASPECTS

29. In the wake of the agreement, unprecedented cooperation between RUF/SL, the Government and the aid community has put the delivery of humanitarian assistance throughout the country within grasp for the first time in years. Despite initial delays, humanitarian assessment missions have been completed or are under way in the rebel controlled areas of Makeni, Kailahun, Buedu, Rokupr and Lunsar. Civilian needs have also been assessed in recently accessible Government-controlled areas, such as Yele, Port Loko, Daru, Kabala, Songo and the Rogberi-Masiaka corridor. These assessments have revealed acute shortages of basic, life-sustaining items such as food and medicine and subsequent

malnutrition, as well as outbreaks of dysentery, cholera, measles and meningitis.

30. As humanitarian access throughout the country increases, the caseload of those needing assistance - currently limited to 500,000 - is expected to triple. Needs have also increased in Government-controlled areas. Difficult overland access continues to cause delays in food shipments to areas such as Kenema and Bo. Combined with the onset of the rainy season, cases of severely malnourished infants nearly doubled in the last month. Obviously, as humanitarian agencies gain access to larger areas of the country, their need for adequate staffing and logistic support will increase significantly.

31. As the first tangible sign of the international community's commitment to the agreement, the rapid country-wide delivery of humanitarian assistance is a key aspect of the consolidation of peace. At present, the 1999 Consolidated Inter-Agency Appeal, which requested $27.9 million for humanitarian programmes in Sierra Leone, is only 26 per cent funded. It is hoped that donors will contribute generously to meet humanitarian needs in Sierra Leone.

32. The peace agreement may also bring an end to the circumstances that forced some 470,000 Sierra Leoneans to live in exile. In the coming months, the Office of the United Nations High Commissioner for Refugees (UNHCR) will develop a strategy for the repatriation of refugees and increase its capacity to monitor possible spontaneous returns, as well as the security, socio-economic and humanitarian conditions in the areas of return. These activities will be carried out in close coordination with other relief agencies as well as with the parties to the peace agreement.

V. FUTURE ROLE OF THE UNITED NATIONS OBSERVER MISSION IN SIERRA LEONE

33. The signing of the agreement requires UNOMSIL to perform significantly expanded as well as new tasks, in close coordination with ECOMOG, whose presence in Sierra Leone remains, in this critical period, indispensable. It is obvious that, in addition to the major disarmament and demobilization effort, the implementation of the Lomé Peace Agreement will require the presence of a substantial number of peacekeepers throughout the country, together with the deployment of additional United Nations military observers, in mutually supporting roles.

34. In accordance with the peace agreement, the mandate of ECOMOG will need to be revised by ECOWAS, in consultation with the United Nations and, as appropriate, with the parties. Among the issues that require detailed discussion are the division of labour between the United Nations and ECOWAS, the need to provide a credible level of security throughout the country (including the rebel-controlled areas), the appropriate size and composition of the required neutral peacekeeping force, the deployment of units to the various regions of the country and arrangements for logistical support.

35. Once these consultations, which are ongoing, have produced an understanding of the respective tasks, strength and mandates of ECOMOG and the United Nations,

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I will be in a position to make comprehensive proposals to the Security Council concerning a new mandate and concept of operations for UNOMSIL. In the interim, however, it will be necessary to act expeditiously in order to offer maximum support to the parties and ECOMOG, and maintain momentum in the peace process. I believe that the most immediate and practical way of providing such support would be the deployment to Sierra Leone of additional United Nations military observers, along with the necessary equipment and administrative support. The number of UNOMSIL military observers required would increase to 210, based on an assessment of the tasks described below. It should be clearly understood, however, that the presence and operations of these observers alone would not be sufficient to ensure the implementation of the agreement. For this, it will be necessary to deploy large numbers of peacekeepers throughout the country. I would also propose that UNOMSIL be strengthened with additional civilian staff in the fields of political and civil affairs, as well as human rights, to allow it to cope with the increased responsibilities which flow from the agreement. An elaboration of these requirements is given below.

36. In order to support the effective functioning of an expanded mission, it is critical that the necessary administrative and logistical support services are made available. To this end, an adequate increase in administrative and technical personnel as well as resources should be provided. The estimated costs of the additional military and civilian staff, as well as of the required logistical support, will be submitted to the Council shortly, in an addendum to the present report.

Military aspects

37. As noted in paragraph 49 of my report of 4 June 1999 (S/1999/645), additional military observers are now being deployed to restore the strength of UNOMSIL to its authorized strength of 70 military observers. The current strength of UNOMSIL is approximately 50 military observers.

38. The envisaged tasks of an expanded UNOMSIL military observer component would be as follows:

(a) To strengthen and expand the contacts already established by UNOMSIL with RUF/SL troops in the countryside since the ceasefire agreement came into effect;

(b) To extend UNOMSIL's ceasefire monitoring activities to a wider geographical area, security conditions permitting;

(c) To strengthen and assist the Ceasefire Monitoring Committees and the central Joint Monitoring Committee established pursuant to the peace agreement to help maintain the ceasefire;

(d) To monitor the military and security situation in the country and report thereon to my Special Representative;

(e) To assist and monitor the disarmament and demobilization of combatants in areas where adequate security is provided;

(f) To work closely with humanitarian organizations to exchange information on security conditions with a view to ensuring the widest possible access for humanitarian assistance to populations in need;

(g) To work closely with human rights officers, as required, in their visits throughout the country;

(h) To maintain liaison and coordinate closely with ECOMOG;

(i) To assist in the preparation of plans for the deployment of neutral peacekeeping troops, as envisaged in the agreement.

39. The additional military observers would be deployed to Sierra Leone in a gradual manner. At present, it is envisaged that UNOMSIL military observers would maintain a strengthened headquarters in Freetown and would deploy to team sites initially in Lungi, Hastings, Port Loko and Bo. For the time being, these military observers would operate under security provided by ECOMOG. It would also be necessary to ensure enhanced logistical support for an expanded UNOMSIL. A key requirement would be the introduction of a second-line medical capability to provide basic and emergency health care. Such a capability would require up to 35 military (or civilian) medical personnel. It would also be crucial for an expanded UNOMSIL to have an aviation capability to provide 24-hour medical evacuation as well as daytime monitoring and observation.

Political and civil affairs

40. The Lomé Peace Agreement signed by the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone includes numerous requests for international involvement, specifically that of the United Nations, in implementing provisions contained therein. This would require a substantial increase in the role of UNOMSIL and, accordingly, in its human and administrative resources.

41. In view of the role of the Special Representative of the Secretary-General in the peace process and the increased responsibilities arising from an expanded UNOMSIL presence to assist the implementation of the peace agreement, it would be advisable to upgrade the level of that post. Accordingly, it is envisaged that the Office of the Special Representative of the Secretary-General will be expanded to include a deputy Special Representative and additional staff for coordination, public information and legal affairs.

42. The envisaged political affairs office of UNOMSIL would consist of up to eight officers and would be responsible for liaison with the parties; government ministers and parliament; United Nations programmes; non-governmental organizations; and provincial and district representatives of the Government of Sierra Leone. The political affairs office would also assist the Special Representative of the Secretary-General in the development and implementation of the Strategic Framework for Sierra Leone (see para. 44 below).

43. The requirement for a civil affairs component derives from the need for UNOMSIL to participate in the various bodies charged with the implementation and monitoring of the agreement and to assist in the phased reintegration of members

of RUF/SL, the Sierra Leone Army and CDF into civil society. The civil affairs component, which would consist of 10 civil affairs officers, would maintain nine field sites located in Freetown, the three provincial capitals and major towns such as Kabala, Kailahun, Kambia and Koidu. Offices would also maintain liaison with provincial and district government representatives. In addition, the civil affairs component would also liaise with appropriate government bodies on matters relating to economic reconstruction and investment and monitor adherence to international law governing compensation in reference to article VII of the peace agreement. It is also envisaged that a small secretariat for the Joint Implementation Committee would be established to monitor respective areas of concern, mainly human rights, refugees and displaced persons, elections and education and health.

44. The successful implementation of the peace agreement will also require a coherent and comprehensive response involving the Government and its international and domestic partners. Following consultations with all relevant partners in the United Nations system, I have decided that a strategic framework be developed for Sierra Leone, encompassing political, assistance and human rights aspects. Through this framework a mutually reinforcing comprehensive political strategy and assistance programme would be developed. Its development and implementation is envisaged as a primarily field-driven exercise, led by my Special Representative working in close consultation with national and international partners. A small United Nations mission visited Sierra Leone from 14 to 19 June to help launch the Framework. As a first step, a steering group has been set up in Freetown, chaired by my Special Representative, with representatives of the concerned United Nations entities. The establishment and implementation of the strategic framework will be facilitated at Headquarters under the guidance of the Deputy Secretary-General.

45. With the signing of the peace agreement, the increased dissemination of information will be crucial in sensitizing public opinion after eight years of civil war. The present UNOMSIL information capacity should be expanded with three additional international staff and an appropriate number of local staff. The functions to be carried out include the production of radio programmes in indigenous languages for broadcast on the Sierra Leone Broadcasting Service and other existing radio stations. United Nations radio programming for local distribution is also required. Consideration should also be given to video production for audiences in Sierra Leone, focusing on the disarmament, demobilization and reintegration process, as well as on issues affecting the population relating to the agreement.

Human rights

46. The human rights component will continue to play a key role in the future operations of UNOMSIL and will strengthen its monitoring and reporting activities in all parts of Sierra Leone. This critical task will include a broad range of human rights issues that encompass the rights of women and children and economic and social rights. In particular, the human rights abuses suffered by women during the conflict will constitute a major focus of the work of human rights officers.

47. In support of the human rights provisions in the agreement, it will be necessary to expand the human rights component to enable it to cover all parts of the country, including the areas previously under RUF/SL control, to collect testimonies, document abuses and bring forward witnesses and survivors of atrocities. A thorough fact-finding process will be critical to the effective functioning of the Truth and Reconciliation Commission and other efforts to consolidate peace in Sierra Leone. In order to ensure that there will be appropriate accountability for serious violations of human rights and humanitarian law, the Security Council may wish to consider various steps to address this question, including the establishment in due course of a commission of enquiry, as recommended to the Government of Sierra Leone by the High Commissioner for Human Rights. Such a commission would investigate and assess human rights and humanitarian law violations and abuses perpetrated by all parties since the commencement of the conflict in 1991. At the same time, technical cooperation will have to be increased to ensure that the judicial system resumes operations throughout the country and that human rights training is extended to public office holders of RUF/SL. These additional functions will require a significant expansion in the current strength of the UNOMSIL human rights component to assist the parties in the implementation of the human rights provisions of the agreement.

48. It is envisaged that additional human rights officers will be deployed to the main provincial centres and towns to carry out comprehensive monitoring, fact-finding, documentation and analysis on the observance of human rights and international humanitarian law by all parties throughout Sierra Leone. Their co-deployment with military observers will also ensure adequate attention to human rights issues and child protection in the disarmament, demobilization and reintegration process.

49. Human rights technical cooperation programmes conducted by UNOMSIL, with support from the Office of the United Nations High Commissioner for Human Rights, will be directed towards the following sectors: (a) human rights training and skills development; (b) promotion of the rule of law; (c) support to and capacity-building for human rights institutions, the Truth and Reconciliation Commission and civil society; (d) promotion of child rights; and (e) mainstreaming of attention to gender rights. Generous financial assistance from the international community will be required for the implementation of these activities.

50. To enable it to carry out an expanded role, it is proposed that the present human rights component be augmented immediately by 10 international human rights officers, including two child protection officers.

Protection of children

51. The protection of the rights of children will require immediate and special attention during the process of disarmament and demobilization and beyond, given the particular needs of child combatants during their rehabilitation and reintegration into society. The United Nations Children's Fund is playing a leading role, in close coordination with my Special Representative for Children and Armed Conflict, in the protection of children and the disarmament, demobilization and reintegration of child soldiers. Among the many other

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pressing needs are the support of child victims of mutilations and sexual exploitation and the rehabilitation of primary health and educational services. Additional financial, material and human resources will need to be mobilized by the relevant agencies in support of these activities. A child protection adviser should be added to the Mission to ensure that these issues are dealt with in a comprehensive manner and are given due attention at the national and international levels.

VI. OBSERVATIONS AND RECOMMENDATIONS

52. The signing of the Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front is a great step forward for Sierra Leone. It provides the Sierra Leonean people a unique opportunity to bring an end to the conflict, which has caused them untold suffering and has registered deeply in the conscience of the international community. Both sides are to be congratulated for showing the flexibility that has made this agreement possible. Credit is due also to the international community and, in particular, to ECOWAS, for their leadership in bringing both sides together and facilitating the conclusion of the peace agreement.

53. Special recognition is also due to ECOMOG. Its troops and, in particular, the Governments of Nigeria, Ghana, Guinea and Mali that provided them, are to be commended for their steadfast courage in the face of considerable hardship and sacrifice. ECOMOG can and should take pride in what it has achieved. I call upon the international community to provide strong and continuous support to this regional force so that it can maintain its critical presence in Sierra Leone. The main requirements of ECOMOG are listed in paragraph 27 above.

54. As in other peace accords, many compromises were necessary in the Lomé Peace Agreement. As a result, some of the terms under which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity, which inspired the creation of the United Nations Tribunals for Rwanda and the Former Yugoslavia, and the future International Criminal Court. Hence the instruction to my Special Representative to enter a reservation when he signed the peace agreement, explicitly stating that, for the United Nations, the amnesty cannot cover international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. At the same time, the Government and people of Sierra Leone should be allowed this opportunity to realize their best and only hope of ending their long and brutal conflict. During my short visit to Sierra Leone on 8 July 1999, I witnessed tremendous destruction, suffering and pain, particularly on the faces of the victims of wanton and abhorrent violence. I took the opportunity to encourage all Sierra Leoneans to seize this opportunity for peace, to rally behind the agreement, seek reconciliation, and to look and work towards the future.

55. By all accounts, the challenges ahead are daunting. Among these are the disarmament and demobilization of combatants, their reintegration into society, the restoration of State authority in territories now held by rebel forces, the necessity of addressing humanitarian needs throughout the country, the repatriation of refugees, the building of institutions and the healing of the

deep wounds caused by the civil war. Strict compliance with the terms of the agreement by both sides, as well as their supporters and all commanders and fighters in the field, is indispensable. The United Nations will, as is customary, exercise its responsibilities in an impartial manner, and calls on both sides to extend to UNOMSIL and ECOMOG their complete cooperation.

56. The international community and the United Nations have an important responsibility to assist Sierra Leone and to ensure that momentum is maintained in this process, especially in the critical phase immediately after the signing of the peace agreement. I therefore recommend that the Security Council approve, as an immediate first step, the provisional expansion of the United Nations Observer Mission in Sierra Leone (UNOMSIL), along the lines set out in paragraphs 33 to 51 above. As indicated in the present report, I hope to revert to the Security Council as soon as possible with an additional report on the situation in Sierra Leone, which will include recommendations for the mandate and structure of the enhanced United Nations peacekeeping presence that may be required in the country.

57. I take this opportunity to express my appreciation to my Special Representative, Francis G. Okelo, the Chief Military Observer, Brigadier-General Subhash C. Joshi, and the staff and military observers of UNOMSIL for their tireless efforts and dedication to bring the difficult negotiation process to a successful conclusion and thereby continue to advance the peace process in Sierra Leone.

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Annex

United Nations Observer Mission in Sierra Leone: contributions as at 29 July 1999

	Military observers	Others[a]	Total
Bangladesh	2		2
China	3		3
Egypt	2		2
India	2	2	4
Jordan	2		2
Kenya	4		4
Kyrgyzstan	1		1
Malaysia	4		4
New Zealand	2		2
Pakistan	5		5
Russian Federation	8		8
United Kingdom of Great Britain and Northern Ireland	8		8
Zambia	5		5
Total	48[b]	2	50

[a] Medical team.

[b] Including the Chief Military Observer.

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July 1999

Department of Public Information
Cartographic Section

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INTERNATIONAL CRIMINAL PRACTICE

INTERNATIONAL CRIMINAL PRACTICE

The International Criminal Tribunal for the Former Yugoslavia
The International Criminal Tribunal for Rwanda
The International Criminal Court
The Special Court for Sierra Leone
The East Timor Special Panel for Serious Crimes
War Crimes Prosecutions in Kosovo

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SECTION 3: CUMULATIVE CHARGING

Charges Must Protect Different Values or Contain Different Elements

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8.3.1 The practice of cumulative charging refers to the charging, in an indictment, of more than one crime in relation to the same set of events. ICTY jurisprudence allows cumulative charging under certain circumstances. See the *Decision on Defence Challenges to Form of the Indictment* rendered in *Kupreškić et al* on 15 May 1998:

> the Prosecutor may be justified in bringing cumulative charges when the Articles of the Statute referred to are designed to protect different values and when each Article requires proof of a legal element not required by the others.

8.3.2 In the *Decision on the Defence Preliminary Motion on the Form of the Indictment* rendered in *Krnojelac* on 24 February 1999, the Trial Chamber upheld the practice of allowing cumulative charging (paras 5–10). The Chamber based itself on both ICTY jurisprudence and the *Akayesu Trial Judgement:*

> 10. The prosecution must be allowed to frame charges within the one indictment on the basis that the tribunal of fact may not accept a particular element of one charge which does not have to be established for the other charges, and in any event in order to reflect the totality of the accused's criminal conduct, so that the punishment will do the same. Of course, great care must be taken in sentencing that an offender convicted of different charges arising out of the same or substantially the same facts is not punished more than once for his commission of the individual acts (or omissions) which are common to two or more of those charges. But there is no breach of the double jeopardy principle by the inclusion in the one indictment of different charges arising out of the same or substantially the same facts.

8.3.3 The test set out in *Kupreškić*, above, differs from that enunciated by the ICTR in the *Akayesu Trial Judgement* in two respects: (1) the *Akayesu* Judgement added a third condition ("where it is necessary to record a conviction for both offences in order fully to describe what the accused did") and (2) presented the three conditions as *disjunctive* ("or") as opposed to the conjunctive ("and") applied in *Kupreškić*. See para. 468 of the *Akayesu Trial Judgement:*

> On the basis of national and international law and jurisprudence, the Chamber concludes that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide.

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Cumulative Convictions Permitted if *Blockburger* Test Met

8.3.4 In the *Delalić et al. Appeals Judgement* (paras 316–359), the Chamber allowed cumulative convictions (as opposed to cumulative charging, which the Chamber allowed generally (para. 327)), only in one situation, namely when each statutory provision involved has a materially distinct element not contained in the other (para. 339). This has been referred to as the *Blockburger* test, after the U.S. case of the same name.

8.3.5 Where this test is not met, a decision must be made in relation to which offence the Chamber will enter a conviction, on the basis that the conviction must be for the offence containing the more specific provision (para. 340). Where the evidence establishes the guilt of an accused based upon the same conduct under both Article 2 and Article 3 of the Statute, the conviction must be entered for the offence under Article 2 (para. 354), because Article 2 has the more specific requirement that the crimes were committed in the context of an international armed conflict.

8.3.6 This approach was followed in the *Foča Trial Judgement* (paras. 548–549):

> 550. Accordingly, once all the evidence has been assessed, before deciding which convictions, if any, to enter against an accused, a Trial Chamber first has to determine whether an accused is charged with more than one statutory offence based upon the same conduct. Secondly, if there is evidence to establish both offences, but the underlying conduct is the same, the Trial Chamber has to determine whether each relevant statutory provision has a materially distinct element not contained in the other. This involves a comparison of the elements of the relevant statutory provisions—the facts of a specific case play no role in this determination. Thirdly, if the relevant provisions do not each have a materially distinct element, the Trial Chamber should select the more specific provision.

8.3.7 When it comes to sentencing, the sentence must "reflect the totality of the criminal conduct and overall culpability of the offender" (para. 551).

8.3.8 See also the *Kordić and Čerkez Trial Judgement*, paras. 814–826. The Trial Chamber, applied the test enunciated by the Appeals Chamber in the *Delalić et al. Appeals Judgement* and set out the appropriate charges to convict upon in situations of overlapping counts.

8.3.9 This approach was also taken in the *Kayishema and Ruzindana Trial Judgement* in relation to the charges of genocide and crimes against humanity:

> 577. . . . in this particular case the crimes against humanity in question are completely absorbed by the crime of genocide. All counts for these crimes are based on the same facts and the same criminal conduct. These crimes were committed at the same massacre sites, against the same people, belonging to the Tutsi ethnic group with the same intent to destroy this group in whole or in part.
> 578. Considering the above . . . it . . . [would] be improper to convict the accused persons for genocide as well as for crimes against humanity based on murder and extermination because the later [sic] two offences are subsumed fully by the counts of genocide. . . .

8.3.10 Judge Khan, in a separate and dissenting opinion, dissented from this approach, believing it was proper in that case to record convictions for both genocide and crimes against humanity.

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Cumulative or Alternative Counts

8.3.11 There seem to be two approaches at the ICTY to the question whether crimes in an indictment may be charged cumulatively or in the alternative. The *Tadić* Trial Chamber, when confronted with this issue, postponed it *to the sentencing stage* (*Tadić Form of the Indictment Decision*, 14 November 1995):

> since this is a matter that will only be relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading. (para. 17).

8.3.12 The *Delalić* Trial Chamber followed its own reasoning in its *Delalić Form of the Indictment Decision* of 2 October 1996 (p. 14); its *Landžo Form of the Indictment Decision* of 15 November 1996 (para. 7), and its *Delić Form of the Indictment Decision* of 15 November 1996 (para. 22).

8.3.13 When the *Tadić* trial concluded, the Trial Chamber imposed concurrent sentences, both as between Article 3 and Article 5 charges relating to the same conduct, and as between different instances of misconduct (e.g. different beatings).

8.3.14 This approach does not, however, entirely address the issue. First, the matter of whether crimes are being charged cumulatively or in the alternative is not a "technicality of pleading"; it goes to the very question of whether an accused has committed one crime or several and it is thus a question of *substance*.

8.3.15 Second, since *concurrent* sentences were imposed in *Tadić*—a practice which could be adopted for both alternative verdicts and cumulative charges—the Trial Chamber was able to side-step the issue. The Chamber would only have had to clarify the matter if it had wished to impose *consecutive* sentences under Rule 101(C), since that would only appear to be permissible where the charges are cumulative (since separate crimes are then being punished) and not where they are alternative (since the accused would then be punished twice for the same crime).

8.3.16 Indeed, an accused should not even be *convicted* of two crimes if they really are alternatives, but if concurrent sentences are imposed, the injustice of the double conviction is mitigated by the fact that it makes no difference in terms of penalty, as noted above (although it can make a difference to an accused to be convicted of fifteen crimes rather than five crimes, even if the overall sentence is the same).

8.3.17 Thus the question of cumulative/alternative verdicts was not answered in *Tadić*.

8.3.18 A different approach was taken in *Kupreškić*, where it was held that cumulative charges are permitted where the crimes charged protect different values or contain different elements (see 8.3.1, above).

8.3.19 See also *Prosecutor's Response to the Trial Chamber's Request for a Brief on the Use of Cumulative Criminal Charges in relation to a proposed "substantive"* non bis in idem *principle in international criminal law* submitted in *Dokmanović* on 10 February 1998, for a discussion of the cumulative charges/*non bis in idem*/double jeopardy issue.

ICTY Rule 87(C)

8.3.20 Reference should be made to ICTY Rule 87(C) in this regard:

> If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.

Walther, Suzanne, "Cumulation of Offences," Ch. 11.6, *in* Antonio Cassese, Paola Gaeta and John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002).

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PROSECUTION EXIBIT P-33

Exhibit P33

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REPORT ON THE SITUATION IN SIERRA LEONE IN RELATION TO CHILDREN WITH THE FIGHTING FORCES

Prepared by Roisin de Burca for the Special Court for Sierra Leone

May 4, 2005

REPORT ON THE SITUATION IN SIERRA LEONE IN RELATION TO CHILDREN WITH THE FIGHTING FORCES

INTRODUCTION

A. ABOUT THE AUTHOR

1. I was based in Freetown from July 1998 until March 2002 as the Child Protection Officer for UNICEF. I was responsible for the development and implementation of programmes for the care and protection of child soldiers, separated children, street children and abused children; as well as the monitoring and reporting of gross child rights violations. UNICEF was the lead agency on these subjects and I was involved in negotiations with the various fighting groups for the release of abducted children, including the demobilization of child soldiers. I was a member of the Technical Co-ordination Committee of National Committee on Disarmament, Demobilization and Reintegration (NCDDR) from 1998 – 2002 and provided technical assistance on all aspects of disarmament and demobilisation of child soldiers. I carried out training for military observers (UNAMSIL) on child rights, disarmament and demobilisation of child soldiers and protection of children affected by the war. I also assisted in the development of the reintegration programme for child soldiers and was a member of the contract review committee of NCDDR for the reintegration of ex-combatants. The policies and strategies proposed by UNICEF were adopted by the Government and became the framework for all agencies working with children in Sierra Leone.

2. I have over 18 years of experience in the field of child protection and the protection of child rights, including work with child combatants. Over the course of my work, I have contributed to the development of many of the policies used today within Child Protection and for Children Associated with Armed Forces. I have also contributed to the continued development of strategies for girls with the fighting forces.

3. My work experience in this field includes: Regional Emergency Planning Officer (April 2002 – March 2004), UNICEF, Regional Office for West and Central Africa, Abidjan, Côte d'Ivoire; Programme Officer – Child Protection (July 1998 – March 2002), UNICEF, Sierra Leone; Head of Sub Office (December 97 – April 1998), UNICEF, Goma, DRC; Programme Officer – Child Protection (January 1997 - December 1997), UNICEF, Goma, DRC and Brazzaville, Republic of Congo (June 1997); Programme Officer – Child Protection (October 1996 – December 1996), UNICEF - Kenya, Rwanda and the Democratic Republic of Congo; Programme Officer – Child Protection (September 1995 – August 1996), UNICEF, Lusaka, Zambia; Consultant (April 1994 – July 1995), UNICEF, Lusaka, Zambia; Programme Co-ordinator (September 1990 – March 1994), Street Kids International (Canada), Lusaka, Zambia; Social Assistant (April 1990 – September 1990), St Francis Training Centre, Ireland; Programme Co-ordinator (May 1989 – November 1998), Street Kids International (Canada), Bangalore, India; Field Researcher (April 1988 – September 1988), Street Kids International (Canada), Brazil, Paraguay, Guatemala, Dominican Republic, Jamaica;

Programme/Medical Co-ordinator (February 1987 – November 1987), Les enfants du Soleil (France), Khartoum, Sudan. I have annexed my curriculum vitae to this report.

4. Whilst in Sierra Leone, my work was divided into the following areas:
   a. **Advocacy**: negotiation with the government for demobilisation and non recruitment of children (CDF faction), negotiation with rebel groups for the release of abductees and for non recruitment (RUF, Ex SLA, Westside boys factions).
   b. **Programme response**: establishment of rapid response for the care (centres, staff and supplies) and the protection of released abductees, which also included children who were captured by ECOMOG.
   c. **Policy**: ensuring through my presence on the technical committee that children with the armed forces were addressed at all policy and implementation stages of DDR. I wrote the guidelines for care and protection of children in demobilization process, which has now been adapted as a UNICEF policy document.
   d. **Child rights**: monitoring and reporting of child rights violations across the country. I established a system for Church Counsel of Sierra Leone (CCSL)[1] to implement. The largest numbers of documented cases were those following the attack on Freetown in January 1999.

5. I conducted regular missions throughout Sierra Leone during 1998 - 2002. The locations of such missions were linked to where there was access at the time and where dialogue had opened with the rebel groups. These areas included Lungi, Bo, Kenema, Daru, Port Loko, Makeni, Kabala, and Kailahun.

B. THE PRESENCE OF UNICEF IN SIERRA LEONE

6. Throughout the war, UNICEF was the lead agency on child protection and child rights protection activities. As the lead donor and coordinator of all activities under child protection, all information concerning child protection was reported to us. All child protection agencies across the country submitted monthly reports to UNICEF that were only in statistical form. Written reports were later received at the end of the year. Moreover, each agency was required to keep files on the children entering their programme.

7. This report will present in detail the child protection activities that were undertaken during the conflict in Sierra Leone by UNICEF and its partnering agencies. In my opinion, approximately 85% of children participating in these child protection activities were child combatants.

[1] Church Counsel of Sierra Leone is a network of church organizations operating in Sierra Leone. Many church organizations were involved in children's issues, including child protection activities.

C. NATURE OF THE PRESENT REPORT

8. This report describes the situation in Sierra Leone in relation to children with the fighting forces.

9. The definition of a "child" used by the Government of Sierra Leone differed from that used by UNICEF and child protection agencies from 1996 to 1999. Prior to 1999, the Government of Sierra Leone defined a child as an individual under the age of 15 years. The government later adopted the definition advocated by child protection agencies upon its approval of the National DDR programme in early 1999. (I came to learn through my work that the RUF in fact defined children as those individuals under the age of 15; whilst the CDF defined children as those individuals under the age of 14.) The definition preferred by UNICEF and its partnering child protection agencies was based upon the Convention on the Rights of the Child, which states that a child is every human being below the age of 18.[2] The subsequent shift by the government in adopting the age of 18 from 15 years is notable because it has implications upon the ages of child combatants that were reported by the Ministry of Social Welfare prior to 1999, which will be later cited and discussed in this report.

10. References to a child soldier or child combatant are based upon the definition of a child soldier employed in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict[3] (discussed in detail later in this report) and the "Cape Town Principles", which provide that a child soldier is any person under the age of 18 who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists; and that child soldiers perform a range of tasks including participation in combat, laying mines and explosives; scouting, spying, acting as decoys, couriers or guards; training, drill or other preparations; logistics and support functions, portaging, cooking and domestic labour; and sexual slavery or other recruitment for sexual purposes.

11. References made in this report to the "release" of children mean the actual handing over of children to child protection agencies **following negotiation** with an armed faction.

12. The sources of information for this report include:
    a. Quarterly reports prepared by the CCSL on child rights abuses, which were funded by UNICEF and widely distributed to the public.
    b. Reports prepared by NCDDR, which included progress and statistical reports that were regularly provided to UNICEF.

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[2] Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990, article one.
[3] G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* February 12, 2002.

c. Press releases prepared by UNICEF and UNAMSIL, NCDDR, Human Rights Watch, which were usually made following the release of children.
d. News articles and reports from the international press, including international news agencies such as Reuters, the BBC and CNN.
e. Interviews with children that I personally conducted as part of my work with UNICEF.

13. More specifically, the sources of my information varied for each fighting faction:
    a. RUF/AFRC: The documentation of separated children who were identified to have been with the RUF was generally based upon:
        I. Family Tracing and Reintegration program (FTR), described later in this report, which recorded how children had been separated from their families through basic documentation that registered missing children.
        II. Throughout 1998 – 2002, Child Protection Agencies regularly reported to UNICEF estimated numbers of children missing in their area of operations in Sierra Leone.
        III. ECOMOG provided UNICEF with estimates on the numbers of children present within fighting factions, which was based upon their own intelligence.

    b. CDF: The information I received concerning the presence of children within the CDF fighting forces was different because these children were not usually separated from their community and therefore not documented as missing. UNICEF received reports from:
        I. Child Protection Agencies; and
        II. ECOMOG, who was working with the CDF.

14. This report is divided into three parts. The first part provides an overview of child protection activities undertaken during varying stages of the conflict in Sierra Leone. It is presented chronologically:

    A. 1991 to 1996: the early years of the conflict to the election of a democratic government

    B. May 1997 to February 1998: the AFRC coup and nine months of junta rule

    C. 1998: Reinstatement of the government and the remainder of 1998

    D. 1999: Rebel invasion of Freetown in January and the remainder of 1999

    The second part to this report describes the history of recruitment of child soldiers and is divided according to the RUF, AFRC and CDF groups. The third and final part to this report describes the age verification process undertaken of displaced children, including child soldiers who were under-going disarmament and demobilization.

REPORT ON THE SITUATION IN SIERRA LEONE IN RELATION TO CHILDREN WITH THE FIGHTING FORCES

I. BACKGROUND TO CHILD PROTECTION ACTIVITIES UNDERTAKEN IN SIERRA LEONE

A. EARLY YEARS OF THE CONFLICT, 1991 TO 1996

15. The time period for this section precedes my arrival in Sierra Leone, which was in 1998. Information presented below is based upon:
    a. Interviews with children once I arrived in Sierra Leone, who would refer to earlier events within this time period.
    b. Material that I reviewed upon my arrival in Sierra Leone in order to familiarize myself with my working environment, including:
        I. UNICEF donor reports, including reports from partnering child protection agencies;
        II. Additional reporting from child protection agencies
        III. Humanitarian Reports issued by the Office of the Coordination of Humanitarian Affairs;
        IV. Human Rights Watch Reports;
        V. International News.

16. In 1991 UNICEF developed a Child Protection Programme in Sierra Leone to specifically address the needs of separated children (child soldiers, unaccompanied children and children suffering from war-related stress). UNICEF, working in collaboration with the then Ministry of Labour and Social Service and National and International NGOs, succeeded in establishing structures for the demobilisation and reintegration of child soldiers, identification, registration, documentation and reunification of children separated from their families, and provision of psychosocial support to children suffering from war-related stress.

17. Less than a week after a public official announcement on 31 May 1993 of the release of all child combatants for rehabilitation, UNICEF received three hundred and seventy children ranging in age from 8-17 years (10 girls and 360 boys). UNICEF, the Catholic Mission, other humanitarian agencies and government, hurriedly established 3 transitional/demobilisation centres. The Catholic Mission, through the Arch Diocese, was one of UNICEF's strongest partnering agencies and a main contact point during this time period for released children.

18. March 1996 saw the establishment of a democratically elected government. Though there were no precise figures on the number of child soldiers at the time, the Catholic Mission (through the CCSL) estimated that there were at least 3,200 children associated with the RUF and over 1,000 with the CDF. However, these figures did increase with the continued abduction and conscription of children by the RUF and recruitment by the CDF. Half of the children associated with the RUF were fighters or were engaged in combat, the others were members of the Small Boys Units or Small Girls Units with very specific tasks given to them.

19. Children from the Small Boys Units who were interviewed throughout 1998 – 2002 informed us that they were given specialised training. They were equipped with specialised skills in communications, intelligence gathering, guerrilla warfare etc. They spoke of the hard physical training they had to undergo and the injuries they suffered. Children overall were difficult to categorise within the fighting forces as they have been exposed not only the roles and functions related to combat but also other difficult circumstances such as exploitative labour, sexual abuse and violence.

20. Whilst I myself conducted such interviews, child protection officers for child protection organizations operating in the Makeni area obtained most of the above-mentioned information through interviews with children. These interviews were later shared with UNICEF. Most of the children who gave this information belonged to the RUF faction. The larger groups of children belonging to the Small Boys Units were in fact not released until the latter stages of disarmament (year 2000), which in my opinion was because the armed factions were reluctant to release these particular children due to the specialized military training they had received.

B. AFRC COUP, MAY 1997 and JUNTA PERIOD

21. During the nine months of Junta rule that followed the AFRC Coup in May 1997, forced conscription of children and abductions from unaccompanied children centres were reported. Students were arrested. Children were killed or wounded during battle. Following the overthrow of the Junta, reports of increased conscription and abduction of children for labour and fighting by remnants of the RUF and AFRC troops continued to reach the Child Protection Committees. Additionally, there were also reports of recruitment of children by CDF and torture, illegal detention and even killing of children associated with the RUF by government vigilantes, including CDF and ECOMOG.

22. UNICEF received this information from children, family members and documentation from the CCSL. The CCSL comprised of a large network of church-based organizations that would hold national meetings through which information was shared amongst members from across the country. The CCSL was in turn a member of the Child Protection Network (CPN).

23. At the time, UNICEF was also a member of the Child Protection Network. The CPN had been established under the Ministry of Social Welfare and comprised of an extended network of local and international agencies and organizations working with children. All members abided by policies and procedures on how to care and protect children. These procedures included regular reporting to the Ministry of Social Welfare of activities by members. The CPN was in turn comprised of Child Protection Committees (CPC's), which included national committees that met in Freetown and provincial committees. The reporting and

sharing of information through the CPN was initiated in 1997 and continued throughout 1998 to 2002.

24. The Ministry of Social Welfare, through Maj. Kula Samba, Secretary of State for Social Welfare, Children and Gender Affairs who was the focal point for the release of children within the junta government, reported an estimated figure of 2900 children in RUF/AFRC custody to UNICEF. At the time, the government was still employing the definition of a child as being an individual under the age of 15; therefore, these numbers represented children 14 years of age and under.

C. ECOMOG INTERVENTION AND THE REMAINDER OF 1998

25. In 1998, the Government appointed a high-level policy body, The National Commission on Disarmament, Demobilisation and Reintegration (NCDDR), made up of key ministers and the office of the UN Secretary General's Special Representative. UNICEF was identified as the technical agency to advise the Government on the demobilisation and reintegration of child soldiers.

26. Child Protection Committees obtained the release of approximately 340 children from the RUF (from September 1997 – January 1998, comprising of very young children, wounded children) and a commitment to release all children under 10 from the fighting forces. Of these 340 children, 188 were determined as child combatants after interviews and assessments. These assessments were conducted with children located in Makeni, Bo and Freetown. A final group of approximately 80 – 90 children who were located in Port Loko were never fully assessed due to a resumption of hostilities. The overthrow of the Junta brought this process of advocacy and negotiation for the release of children associated with the RUF/AFRC to a halt. Following the retreat of the RUF/AFRC to the bush, child protection agencies lost the opportunity to secure the release of the estimated 2,900 children in AFRC/RUF custody.

27. Due to the resumption of active hostilities, most of the children that were received during 1998 by UNICEF and other child protection agencies were prisoners of war (POW's) from ECOMOG. More children were received as ECOMOG began gaining territory during the fighting.

28. By the end of November1999, UNICEF officially reported that 773 children had been released from the RUF/AFRC and 139 children were handed over by ECOMOG. ECOMOG would keep children if they were in fact combatants for official handover to UNICEF and child protection agencies. Three hundred and forty two (342) children were officially demobilised from demobilisation camps. Only those children who were screened and who were verified as combatants underwent demobilisation.

29. Demobilisation of children associated with the Civil Defence Force (CDF) was also a major concern in child protection. The NCDDR also secured an agreement

to ensure the non-recruitment of children by the CDF and to commence the demobilisation of children associated with their forces. The CDF, in collaboration with child protection agencies, carried out the pre-demobilisation registration of over 300 children in the Southern Province in 1999.

30. These 300 children were registered as child combatants by the CDF themselves. UNICEF received CDF registration forms that included the child's name, individual age – all of which were under 14, and name of commander that the child was under, the location where the child was based and the type of weapon that the child had been assigned. UNICEF later changed the format of this CDF registration form to include the names of the child's parents and the original home.

31. I left Sierra Leone from late December 1998 and returned with the first humanitarian mission following the Freetown Invasion in early February 1999.

D. POST FREETOWN INVASION, 1999 to DISARMAMENT

32. Following the January 1999 rebel invasion of Freetown, the Child Protection Network established registration points and used radio publicity to help families trace missing children. More than 4,800 children were registered through the CPN as missing following the January 1999 invasion. The CPN assisted in the tracing and family reunification of more than 2,500 children and monitored the situation of these children following reunification. As a member of the CPN, these figures were shared with UNICEF.

33. In my opinion, the figure of 4814 children is accurate. This figure resulted from the number of children being **physically** registered and documented by the CPN. 60% of these documented cases were reported as abductions. At that time, points were established throughout the city of Freetown to register missing children. The interviews that resulted from these registrations reported the rape and abduction of girls from 12 and 13 years of age, the use of children as human shields and also the use of children to carry loads.

34. The emergency interim care centres established in previous years were expanded in anticipation of an influx of children following the signing of the Lome Peace Agreement in July 1999. More than 1176 children were cared for in the centres in 1999. Only those children who went through demobilisation centers were officially demobilised in 1999. Children who were screened by ECOMOG and handed over officially to UNICEF were handed over with official documents. These children did not go into demobilisation camps but were later were demobilised in 2000 under the 'retro-active' demobilisation programme. Children who had been abducted in early 1999 and who had not actively participated in the conflict were not demobilised.

35. From March 1999, I would regularly visit the CDF base at Brookfields Hotel, Freetown, where I saw child soldiers. Children were always visible amongst the CDF, most of them were of 15 years of age and under.

36. In 2000, I was informed about negotiated releases by the Inter-religious counsel for Sierra Leone with Morris Kallon of RUF based in Lunsar. Morris Kallon stated that he was the focal point nominated by the RUF on the handover/withdrawal of kids from the RUF. I was later informed of this meeting and another that took place the same day with Gibril Masaquoi. It was agreed that as part of a first phase of the handover, children then based in Makeni were to be grouped in Makeni; whilst children then based in Kamakakwie, Kamambi, Foradugu were to be grouped at Kabala. Later, as part of a second phase of disarmament, children then based in Kambia, Lunsar, Madina, Rokpr were to be grouped in Lunsar. Finally, a third phase was agreed upon to group child fighters in Magburaka who were then based in Magburaka, Kono and Kalihaun.

37. On the 5th of May 2000, there were 200 children in the Interim Care Centre ("ICC") in Lunsar and 189 in Makeni. Further plans to move children out of Makeni to Lunsar for onward transfer were refused by Morris Kallon. Approval had to be sought from Foday Sankoh. Foday Sankoh issued a letter authorising the movement of the children but the events of May 2000 did not allow for this to take place. Both ICC's came under attack as commanders tried to re-recruit the children. I was in Freetown during this time and worked to set up a centre for the children in Lungi and to ensure their safe passage from Makeni and Lunsar.

38. On 12 June 2000, Kamajor militiamen handed over 138 children to UNICEF (I personally received the children), most of them child combatants.. The children, aged 8 to 16, were taken into custody in front-line towns like Lunsar. The CDF claimed that the children were from the RUF, although many were dressed in traditional CDF clothing.

39. In July 2000, UNICEF met with Johnny Paul Koroma to follow up on a public statement he made to release children from the AFRC forces.

II. HISTORY OF RECRUITMENT OF CHILD SOLDIERS BY THE AFRC, RUF AND CDF FIGHTING FORCES

A. RUF

40. Interviews with children who were associated with the RUF revealed that recruitment during 1991 to 1996 varied:

    a. Children along the border areas with Liberia spoke of attacks on their villages, burning of huts, killing of family members and being forced to move with the group carrying looted guns.

b. In areas where the RUF set up bases, the children informed us that the RUF ask them to join, promising them that everything would change, that life would be better for all and that education would be freely available.
c. Other children spoke of peer pressure from family members who believed in the ideology of what the RUF presented and that they should join.

41. Reports from children from the year 1996 onwards were all of recruitment following abduction. Abduction linked to attacks on their areas, abductions linked with forced killing of family member or community member etc. Although the children spoke of a well structured operation within the RUF in the years prior to 1996 (such as medical services, discipline, adequate food, organised groups and tasks, education for younger children), this changed dramatically with the change in the structure and dimensions of the conflict.

B. AFRC

42. The AFRC was made up predominately of former SLA soldiers. On 1st May 1992, under the National Provincial Ruling Council (NPRC) children commenced training within the armed forces. Whilst the SLA had a policy of recruiting children, it was also sometimes reported that the AFRC later adopted the "ways" of the RUF in terms of recruitment and use of children.

43. In 1999, 189 child soldiers from the 1997 junta period were demobilized by NCDDR; AFRC/RUF rebels released 51 children in March, 129 in July and 165 in August. The total number of children released by November 1999 was 773. I was personally involved in the release of these children and interviewed them. My involvement in these releases included the coordination of the releases, the preparation of sites for reception and the interviewing of children upon release. Based upon my observations, the majority of these children were under the age of 15. In my opinion, the rebel forces simply wanted to get rid of the younger children and thus many of those released were below 15.

44. Based upon my interviews, children who reported fighting with the SLA in the early 90's reported that they were often linked by family ties to the SLA – sons, brothers, cousins etc, and lived in and around the barracks prior to engaging in the war. Others reported that they were living on the streets but 'hung out' around barracks doing jobs of various sorts. Once the unit deployed, these children deployed with them.

45. Although children with the SLA were originally used for tasks around the camp, these children reported that they graduated to being used for spying missions as they could blend in easier (especially if given a school uniform). As they developed their spying techniques, they were seen as essential to the intelligence work and received specialised training in this area (especially those who were educated). Others graduated directly to using weapons. Over time, all were systematically trained in weapon use. Many of these children were either

captured by the RUF or stayed with the SLA under AFRC who subsequently used them for their own benefit.

46. The children I interviewed who fought under the SLA spoke of being selected for 'execution squads', where their duty was to execute all who were captured. They spoke of this task being for the children only and that a competition developed among the children about the number they had executed. Status and position was given to those whose count was the highest. This task was always well rewarded. Using children for execution squads continued under the AFRC (as was reported to me by the children).

47. Following the attack on Freetown in 1999, children who were abducted during the flight of the AFRC/RUF and later released to Child Protection Agencies reported that they were forced to carry goods as they moved towards Hastings and Waterloo. During interviews, they reported that the abductions were done in haste without any difference made on the age of the children and that large groups of children were rounded up and pushed in one direction. They also informed us that they were constantly put between the 'rebel' troops and ECOMOG to stop ECOMOG firing on them. Due to the large scale abductions, the children reported that there were many younger children among the groups (under 5 years of age), and that young girls (under 12 years old) also had babies strapped to their backs.

48. The released children also reported that upon arrival at their base, they were given drugs to smoke as they were told this would calm them. Over the next few days they underwent initial training of 'cock and load'. Those who refused to participate they were executed in front of the others. According to the released children, this primarily happened to 'small girls' who did not stop crying and who were unable to hold guns.

49. Some children were issued with weapons, but the general order was that if a combatant should be killed, the child was to pick up his gun and use it. The released children informed me during interviews that their role was to be on the front line and to attack the target. Adult combatants and more 'seasoned' child soldiers would come up the rear. The children reported that they were informed that if they ran away, the ones behind would shoot them.

C. CDF

50. The patterns of recruitment between the RUF/AFRC and the CDF were fundamentally different. From 1998 onwards, I personally witnessed large numbers of children amongst the CDF fighting forces. I saw armed children from between 12 – 15 years of age manning CDF checkpoints. As a child protection officer, I was free to speak with these children in areas where all agencies had free access. UNICEF also received reports from child protection agencies and church groups who interviewed children with the CDF. UNICEF also received reports

from schools that were experiencing difficulties with children initiated into the CDF.

51. From speaking with these children, I learned that CDF recruitment was determined by community ties. Initial reports from child protection officers who also spoke with these children, mostly those in the southern province of Bo, reported children's involvement with the CDF being initially linked to the preparation for battle: boys as young as 7 years old danced in front of the advancing CDF warriors as they went into battle. These reports stated that these boys were 'highly valued' and also protected. There were no reports of these particular children being armed.

52. As the war effort intensified in 1998, child protection agencies started to receive reports of more children being initiated into the CDF and actually joining the older fighters in battle. With the evidence gathered and due to the fact that the CDF were a pro-government group, this practice was given special attention by Mr Olara Otunnu during his visit to Sierra Leone in July 1998. The President, His Excellency Dr. Ahmed Tejan-Kabbah and the Deputy Minister of Defence Honourable Hinga Norman, agreed to halt all recruitment of children into the CDF as part of their commitments to Mr. Olara Otunnu, SRSG for Children and Armed Conflict in May.

53. Following this meeting, the CDF registered child combatants. Over 300 children in the Southern Province under the CDF were registered. However, these 300 children were not provided with the agreed disarmament and demobilisation as per the national DDR plan and the earlier commitment that had been made to the SRSG. Despite these agreements and efforts, UNICEF continued to receive reports from across the country of the increase in the initiation and the arming of children among the CDF.

54. In 1999, I observed the establishment of the "Avondo" Society, which included initiations of children. The Society was headed by Alieu Kondewa.

55. In June 1999, I met with Hinga Norman at the UNICEF office to discuss the issue of children in the CDF forces. During this meeting, we discussed the CDF commitments made to Olara Ottunu. Mr. Norman acknowledged that children were present amongst the CDF and that they were being initiated for their own protection. I held later meetings with Hinga Norman where I referred to CDF child soldiers, which he did not deny.

56. I also met with the representative of the CDF on the NCDDR technical committee to discuss the disarmament of CDF child soldiers. UNICEF was a member of the NCDDR technical committee. Each fighting group had a representative on the committee, including the CDF. During this time, I spoke with the CDF representative and I advocated the non-recruitment of children and I obtained lists

of child fighters for whom DDR was to be sought. UNICEF obtained lists of CDF child fighters at the local level, predominantly from Bo Town.

III. AGE VERIFICATION OF CHILDREN

57. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict came into force in February 2002. It deals specifically with the use of child soldiers. It bans the direct use of all children under the age of 18 in hostilities and prohibits all military use of those under the age of 18 by non-governmental armed groups. The Government of Sierra Leone adopted this base age of 18 within the National DDR programme in 1999.

A. The process undertaken in Sierra Leone to ascertain ages of children

58. As the birth date of most of the children born in Sierra Leone is not registered, several other criteria have been used to determine the age of children. The implementation of these criteria is known as the age verification process. Age verification was employed by the juvenile justice system in Sierra Leone before its subsequent use during the war by the Family Tracing and Reunification program (FTR).

59. As a result, these existing measures were adopted and expanded during the disarmament process. These measures included medical examination by the Ministry of Social Welfare as well as interviews with their parents and other relatives. Parents would be asked to recall major events in the farming or other calendars in order to assist social workers in determining the age of their child. Comparisons were also made with the ages of children born during the same period, which was especially helpful when the parent had in fact registered the birth of another sibling.

60. The Family Tracing and Reintegration program assisted separated children. A "separated child" is defined as a child who has not attained the age of 18 years of age and who is separated from both parents and not been cared for by a guardian or another adult who by law is responsible to do so. This category includes:

    I. Children entirely on their own
    II. Children with the military forces (child combatants and camp followers)
    III. Children abducted from their families
    IV. Children in prisons or detention
    V. Children in exploitative labour situations

61. The Sierra Leonean FTR built on the experiences of child protection agencies in Eastern Zaire operating during 1994-95. In Eastern Zaire, the FTR programme was formalized with appropriate policies, procedures and tools for the documentation and tracing for separated children. Agencies in Eastern Zaire were

taught how to use these tools and methodologies, which later became 'institutionalised' within child protection programmes around the world. Building on these experiences, child protection agencies in Sierra Leone together with the Ministry of Social Welfare used well-established methodologies and tools to implement the "National Family Tracing programme and the National Child Protection Network (1996)", following which 3,059 separated children were registered. The National Child Protection Network had a sub committee for FTR, which was chaired by the Ministry of Social Welfare and included child protection agencies, civil society organizations and church groups working on issues dealing with children.

62. The FTR sub-committee established policies and procedures for all implementers of FTR programmes across the country. These tools included: methodologies in tracing, such as physical tracing, photo tracing, radio tracing and various forms, such as verification forms, transfer forms and reunification forms. These forms were sent to the Ministry of Social Welfare. Given the security situation in Sierra Leone, photo tracing was not employed in order to protect the identity of former child combatants – signifying how FTR tools were adapted to the particular context in Sierra Leone. Extensive training of social workers was also undertaken.

B. Documentation of separated children throughout Sierra Leone

63. The FTR network documented separated children and carried out tracing activities from this documentation. Based upon the age verification, once an individual had been determined as a child from the fighting forces, he/she would receive a special code on their documentation form which would alert the tracing agencies that special protection and safety measures needed to be taken during the tracing and reunification process.

64. In relation to children from the fighting forces, age was first introduced as an issue in relation to negotiations of release/handover. Until the full implementation of the National DDR programme, promises and commitments were made to the UN that children would be released &/or not recruited. Negotiations, followed by commitments ranged from non recruitment to the release of all children less than 10 years. Further negotiations led to the same commitments and the release of children under 15 years of age, to finally release of children less than 18 years of age.

C. Implementation and results of the age verification process undertaken through the FTR

65. In practice, I observed that commitments were rarely honoured. Early numbers prior to 1997 of children from the fighting forces released and entering child protection agencies programmes were limited and for the majority, only included young children, pregnant young girls, injured/wounded. The same situation occurred with the AFRC during the junta period.

66. From 1995 onwards, child protection agencies applied the process of age verification in their negotiations for release of child soldiers. During 1995 – 1999, child soldiers were still being defined by the government as any individual under the age of 15 years. Thus, age determination was conducted during this time for those less than 15 years of age. At this time, ECOMOG was also relying upon age 15 as a cut-off point for the release of those combatants that were considered as children. Furthermore, in 1996, the CDF determined that a child was someone less than 14 years of age; their position changed once the government accepted the principals of the national DDR programme, which in 1999 increased the definition to the age of 18 years.

67. As discussed earlier, with the development and adoption of the National DDR programme, the government accepted to abide by the optional protocol and the non use of children under the age of 18 years of age. Procedures and guidelines for the care and protection of children from the fighting forces within the DDR programme (including age verification) were then adopted as part of the national programme.

68. In a 1999 agreement with the child protection agencies, the government established a system for age verification. The system included 1) the comprehensive documentation and interview process that is applied to the FTR documentation; 2) use of teeth charts; and 3) physical examinations, which were only used in certain cases.

69. The final assessment of age of an individual (where age was in debate), was the responsibility of the Ministry of Social Welfare. Government social workers were placed in child protection programmes that had prior experience in age verification under the juvenile justice system. This process of age verification applied to children who had been released or withdrawn; however, it was not applied as a screening process within the fighting forces themselves.

70. In terms of the DDR programme and children, there was a need to ensure that age verification was in place for the following reasons:
    a. Children claimed they were adults (voluntarily or involuntarily) as there were cash benefits allocated only to adults.

    b. Adults claimed they were children because of the absence of any 'gun' criteria for children.

71. Of the documented children, approximately 5% were found to be over 18 years of age. These adults can be divided into a number of categories:
    a. Girls who were classed as adults but for whom child protection services were necessary especially since many had one or more children.

b. Over age boys who entered in the early stages of disarmament (which was from October 1999 to May 2000) of one gun and did not understand the benefits of being programmed with the adults.

c. Children for whom age determination proved inclusive (17 or 18) but who were classed as ex child combatants who required the services of a specialized assistance programme to help them with their reintegration (approximately 120 cases).

72. The child protection programme for the care and protection of children was not designed for those over 18 years of age. The model of the programme where each child was allocated a care giver and a social worker was not one which persons over 18 years of age could adapt to. Where an error may have been made (normally on the border line of 17 years/18 years), and based on follow up interviews, a person would be classed as an adult (with a certificate) and informed that he/she should report to the NCDDR office for reintegration assistance.

73. What must also be stated here is that there were two types of verification. The first verification was of status and the second of age. Statistics will show that large numbers of 'separated' children also entered the child protection centres but were not documented as 'children from the fighting forces' and therefore never went through a demobilisation process. This applied to many of the children who were released within six months of their abduction in 1999 and where there was no evidence that the child had participate in combat. It also applied to younger children (under 8) for who demobilisation was not deemed a necessary step. Those children who refused to be demobilised were also exempt.

74. In my opinion, the age verification process, undertaken as part of DDR efforts throughout 1999, was 95% successful in identifying those individuals (coming through the DDR process) who were child combatants within the fighting forces. (See paragraph 72, which refers to 5% of those documented as children were in fact over the age of 18 years.) Once DDR became more structured, around 1999, age verification was undertaken at the site of disarmament. It was agreed amongst child protection agencies that were operating at the site that the border-line cases of individuals between 17 and 18 years of age would be classified as adults, provided they were deemed mature enough. As a result, the majority of individuals categorized as children were of the age of 16 and under. In fact, in my opinion, social workers displayed a higher tendency to move 17 and 18 year olds into adult programs because often these individuals were not interested in child protection programs (such as basic schooling, etc) and thus would cause disruption and create difficulties for implementing child protection organizations.

75. The numbers of child combatants processed by DDR were the result of physical demobilization of children, which involved the completion of forms and the issuance of a DDR card after the age verification was completed. Based upon this and the information presented in the preceding two paragraphs, in my opinion, the

DDR numbers accurately represent the actual number of individual **children** that managed to undergo the DDR process. DDR statistics for the period of October 1999 to 2000 are presented in Annex Two and total 2000 children.

76. In my opinion, based upon my observations, approximately 70% of those individuals that came into the care of child protection agencies from the fighting forces during 1998, 1999 and 2000 were in fact child combatants who were under the age of 15 at the time they came into such care. The total number of children received by Interim Care Centres by year 2000 is presented in Annex Three, which totals 2720. 1741 of these children were demobilized and 979 were separated children. Based upon my own interviews and others that were documented and given to UNICEF, recruitment was generally undertaken of children between the ages of 10 and 14 years old because children at this age were easier to control and followed orders. During interviews, I learned that children aged 16 and 17 years who were abducted were primarily made to carry loads (males) or to be used as 'bush wives' (females). In fact, during interviews with younger child fighters, I learned of instances where younger children were abducted and their older siblings were left behind.

77. In my opinion, the figures presented in this report, when taken as a whole, likely under-represent the total number of children who were present in the fighting forces in Sierra Leone for several reasons. First, as described above, the information received by UNICEF was primarily based upon the actual documentation of missing children. However, not all parts of the country were accessible due to security concerns. Therefore, it was not possible to physically document all reports that were received of missing children. Second, girls were systematically overlooked in the disarmament process because they were generally not perceived as visible combatants; and as such, girls constituted less than 5% of overall DDR figures concerning demobilized child combatants. Third, many child combatants were casualties in the war. Fourth and fifth, while some children may have escaped prior to the demobilisation process, others may have never left their commanders and therefore both groups never participated in the disarmament process. Finally, those children who were recruited at an early age (say 14 years) and then later disarmed as adults (say 18 years), also would not have been included in disarmament figures as child combatants.

REPORT ON THE SITUATION IN SIERRA LEONE IN RELATION TO CHILDREN WITH THE FIGHTING FORCES

ANNEX ONE

CONFIDENTIAL

Curriculum Vitae

REPORT ON THE SITUATION IN SIERRA LEONE IN RELATION TO CHILDREN WITH THE FIGHTING FORCES

Roisin De Burca

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EMPLOYMENT

***Regional Emergency Planning Officer (April 2002 – March 2004)*, UNICEF, Regional Office for West and Central Africa, Abidjan, Côte d'Ivoire.**

- Responsible for risk analysis and contingency planning in respect of humanitarian emergencies in the region and support to UNICEF country offices in both preventive planning, design and implementation of emergency responses, with particular focus on support to children affected by conflicts.

***Programme Officer – Child Protection (July 1998 – March 2002)*, UNICEF, Sierra Leone**

- Responsible for the development and implementation of programmes for the care and protection of child soldiers, separated children, street children and abused children. Member of the Technical Co-ordination Committee of NCDDR from 1998 – 2002 and provided technical assistance on all aspects of disarmament and demobilisation of child soldiers. Carried out training for military observers (UNAMSIL) on child rights, disarmament and demobilisation of child soldiers and protection of children affected by the war. Assisted in the development of the reintegration programme for child soldiers and was a member of the contract review committee of NCDDR for reintegration of ex combatants. Programme budgeting, management of US $ 3 million programme budget, donor proposals and donor reporting.

***Head of Sub Office (December 97 – April 1998)*, UNICEF, Goma, DRC.**

- Planning, implementation, monitoring and evaluation of all programme activities in the fields of Health, Education, Water and Sanitation and CEDC. Monitoring and control of all financial transactions for all offices in Eastern DR Congo. Distribution of supplies to all offices in Eastern DR Congo. Carrying out all other functions of Head of Sub office and supervision of 30 National staff members. Area Security Co-ordinator for UN Agencies under the direction of the Designated Official.

***Programme Officer – Child Protection* (*January 1997 - December 1997*). UNICEF, Goma, DRC and Brazzaville, Republic of Congo (*June 1997*)**

- Regional Advisor for UNICEF (four provinces) on children in difficult circumstance. Re-establishing of Child Protection Programme in North Kivu. Acting Head of Office during the absence of head of office. Establish and carry out emergency programmes for evacuation and repatriation of separated Rwandan children from Tingi Tingi, Amisi and Kisangani. Establishment of registration, care and repatriation programme for separated refugee children in Brazzaville, Republic of Congo. Project appraisals, monitoring and evaluation of UNICEF supported projects. Research on child soldiers and development of demobilisation programmes. Responsible for all logistics and supplies during emergency periods in Tingi Tingi and Kisangani. Acting Education officer – development and implementation of comprehensive training plan and the distribution of schools supplies to 60,000 primary school students.

REPORT ON THE SITUATION IN SIERRA LEONE IN RELATION TO CHILDREN WITH THE FIGHTING FORCES

***Programme Officer – Child Protection (October 1996 – December 1996),* UNICEF - Kenya, Rwanda and the Democratic Republic of Congo**

- Assist in the establishing of the Great Lake Emergency Office in UNICEF Regional Office, East and Southern Africa, Nairobi. Assessment of situation of separated children, local NGOs, and UNICEF office in Goma, DRC. Preparation and implementation of emergency assistance programme for separated children during mass repatriation from Tanzania to Rwanda and Acting Head of office in Kigoma, Rwanda during emergency.

***Programme Officer – Child Protection (September 1995 – August 1996),* UNICEF, Lusaka, Zambia.**

- Development and implementation of Child Protection Programme. Design of management plan and the establishment of a networking secretariat for organisations working with children in difficult circumstances. Development of a national policy and action plan to respond to the needs and rights of AIDS orphans. Participatory research to identify models of community care for orphans. Assessment of proposals and provision of support to NGO's and Government departments working with children in difficult circumstances.

***Consultant (April 1994 – July 1995),* UNICEF, Lusaka, Zambia.**

- Carry out a study on situation and provision of services for adolescents and youth in shanty compounds of Lusaka. Working in collaboration with the Ministry of community development for the strengthening of services to children in need. Provided technical support to the Government of Zambia on Social Policy Development.

***Programme Co-ordinator (September 1990 – March 1994),* Street Kids International (Canada), Lusaka, Zambia.**

- Development and implementation of programmes for street children in Zambia. Financing, administration, fundraising, budgeting and reporting for all projects. Assisting NGO's and Government bodies in developing strategies, policies and projects for children in need. Establishing of a legal aid network for street children.

***Social Assistant (April 1990 – September 1990),* St Francis Training Centre, Ireland.**

- Remedial teaching to out of school youth. Transit home supervisor for homeless children. Assistant co-ordinator for the renovation of an old house into a drug rehabilitation centre, working with young drug addicts as participants in the renovation work.

***Programme Co-ordinator (May 1989 – November 1998),* Street Kids International (Canada), Bangalore, India.**

- Development and implementation of income generating programmes for street children. Staff selection and training. Management of programme and transfer to national NGO. Development of an education programme for rag pickers.

***Field Researcher (April 1988 – September 1988),* Street Kids International (Canada), Brazil, Paraguay, Guatemala, Dominican Republic, Jamaica**

- Research on the situation of street children in five countries.

REPORT ON THE SITUATION IN SIERRA LEONE IN RELATION TO CHILDREN WITH THE FIGHTING FORCES

Programme/Medical Co-ordinator (February 1987 - November 1987), **Les enfants du Soleil (France), Khartoum, Sudan**

- Programme co-ordinator covering administration/finance/logistics and supervision of programmes in Health, Nutrition, Education and Child Protection. Responsible for medical team working within two clinics, one nutritional centre and five centres for street children.

Medical Assistant (April - May 1996), **Burkina Faso**

- Medical work in clinic and hospital. Health education in local school

Child Assistant (February 1984 - June 1985), **Nantes, France**

- Tuition for handicapped child, covering education, physical training and social skills

Assistant Teacher, (October 1993 - February 1994), **Spastic clinic and School, Ireland**

- Assistant teacher for primary school class of handicapped children. Sports teacher for severely handicapped children. Teaching typing to children whom have no use of their hands. Assisting in swimming and drama activities

EDUCATION

1982-1983	School of Commerce and ANCO training courses, Cork, Ireland. **Accountancy, Business administration, computers, typing**
1984-1985	University of Nantes, France **French language course level Superior Diploma**
1985-1988	Institut De Formation et d'Appui aux Initiatives de Développement (I.F.A.I.D. Aquitaine) Bordeaux, France (Africa, S. America, Central America) **Agent de Développement Internationale - Biomédical**
1990-1991	Alliance Française of Lusaka, Zambia **Diplôme de langue française (Paris)**

Languages

French – Read/Write/Speak
Spanish – Working Knowledge

REPORT ON THE SITUATION IN SIERRA LEONE IN RELATION TO CHILDREN WITH THE FIGHTING FORCES

ANNEX TWO

NCDDR Statistics: Breakdown of children in sample survey according to fighting faction

REPORT ON THE SITUATION IN SIERRA LEONE IN RELATION TO CHILDREN WITH THE FIGHTING FORCES

NCDDR Statistics

Table: Breakdown of children in sample survey according to fighting faction

Fighting faction	Sample number	% of total in this faction
SLA/ AFRC	799	19.8
RUF	688	16.9
CDF	445	5.2
OTHERS	50	42.5
TOTAL	2000	11.8 (% of total sample)

Phase 2 (Oct 1999 – May 2000)

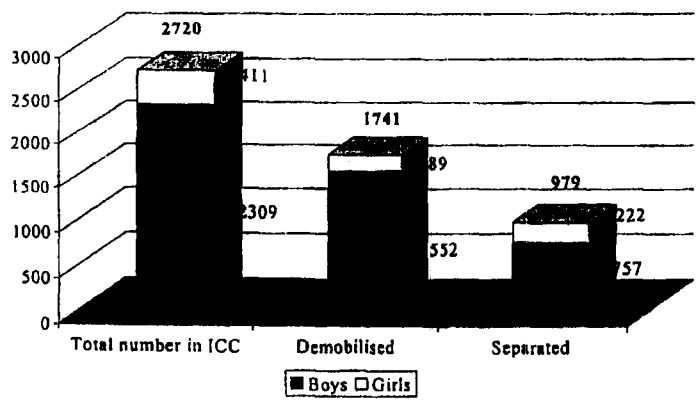
REPORT ON THE SITUATION IN SIERRA LEONE IN RELATION TO CHILDREN WITH THE FIGHTING FORCES

ANNEX THREE

Total Statistics on Children Received in Interim Care Centres, Year 2000

REPORT ON THE SITUATION IN SIERRA LEONE IN RELATION TO CHILDREN WITH THE FIGHTING FORCES

Total Statistics on Children Received in Interim Care Centres, Year 2000



A COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT:

A COMMENTARY

VOLUME I

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This general line is not without exceptions, however, which in particular concern two groups: one being aiders and abettors who, beyond their general double intent, must act 'for the purpose of facilitating the commission of [such] a crime' according to Article 25(3)(c) of the ICC Statute,[222] and the other being accomplices in group crimes, who, beyond their ordinary double intent, must have a special intention according to Article 25(3)(d) of the ICC Statute.[223]

V. Mistake of Fact and Mistake of Law according to Article 32 of the ICC Statute

A. Main Approaches

As already indicated in the introductory review of the reluctant recognition of mistake of fact and, even more controversial, mistake of law,[224] Article 32 is perhaps one of the most enigmatic impediments of the ICT Statute's general elements of criminal responsibility. Its evaluation very much depends on the penal-political preparedness for recognizing misperceptions of the perpetrator as a defence and on the conceptual ways of regulating this. In disregarding various nuances of innumerable opinions on mistake of fact and law, the regulation of Article 32, before going into details, may be reflected upon from two opposite approaches.

On the one hand, from the traditional common law perspective,[225] Article 32 may draw applause both for leaving as little room as possible for mistake of law[226] and for constructing a mistake, in order to be recognizable, as negation of the mental element in terms of intent and knowledge.[227]

On the other hand, from more modern perceptions prevailing in civil law jurisdictions and theories, the aforementioned strengths are in fact the very weaknesses of the ICC regulation; for, first, when accepting a mistake (of fact or of law) only if it negates the mental element,[228] Article 32 is repetitious—and, thus, appears superfluous[229]—in merely restating the mental element as a requirement of criminal responsibility according to Article 30(1) without giving any further information as

[222] For details, see Ch. 20 above, V.E.2(a).
[223] For further details, see Ch. 20 above, V.E.2(a).
[224] Cf. *supra*, I and II with references to the various documents and drafts.
[225] Cf. *supra*, I at note 3.
[226] Even this narrow gate, however, appears too broad for some as in particular Cassese, *supra* note 210, 155 f., if compared with the traditional adherence of international case law to the principle of '*ignorantia legis non excusat*'.
[227] Although the present wording of Art. 32 ICC Statute was finally proposed by Saland (in Lee, *supra* note 89, 210), its basic contents has earlier sources (cf. *supra*, II.C at note 33).
[228] According to Art. 32(1) and (2) (sentence 2), respectively.
[229] See Schabas, *supra* note 62, 426, Triffterer, in Triffterer, *supra* note 4, margin No. 11.

to when and how a mistake may negate the mental element.[230] Second, by almost completely closing the door to mistake of law in requiring legal ignorance to nullify a mental element essentially focused on facts, the Rome Statute disregards growing sensitivity to the principle of culpability, particularly with regard to consciousness of unlawfulness (as distinct from and in addition to the fact-oriented intention), and third, in limiting intent and knowledge to the positive material elements of the crime, the Statute forecloses the possibility of mistakes with regard to (negative) grounds excluding criminal responsibility. From this perspective, it is no wonder that the ICC regulation of mistake, in particular with regard to that of law, has been described as 'archaic'.[231]

The best way of analysing the main contents of this regulation seems to be starting with (B) a short survey of misperceptions of the perpetrator which might be possible at all, then distinguishing between recognized (C) and disregarded mistakes (D), and finally reflecting on solutions, if considered desirable (E).

B. Conceivable Objects and Ways of Misperceptions

Before looking into what mistakes have been recognized or rejected by the ICC Statute, one must be aware of the variety of objects about which and ways in which the perpetrator can err. Not being aware of the broad spectrum of conceivable errors may be one of the reasons why discussions on mistake of fact or law, particularly if conducted beyond borders and different legal cultures, are so often impaired by conceptual and terminological misunderstandings, fixations about specific points and possible political antagonism. Although it is, of course, impossible to give a comprehensive picture of all the problems involved,[232] at least the following types and possible objects of error may be outlined here.

First, although the basic distinction between mistakes of *fact* (paragraph 1) and *law* (paragraph 2) appears clear, this, if at all, only holds true with regard to elements of the crime completely perceivable by the human senses such as, for instance, identifying a living person as the victim of a killing. As soon as the question arises, however, as to whether this person belongs to a protected ethnical group, some sort of normative judgement may be required as has been demonstrated with regard to the awareness of normative elements according to Article 30(3) of the ICC Statute.[233] This entails the question of whether an erroneous evaluation with regard to a normative implication, as given in the example of the

[redacted]

[230] For further deficiencies [redacted]ft, see *supra* I.

[231] T. Weigend, 'Zur Fr[redacted]s internationalen Allgemeinen Teils', in B. Schünemann *et al.* (eds.), *Festschrift für Cl[redacted]* (2002) 1392. For further criticism see Kress, *supra* note 119, 7.

[232] As a first, tho[redacted] not comprehensive analysis of potential errors cf. Fletcher, *supra* note 87, 146 ff., furth[redacted]efined in his *Basic Concepts of Criminal Law* (1998) 149 ff.

[233] For de[redacted] *supra*, IV.F.2 and 3.

mistaken denial of the victim's protected status due to a normative misjudgement, is a mistake of fact, thus negating the mental element according to paragraph (1), or rather a mistake of law according to paragraph (2), and thus not necessarily excluding the mental element—a question which is not explicitly answered by the ICC Statute, therefore requiring further elaboration.

Second, corresponding to the previously mentioned distinction between descriptive and normative elements of the crime, mistakes can result from (a) *not recognizing a fact* which is present or assuming a fact which is not present or (b) from *erroneous evaluations* due to the unawareness of or misinterpretation of an existing norm, or the assumption of a non-existing norm.[234]

Third, both types of misperception can occur with regard to all *sorts of elements* or their position within the structure of the crime. They can concern:

- (positive) material elements in terms of Article 30(1) of the ICC Statute, as in the case that the object the perpetrator is shooting at is not, as he believed, an animal, but a human being or that he recognized it as such, but was not aware of its protected status, or
- (negative) grounds of excluding responsibility in erroneously assuming an attack which would allow the perpetrator to invoke self-defence or, in the case of an actual attack, in misjudging the permissible proportionality of his defence,[235] or
- exemptions from punishability and jurisdiction, as in the case of a Head of State's unawareness of the irrelevance of his official capacity (according to Article 27 of the ICC Statute) or the perpetrator's misjudgement of the relevant age presupposed for the jurisdiction of the Court (according to Article 26 of the ICC Statute).[236]

Fourth, particularly with regard to *evaluative* mistakes, these can be due to:

- the misinterpretation of a normative element (as, for instance, the understanding of 'inhumane acts'[237]), or
- the unawareness of a protective norm (as with regard to the age of the victim),[238] or
- the ignorance of referential norms (such as 'fundamental rules of international law' violated by imprisonment),[239] or

[234] As to this distinction cf. the scheme in Eser and Burkhardt, *supra* note 83, Vol. I, p. 179.

[235] According to Art. 31(1)(c) ICC Statute.

[236] As to more details on the various elements and levels which might be reference points of misperception cf. the scheme of the general structure of the offence by Eser, in Eser and Fletcher, *supra* note 3, Vol. I, p. 62.

[237] According to Art. 7(1)(k) ICC Statute.

[238] E.g. according to Arts. 6(e), 8(2)(b)(xxvi) and (e)(vii) ICC Statute.

[239] According to Art. 7(1)(e) ICC Statute; to further instances, cf. *supra*, IV.F at note 172 f.

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- the unawareness of the prohibition as such (as, for instance, to the improper use of flags or other protected symbols[240]), or
- the assumption of a justification which is in fact not recognized (as the '*tu quoque*' argument), or
- the erroneous assumption of an excuse (as with regard to duress), or
- the case where the perpetrator is fully aware of his wrongdoing but believes it unpunishable or, even if so under national law, believes that the ICC lacks jurisdiction.

Fifth, not lastly in face of this great variety of conceivable errors of the perpetrator, the possible *consequences* are of crucial significance: whereas, in principle, mistake of fact leads to the exclusion of the intention and finally, if recklessness and negligence are not punishable (as is the rule in the ICC Statute), to the discharge of the defendant, mistake of law by contrast is only recognized, if at all, on narrower conditions. Therefore it is of consequential importance whether an error falls within this or that category of recognized or irrelevant mistakes.

C. *Recognized Mistakes*

1. With Regard to Facts (Article 32(1) of the ICC Statute)

When mistake of fact is commonly pronounced as a valid defence, with regard to the ICC Statute this statement may be correct in principle, but bound by a qualification not to be overlooked; for, since mistake of fact does not exclude criminal responsibility *per se* but 'only if it negates the mental element' (paragraph 1), it refers to the prerequisites of the mental element in terms of intent and knowledge (Article 30(1)) without which the perpetrator cannot be held criminally responsible. Although this consequence is already expressed in Article 30(1), thus letting Article 32(1) seem repetitious,[241] this provision has its own, though questionable, function in that it (i) combines (and thereby restricts) recognizable mistakes of fact to the material elements of the crime and (ii) requires a mistake capable of nullifying intent or knowledge. Reversed, this means that possible reference points of a mistake of fact can only include the nature of the conduct and, more frequently, its circumstances and consequences in terms of Article 30(3). This has, in particular, the following consequences.

(a) The sole clear category of recognizable mistakes of fact is that 'about *factual* elements of the definition'[242] in terms of 'descriptive elements' of the crime, perceivable by means of the human senses.[243] If the soldier, for instance, does not realize

[240] According to Art. 8(2)(b)(vii) ICC Statute.[241] As already had been criticized within the Preparatory Committee; cf. *Report and Draft Statute and Draft Final Act*, p. 67 note 21 to Art. 30 (in Bassiouni, *supra* note 4, 145), furthermore Triffterer, in Triffterer, *supra* note 4, margin No. 11.
[242] As described by Fletcher, *supra* note 232 (Basic Concepts), 156.
[243] Cf. *supra*, IV.F.1.

that the body he is shooting at, is already dead or that the building which appears to be a military unit, had in fact been turned into a civilian kindergarten, he would lack the factual knowledge of elements material for a wilful killing or attacking civilian objects and, thus, could not be held criminally responsible under Article 8(2)(a)(e) or (b)(ii) of the ICC Statute.

The same holds true in cases where the perpetrator does not foresee the consequence of his conduct, as for instance, the deportation of people[244] he had assembled assuming that they would be merely needed for clearing away the debris of a bombing.

To be certain, however, not every case of mistaken identity entails the negation of the mental element. If the perpetrator, for instance, intended to kill the person in front of him because he held the victim for his personal enemy *A* while in fact it was a neutral *B*, this mere *error in persona* would be irrelevant because the material element of killing a human being, regardless of its personal identity, would in any case be fulfilled. Therefore, as long as in case of mistaken identity both the envisaged and the actual victim fall within the same definitional category of the crime, the perpetrator's intent and knowledge is not affected by his mistaking the identity.[245] Consequently, the confusing of persons or things entails the negation of the mental element only if the objects confused are not equivalent in terms of corresponding to the same material element of the crime, as in the case that a soldier shooting a human being takes it for an animal; this mistake of fact would negate his knowledge of a material element, and thus, his intention of murder.

To a certain extent, a similar result is possible even in the case where a soldier knew he was attacking a human being without being aware, though, that the victim had a protected status as member of a peace keeping mission according to Article 8(2)(e)(ii) of the ICC Statute. In this case, he could only be held responsible for assault and battery according to national law, but not for the aforementioned war crime.[246]

(b) Different from the preceding mistakes, all of which are due to lack of factual knowledge or misperception, a mental element can also be found to be lacking through conceptual errors as, for instance, in the aforementioned example of a soldier not being aware of the protected status of his victim as member of a peace keeping mission. If this error was due to the fact that because the victim was

[244] Art. 7(1)(d) ICC Statute.

[245] Although this position is not undisputed in that in the case of an *error in persona vel objecto* the perpetrator should be merely liable for negligence (which is not punishable in the area of the ICC Statute), the position taken here seems to prevail worldwide: cf. Jescheck and Weigend, *supra* note 85, 311; Smith and Hogan, *supra* note 2, 73 f.; Mir Puig, *supra* note 80, 259; with regard to the explicit regulation in Arts. 60, 82 Italian Ciminal Code, cf. Mantovani, *supra* note 130, 423 f.

[246] Thus far on the same line the elements of the Preparatory Commission, p. 42 (para. 5) to Art. 8(2)(e)(iii).

dressed differently from other peace keeping personnel, the perpetrator held him for a person not belonging to this group, it would be a clear mistake of fact in terms of supra (a). If he had realized, however, that his victim was a member of the group concerned, but that he, through ignorance of the rules according to which certain persons gain the status of a protected group, mistook his victim as not protected, this mistake about *legal aspects* of the definition[247] would not be a factual but an evaluative one as was demonstrated above with regard to the awareness of 'normative elements'.[248] In the same way since such elements need and are open to a normative judgement, though not requiring more than a 'parallel evaluation in the layman's sphere'[249] as suggested here, the mental element could be negated if the perpetrator was not aware of criteria giving certain individuals the status of a protected group. Should this position not be accepted because it involves a legal evaluation which the perpetrator should not be entitled to plead,[250] his ignorance of protective criteria (as any other normative components of material elements) could find consideration, if at all, only as a mistake of law to be dealt with later.[251]

(c) With regard to the erroneous assumption of facts, which, if given, would produce a ground for justification it is doubtful as well whether it could be considered a mistake of fact as, for instance, in the case where the perpetrator, if he was imminently and unlawfully attacked as he erroneously believed, would have been allowed to defend himself with deadly force. Although this is a clear 'mistake about the *factual* elements of justification', resembling the '*factual* mistake about elements of the definition',[252] thus certainly related to facts, this category of mistakes can hardly be covered by Article 30(1). Again, it is the requisite connection between the mistake and its negating effect on the mental element which causes problems. For, as according to Article 30(1) the mental element is (solely) related to the 'material elements' of the crime and if this must be understood as merely comprising the positive elements of the crime (as distinct from grounds negatively excluding criminal responsibility such as justifications) as generally assumed,[253] then putative self-defence as with any other erroneous assumption of a justifying situation leaves the mental element untouched. Therefore, in these cases, the door to a recognizable mistake of fact could be opened only if the 'material elements' of

[247] As termed by Fletcher, *supra* note 232 (Basic Concepts), 156.
[248] Cf. *supra*, IV.F.2 and 3.
[249] Cf. *supra*, IV.F.2(b).
[250] As it seems also to be the position of the Preparatory Commission by not expecting a value judgement from the perpetrator (as, in principle, ruled by the Preparatory Commission Elements, Introduction, p. 5).
[251] For, if evaluations are declared irrelevant for the mental element, neither the complete lack of an evaluation nor normative misjudgements are capable of negating the mental element. This has to be remembered when talking about the (disputed) culpability of mistakes of law to negate the mental element. See *infra*, 2(a).
[252] As described by Fletcher, *supra* note 232 (Basic Concepts), 148 f.
[253] Cf. *supra*, IV.C.

the crime were understood as comprising both the positive and negative components of unlawfulness, that is the definitional elements of the crime as one part and the (absence of) justification as the counterpart.[254]

(d) Even the last mentioned route to a mistake of law is closed, however, with regard to non-justificatory grounds for excluding criminal responsibility, such as mere excuses or other exemptions from punishability or jurisdiction under the ICC Statute.[255] If, for instance, a soldier kills a civilian in fear of being himself killed for not giving into pressure from his comrades who, in fact, only wanted to test his resistance, his mental element to kill would certainly not be negated; neither would his intent to kill be nullified if he had acted under actual duress which would excuse him according to Article 31(1)(d) of the ICC Statute. Consequently, his mental element in knowingly killing would be negated even less if he erroneously assumed the situation of a duress.

(e) In sum, only cases in which the perpetrator did not become aware of or misperceived factual circumstances or consequences required as 'material elements' of the crime definition, are clear instances of a mistake of fact in terms of negating the mental element and, thus, exclude his criminal responsibility according to Article 32(1).

2. With Regard to Law (Article 32(2) of the ICC Statute)

In view of the great variety of normative implications a perpetrator may not have knowledge of, and of the evaluative misinterpretations which are open to him,[256] it cannot be a surprise that mistake of law finds itself regulated in a more differentiated manner than mistake of fact for which apparently one short sentence sufficed. On closer inspection, however, Article 32(2) seems to be designed to leave as little room as possible for excluding criminal responsibility due to a mistake of law. Thus, in order to find out what is left for being invoked by the perpetrator, the following distinctions and restrictions have to be observed.

(a) In foreclosing mistakes of law as to 'whether a particular type of conduct is a crime within the jurisdiction of the Court' (sentence 1), it is made clear that mistake of law need not concern the international prohibition of the crime as such,[257]

[254] For further details of this conception which, after having been developed in German theory (cf. with criticism as well, T. Lenckner, in Schönke and Schröder, *supra* note 85, § 13 prenotes 15 ff.), has also found followers in Italy and Spain; as to Italy cf. Mantovani, *supra* note 130, 158, as to Spain, Mir Puig, *supra* note 80, 416 f.

[255] For further details as to the distinction between justification and excuse, cf. Ch. 24.1 below; Eser, in Eser and Fletcher, *supra* note 3, Vol. I, p. 34 ff. As to 'grounds of justification and excuse as distinguished from other grounds for denying culpability', cf. Roxin, in Eser and Fletcher, *supra* note 3, Vol. I, pp. 229–262; as to the profileration of these distinctions in Romanic jurisdictions, see the contributions in Eser and Perron, *supra* note 3.

[256] Cf. *supra*, V.B to D.

[257] As perhaps misunderstood by Cassese, see *supra* note 210.

thus restricting the possible reach of mistakes of law to something more special although without naming it.

(b) The restrictiveness of this course is intensified by allowing mistake of law to exclude responsibility only 'if it negates the mental element' of the crime (sentence 2). As seen with mistake of fact,[258] this has two implications: (i) the mistake has to have been capable of negating the mental element and (ii) this can be procured solely by the perpetrator's lack of knowledge of a material element of the crime. Whereas it was easier to conceive that the unawareness of a material fact affects the knowledge of this element, it is much harder to see a way in which the ignorance of a norm might eliminate the mental element with regard to a material element, the factual basis of which the perpetrator is aware of. As one should not assume that the drafters of sentence (2) wanted it to run idle, this 'cryptic' provision[259] was perhaps meant to open the door for mistakes with regard to normative elements and evaluations.

Thus, insofar as one does not wish to resort to mistake of fact as shown above,[260] with regard to normative references and elements of the crime,[261] evaluative misperceptions could be treated in the following manner: since his mental element can only be negated by mistake to the extent that the perpetrator must be aware of material elements, accordingly normative misjudgements are capable of ensuing from a mistake of law only to the extent that the mental element is open to (mis)judgements. As, in addition, the mental element does not require more than the perpetrator's awareness of the social significance of a definitional element, it presupposes neither positive knowledge of the underlying legal provisions nor of their jurisprudential interpretation. Consequently, normative ignorance or evaluative misperceptions would constitute a mistake of law negating the mental element only if the perpetrator did not even realize the social everyday meaning of the material element of the crime. This, for instance, might be the case if he had no idea that certain letters on a car were to indicate the protected status of this personnel, but not, however, if he related these letters to another organization which would have had a protected status as well.

(c) Even if the mental element is negated by a mistake of law in the way described before, this does not necessarily lead to the exclusion of criminal responsibility though; for, as according to sentence (2) this '*may*' merely be the case, it seems as if the ICC Statute wants to leave some *discretion* to the Court to either accept or ignore the mistake. Although the use of 'may' could perhaps simply mean that not every mistake of law negates the mental element,[262] the other interpretation

[258] See *supra*, V.C.1.
[259] As described by Kress, *supra* note 119, 7.
[260] *Supra*, V.C.1(b).
[261] As to their variety and types cf. *supra*, IV.F.2 and 3.
[262] As suggested by Weigend, *supra* note 231, 1391.

appears preferable. Not only is 'may' not referring to the negation of the mental element but rather to the exclusion of criminal responsibility (if the mental element is negated by the mistake of law), but the same reference to the exclusion of responsibility can be found in sentence (1), with one significant difference, however: whereas mistakes of law in terms of sentence (1) definitely not capable of excluding criminal responsibility, the principal admissibility of mistakes of law in terms of sentence (2) was intended perhaps to be limited, and therefore subjected, to the discretionary non-exclusion of criminal responsibility by the Court.[263]

Even more convincing in this direction from a legal policy point of view is the fact that, unlike national laws and former international drafts,[264] the ICC Statute does not pay any attention to the (un)avoidability of the mistake, thus not providing a clause rejecting a mistake of law completely or merely allowing mitigation of the sentence, depending on the degree to which the mistake was avoidable for the perpetrator. This lack of flexibility corresponding to the degree of potential blameworthiness of the perpetrator is partly made up for by at least granting the Court discretion with regard to the exclusion of criminal responsibility.

(d) In complementing the general rules on mistake of law dealt with above, a special regulation[265] is provided for *mistakes with regard to superior orders* according to Article 33(1)(b) and (c) of the ICC Statute. In recognizing the at times delicate situation in which a subordinate was ordered to carry out a command without having had the chance of examining the lawfulness of what he is going to do, the perpetrator, when committing the crime in obedience to superior orders or prescriptions of law, can be relieved of criminal responsibility if he did not know that the order was unlawful (subparagraph b), provided, however, that the order was not manifestly unlawful (subparagraph c).[266]

(e) In sum, aside from the special case of the ignorance of the (non-manifest) unlawfulness of a superior order, mistake of law, as required to negate the mental element, is of practical relevance solely with regard to normative implications of material elements or referential norms.[267] Even within this narrow scope, however,

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[263] In the same sense Triffterer, in Triffterer, *supra* note 4, margin No. 38 f.

[264] Cf. *supra, inter alia*, Freiburg Draft, Art. 33n (2) and the Updated Siracusa Draft Art. 33-15 (2), *supra* II.C, at note 40.

[265] Referred to in the last phrase of Art. 32(2) to Art. 33 ICC Statute.

[266] For further details, see Ch. 24.2 above; P. Gaeta, 'The Defence of Superior Orders', 10 *EJIL* (1999) 172–191 (188 f.). As to the practical unlikeness of such a case of recognizable mistake, see Cassese, *supra* note 210, 157.

[267] This principal disregard of the (non)consciousness of the prohibition as such is, incidentally, a fundamental difference from modern theories of error, also insofar as, with Arts. 30 and 32 ICC Statute, the demarcation of mistakes still runs between mistake of *fact* and of *law*, whereas the distinction between 'factual errors' (with regard to elements both constituting and negating the unlawfulness of the crime) and 'prohibitional errors' with regard to norms (whether constituting or excluding the unlawfulness) allows the orientation of culpability to the perpetrator's ability of realizing his wrongdoing; cf. § 9 (1) Austrian Strafgesetzbuch, § 17 German Strafgesetzbuch; in the

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a mistake of law cannot be established by the perpetrator's claiming not to have known the legal provisions and/or their jurisprudential interpretation, but only by his not even having been aware of the social meaning or significance of the material element in a layman's perspective. And even if the perpetrator succeeds in proving this degree of normative ignorance, the Court will still have the discretionary power of rejecting the mistake completely or merely mitigating the sentence[268] according to the degree to which the perpetrator would have been able to avoid his mistake.

D. Non-recognized or Disregarded Errors

With the exception of the case in which the perpetrator was unaware of the (non-manifest) unlawfulness of a superior order or prescription of law,[269] both mistake of fact and of law are admissible only if they negate the mental element.[270] As a consequence quite a few of the many conceivable misperceptions of the perpetrator[271] will fail to exclude criminal responsibility according to Article 32. Concentrating on the greater errors which are either explicitly rejected or conclusively disregarded by the ICC Statute, the following appear worthy of mention.

(a) As by nature leaving the mental element related to material elements of the crime untouched, mere *ignorance of legal norms or their misinterpretation* can, in principle, not establish a valid mistake of law, the only major exception being the misperception of normative elements or references, provided that the perpetrator is not even aware of the social significance of the normative implications concerned.[272]

(b) The ICC Statute's disregard of ignorance of law is expressed with particular regard to the prohibition as such. Although Article 30(2) sentence (1) explicitly excludes mistake of law only 'as to whether a particular type of conduct is a crime within the jurisdiction of the Court', this is not merely to be understood in terms of a procedural error of the perpetrator; for due to the double structure of the Rome Statute in providing both the procedural jurisdiction of the Court and the definition of the prohibited international crimes,[273] the perpetrator's ignorance of the Court's jurisdiction can, at the same time, imply his ignorance of the international prohibition. Consequently, in precluding the jurisdictional mistake, Article 32(2) sentence (1) excludes the *ignorance of the prohibition* as

same sense, see Art. 14(3) (Spanish Codigo Penal, Arts. 29 f. Polish Kodeks karny); as to evidentiary requirements of Art. 122-3 French Code Pénal, see Merle and Vitu, *supra* note 99, No. 587.

[268] According to Art. 78 ICC Statute.[269] Cf. *supra*, V.C(d) to Art. 33(1)(b) and (c) ICC Statute.

[270] Cf. *supra*, V.C.2 and 3(b).

[271] *Supra*, V.B.

[272] *Supra*, V.C.2(b).

[273] Cf. Ch. 20 above, I.

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well.[274] Thus, unlike various recent national penal codes prepared to recognize the 'mistake of prohibition', if unavoidable, as a special type of mistake of law,[275] in this fundamental issue the ICC Statute adheres to the old principle of '*ignorantia juris (criminalis) non excusat*'.

(c) Accordingly, it cannot come as a surprise that the ICC Statute does not take notice of the *mistaken assumption or misinterpretation of justifying norms* either. Therefore, both in the situation where the perpetrator believes his torturing of war prisoners was justified by a (in fact not recognized) ground of 'military necessity' or that he erroneously extends his right of self-defence beyond its recognized limits, he cannot defend himself by invoking mistake of law.[276] The same holds true with regard to the erroneous assumption of *excusing or otherwise exemptory norms*, as for instance, in the case that an accused Head of State was not aware of the irrelevance of his official capacity according to Article 27 of the ICC Statute. Even if he would be believed, he could not be heard with this defence.

(d) Errors disregarded by the ICC Statute may not only be found with regard to the law, but with regard to facts as well. Perhaps of greatest practical relevance concerns in particular the *mistake about the factual elements of justification*, as, for instance, in the case where the perpetrator would have been justified for self-defence if he had, as he erroneously assumed, in fact been attacked.[277] If the material element which the perpetrator must be aware of is limited to the positive definitional elements of the crime, thus not comprising justificatory grounds for excluding responsibility, factual mistakes with regard to grounds of justification are precluded. This is even more true with regard to non-justificatory grounds of excluding criminal responsibility, such as *excuses* or *other exemptions* from punishability.[278]

E. Possible Solutions

Although the emotional abhorrence of crimes as serious as those in question here may argue against the attempt to find further loopholes by widening the door for errors, from the legal point of view, defendants charged with international crimes should not be denied the general principles and defences that are valid for 'normal' everyday criminality. Just as a person accused of killing his neighbour may defend

[274] This exclusion of a mistake, at least according to Art. 32(2), seems to have been overlooked by Cassese, *supra* note 210, 155, in his example of a serviceman, not being aware of his violating an international law prohibition. As to whether the result may be different in case of a superior order, believed by the serviceman to be lawful, cf. Gaeta, *supra* note 267, 188 f.

[275] As, *inter alia*, Art. 14 Spanish Codigo Penal; Art. 122-3 French Code Pénal; § 17 German Strafgesetzbuch. Though probably arriving at the same end, § 9 Austrian Strafgesetzbuch recognizes mistake of law if the perpetrator cannot be blamed for his actions ('nicht vorzuwerfen ist').

[276] As to the same conclusion cf. Ambos, *supra* note 38, 29 f.

[277] Cf. *supra*, V.C.1(c).

[278] See *supra*, V.C.1(d).

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himself by having reasonably believed in being seriously attacked, the soldier in an armed conflict must be given the same chance if he believed himself attacked by a civilian from behind. Similarly, even if the crimes prohibited by the ICC Statute are of a nature and gravity commonly known as unlawful, even the soldier who has been informed of the contents of the Geneva Conventions may not be aware of the variety and reach of all relevant prohibitions, particularly insofar as they are of formal character.[279] Therefore, it appears appropriate to reflect on ways in which some of the shortcomings of the Rome Statute's regulations on mistake of fact and law may be improved. This appears necessary in at least in two respects.

(a) With regard to the *mistake about factual elements of justification*[280] it appears appropriate to apply Article 32(1) by analogy.[281] This is particularly true in view of the fact that it can be a matter of accident whether a material element is formulated in a positive or a negative way. If, for instance, sexual offences are defined as acting 'against the victim's will', thus granting the perpetrator a mistake of fact if he reasonably believed in the victim's agreement with the molestation, it would hardly be understandable to disregard his mistake if the crime definition did not require acting 'against the victim's will' but instead granted a justification if the victim consented. Since in both configurations the perpetrator's intention, or his mistake, were essentially the same, his criminal responsibility cannot differ between being excluded in the first instance and remaining in the other. As mistakes of this sort have apparently been missed by the ICC Statute, it would be up to the Court to make use of its power to have recourse to principles derived from national laws according to Article 21(1)(c) of the ICC Statute.

(b) Even in recognizing the fact that international crimes, as in general of the gravest nature, are universally known as unlawful and highly reprehensible, there may be situations in which the perpetrator is without fault unaware of the criminal character of his conduct.[282] The more the principle of culpability is recognized as an essential requirement of criminal responsibility, the less an international penal code can afford, particularly if it wishes to function as a model of enlightened criminal law, to completely ignore lack of culpability *by unavoidable mistake of prohibition*.[283] As the recognition of such a ground for excluding criminal responsibility

[279] This is particularly true with regard to rules of warfare the knowledge of which cannot just simply be expected of any ordinary soldier (cf. Weigend, *supra* note 231, 1392, with reference to Art. 8(2)(b)(xiv) and (e)(xii) ICC Statute). In this respect, the situation has hardly changed for the better since Y. Dinstein, in *The Defence of Obedience to 'Superior Orders' in International Law* (1965) 33, declared that 'one should take into account the relative uncertainty of laws of war and other branches of international law'.

[280] Cf. *supra*, V.C.1(c), D(d).

[281] To the same end, though not explicitly taking recourse to analogy, see Triffterer, in Triffterer, *supra* note 4, margin No. 14.

[282] Cf. A. Eser, ' "Defences" in War Crimes Trials', 24 *IYHR* (1995) 202, at 216 f.

[283] As to the same view, see Ambos, *supra* note 38, 30; see also Nill-Theobald, *supra* note 11, 347 f. with references to Pre-Rome voices to the same end.

would function in favour of the perpetrator, it could be introduced and applied by the Court without violating the principle of *nullum crimen sine lege* (Article 22 of the ICC Statute).

(c) Should the Court not be prepared to follow the aforementioned suggestions for recognizing mistakes which exclude criminal responsibility, it should at least consider adequate *mitigation* in the determination of the sentence by taking into account that, due to a mistake, the gravity of the crime may be diminished according to Article 78(1) of the ICC Statute.

VI. Concluding Assessment

The ambivalent impression, mentioned at the beginning, was amply demonstrated in the end.

On the one hand, the Rome Statute provides a rather high threshold for subjecting a person to criminal responsibility for an international crime. Not only, is it the case that with few exceptions, recklessness and negligence cannot render a perpetrator responsible for prohibited acts, but even intention is determined by high standards barely even met by *dolus eventualis.*

On the other hand, however, as soon as this threshold to an intentional crime is transgressed, the Rome Statute is very reluctant to pay consideration to errors and misperceptions of the perpetrator, even if they are unavoidable for him. This seems to be due to the fact that the underlying philosophy of criminal responsibility is still not free from result-oriented remnants of 'strict liability': international crimes appear so abhorrent that the perpetrator may not be allowed to plead excuses. Yet, as understandable as the ideal of a strong international criminal justice may be, particularly if it expects to be looked up to as an exemplary challenge for criminal justice in general, it cannot leave behind principles recognized throughout the world as fundamental for criminal responsibility. This is true in particular for the principle of culpability, an essential prerequisite of which is the consciousness of unlawfulness. This requirement is not met so long as errors with regard to the prohibition or a justification are deemed irrelevant even if they were truly unavoidable for the perpetrator and for which he, thus, cannot be blamed. *Ultra posse nemo tenetur*—an old Roman principle a modern code of international criminal law justice not exempt itself from.

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CRIMINAL TRIAL HANDBOOK

BY

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JUDGE ROGER E. SALHANY

CRIMINAL TRIAL HANDBOOK

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PUBLISHER'S NOTE

CASE LAW HIGHLIGHTS

- **Right to Counsel of Accused — Role and Duty of Counsel — Right to Counsel:** The accused was driven to the police station in a police cruiser contrary to his request to be interviewed at his residence. When he denied any involvement in a specific break and enter, he was accused of lying. The accused believed himself to be detained and the Court held that this belief, under the circumstances, was reasonable. Even though the police officer did not believe that the accused was detained, this was not decisive. The Court found that "detention" included submission or acquiescence where a person could reasonably believe that he did not have any other choice. Under these circumstances, the accused had been detained and his right to counsel had been violated: ***Johns*** (1998), 14 C.R. (5th) 302, 123 C.C.C. (3d) 190 (Ont. C.A.).

- **Selecting the Jury:** The accused, a native Indian, was charged with robbery. The trial judge refused to permit a challenge for cause. The trial judge held that there had to be realistic possibility that jurors would be influenced by their bias against native people in carrying out their oath of duty. The mere fact that the accused was a native Indian was insufficient evidence of bias. The B.C. Court of Appeal upheld the trial judge's judgment after finding that bias could not be equated with partiality. The existence of bias in the general population was insufficient to rebut the presumption that a juror would act according to his oath. The decision was reversed on appeal to the Supreme Court of

(d) Statements by the Accused

> There is a well-known principle that evidence which is clearly relevant to the issues and within the possession of the Crown should be advanced by the Crown as part of its case, and such evidence cannot properly be admitted after the evidence for the defence by way of rebuttal. In other words, the law regards it as unfair for the Crown to lie in wait and to permit the accused to trap himself. The principle, however, does not apply to evidence which is only marginally, minimally or doubtfully relevant.

Drake (1970), 12 C.R.N.S. 220 (Sask. Q.B.), per McPherson J. at p. 221.

Where a statement made by an accused to the police relates to the basic issue involved in the trial and cannot be said to be marginally, minimally or doubtfully relevant, it must be tendered by the Crown, if at all, as part of its case-in-chief. It is improper for the Crown not to introduce the statement initially, but then to cross-examine the accused on it and then prove it in rebuttal: *Bruno* (1975), 27 C.C.C.(2d) 318 (Ont. C.A.), approving *Drake, supra.*

It has been held that the Crown is entitled to have as part of its case-in-chief, an accused's statement ruled voluntary during a *voir dire*; but the Crown is not required to tender the statement as evidence and may use it for the purposes of cross-examining the accused should he or she testify. However, where the statement is so used for cross-examination of the accused, it must then be produced and tendered as evidence for consideration by the jury, barring only irrelevant matters. Unless it is tendered, the jury, being unaware of the contents, might easily conclude that the accused had made a statement, was subsequently charged with the offence and was, therefore, probably guilty: *Lizotte* (1980), 18 C.R. (3d) 423 (Que. C.A.).

(e) Cross-Examination by the Defence

(i) Generally

When the prosecution has completed its examination-in-chief, the defence may cross-examine the witness. The purpose of cross-examination is to show that the witness is mistaken or lying, or it may be directed towards bringing out new facts favourable to the defence. Here, questions which suggest the answer are not only permitted but will often be put to the witness by the cross-examiner.However, questions on cross-examination must relate to a material or relevant fact in issue or to the impeachment of the witness's credibility. If the question is not relevant to any of these issues, the trial judge has the duty to disallow it even if the opposing counsel does not object: *Rowbotham (No. 5)* (1977), 2 C.R. (3d) 293 (Ont. G.S.P.); *Bourassa* (1991), 67 C.C.C. (3d) 143 (Que. C.A.).

> That full cross-examination of an opposite witness should be permitted by the trial Judge is well settled. The Judge may check cross-examination if it become irrelevant, or prolix, or insulting, but so long as it may fairly be applied to the issue, or touches the credibility of the witness it should not be excluded.

Anderson (1938), 70 C.C.C. 275 (Man. C.A.), per Dennistoun J.A. at p. 279.

The trial judge also has the duty to prevent the cross-examiner from putting a question to the witness which is vexatious or has the effect of misleading or leaving a false impression with the court: *Hehr* (1982), 24 Alta. L.R. (2d) 59 (Q.B.).

> The trial judge may disallow any question put in cross-examination which may appear to him vexatious and not relevant to any matter proper to be inquired into, e.g., questions as to alleged improprieties or remote date or of such a nature as not seriously to affect present credibility. Thus, the trial judge may ask himself or herself in any particular situation whether the danger of unfair prejudice against the witness and the party calling him from character impeachment outweighs the probable value of the light shed on credibility. The court has a responsibility to ensure that witnesses are dealt with fairly and to prevent their victimization. It is not the witness who is on trial. Counsel who proceeds on that premise frequently fails to assess the situation carefully.

Rowbotham (No. 5), *supra*, per Borins Co. Ct. J. at p. 299.

Where a party intends to introduce evidence contradicting the testimony of a witness on a fact in issue, it is submitted that there is an obligation upon the cross-examiner to put the substance of that evidence to the witness, so that the witness can have the opportunity of explaining the contradiction: *Browne v. Dunn* (1893), 6 R. 67 (H.L.). However, it has been held that the failure to confront the witness on proposed contradictory evidence will not prevent the cross-examiner from leading that evidence in-chief: *Palmer* (1979), 14 C.R. (3d) 22 (S.C.C.).

There is no absolute or general rule requiring counsel for the defence to put to the complainant the accused's version of the events. It is a matter of weight to be decided by the trier of fact in the circumstances of the particular case: *MacKinnon* (1992), 72 C.C.C. (3d) 113 (B.C. C.A.).

A witness is required to submit to cross-examination on a statement that has been reduced to writing: Evidence Act, s. 10. Thus, it is improper for a trial judge to refuse the defence permission to cross-examine a Crown witness on a "will-say" statement prepared by the investigating officer of what he or she expects the witness to say for two reasons. First of all, the cross-examiner may be able to establish that the statement, although not prepared by the witness is his or her statement "reduced to writing" within the meaning of s. 10. Secondly, if the witness has refreshed his or her memory from the "will-say" statement, the cross-examiner is entitled to show that the witness's memory may have been "selectively refreshed by passages from the document" and the police may have "provided erroneous information to the witness while purporting to assist him in refreshing his memory": *Morgan* (1993), 80 C.C.C. (3d) 16 (Ont. C.A.).

In *K.(O.G.)* (1994), 28 C.R. (4th) 129 (B.C. C.A.), the British Columbia Court of Appeal reaffirmed its earlier ruling in *MacKinnon*, *supra*. Southin J.A., in a separate judgment, went on to stress that it was not fair to a witness to adduce evidence which casts doubt upon his veracity when he has not been given the opportunity to deal with that evidence.

In *Verney* (1994), 87 C.C.C. (3d) 363 (Ont. C.A.), it was held that the rule in *Brown v. Dunn*, *supra*, was a rule of fairness that prevents a witness from being ambushed. It is not, however, an absolute rule requiring defence counsel to slog through a prosecution witness's evidence-in-chief putting the witness on notice of every detail that the defence does not accept.

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INTERNATIONAL CRIMINAL LAW

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13.4 MISTAKE OF LAW

13.4.1 GENERAL

Like most national legal systems, international law does not consider ignorance of law as a ground for excluding criminal responsibility. Article 32(1) first sentence of the ICC Statute ('A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the court shall not be a ground for excluding criminal responsibility') may be held to codify existing customary law.

The rationale behind the principle *ignorantia legis non excusat* (ignoring the law may not amount to a justification for the commission of a crime) is self-evident: everybody living in a State is bound to know the law; were one allowed to successfully plead that he committed a crime because he ignored that that conduct was prohibited, the road would be open to general non-compliance with the law. The foundations of society would be undermined. In addition, (i) if ignorance of law were admitted as a defence, the applicability of international criminal law would differ from person to person, depending on their degree of knowledge of law; (ii) the admission of such a defence would eventually constitute an incentive for persons to break the law, by simply proving that in fact they were not aware of the existence of a legal ban.

Nevertheless, there may be cases where a mistake of law may become relevant as an excuse. This defence may be invoked when one may prove that the offender, because of his ignorance of a legal element, did not possess the requisite mental element, that is intent, or recklessness, or knowledge, or culpable negligence. Also in this respect Article 32(2) of the ICC Statute may be regarded as codifying customary international law (it provides that 'A mistake of law may . . . be a ground for excluding criminal responsibility if it negates the mental element required for such a crime').

It is submitted that mistake of law may be pleaded as a valid excuse not when the offender was unaware of the unlawfulness of his conduct, but when: (i) he *had no knowledge of an essential element of law* referred to in the international prohibition of a certain conduct; (ii) this lack of knowledge *did not result from negligence*; (iii) consequently the person, when he took a certain action, *did not possess the requisite mens rea.*

accused may have been a particularly capable, knowledgeable and experienced official within the group of criminal investigators to which he had belonged for 24 years, nevertheless, according to the legally incontrovertible evidence presented to the Court of assize, he did not have the knowledge necessary for appraising these legal issues of public law and international law. There are no indications that, at the time of the offence, the accused had any reason to mistrust the academically trained head of the Gestapo office. Moreover, the accused had learned from experience prior to the offence that the administration of criminal justice against Poles had passed from the hands of the judiciary to the offices of the Gestapo and that, according to his observations, generally Public Prosecutors and ordinary courts had not opposed this development' (at 234–5). See also *Schzeiner Z.*, at 712–5.

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13.4.2 LIMITATIONS OF THE PRINCIPLE *IGNORANTIA LEGIS NON EXCUSAT*

The principle at issue is predicated on a fundamental assumption: that the law is a body of rules which are fairly deep-rooted (in that the rules are consonant with the fundamental moral, or religious, values obtaining in society), and in addition are accessible and clear. Indeed, in those areas of international humanitarian law or criminal law where the rules are *clear, incontrovertible, and universally recognized*, one is barred from invoking the plea (or, if one puts forward the defence, the court must dismiss it out of hand).

Many cases support this proposition.[39] However, legal certainty and clarity are not commonly found in international criminal law. As was pointed out above (2.2), this body of law has grown gradually, in a somewhat haphazard manner, and largely consists of customary, that is, unwritten rules. Often some of these rules of customary nature are loose or ambiguous. In the case of treaty rules, frequently they are not couched in clear and exhaustive terms. In addition, State agents normally tend to behave in accordance with their own national law, ignoring the legal commands deriving from international law. National law implementing international rules may contain gaps, or be unclear or refrain from explicitly referring to international rules on points not covered by it. Case law has undoubtedly elucidated many obscure points, but is still far from clarifying all the main areas of that body of law. And it is indeed true what the Judge Advocate said in his summing up in *Peleus*, that is that

[39] In *Jung and Schumacher*, a case brought before a Canadian Military Court sitting at Aurich in Germany, the Judge Advocate, after discussing the legal position of the two defendants (one had ordered the other to execute a Canadian prisoner of war), noted: 'Both Jung and Schumacher have admitted that they knew the killing of a prisoner to be wrong. If I am wrong in this, the Court will correct me since they find the facts. In any event, ignorance of the law is no excuse' (at 221).

Similarly, in *Buhler*, the accused (Secretary of State and Deputy Governor General of that part of Poland occupied by German armed forces and known as the Government-General), charged with war crimes and crimes against humanity, had pleaded ignorance of international law; the Polish Supreme National Tribunal sitting in Cracow rejected the plea on the grounds that as a doctor of laws the accused must have possessed sufficient knowledge of the rights and duties of an Occupying Power and of the general principles of criminal law common to all civilized countries (at 682). In *Enkelstrohth* a Dutch Special Court at Arnhem held that the accused, a German police officer, must know that the shooting without previous trial even of a spy caught red-handed was contrary to the Hague Regulations, the more so because several German Ordinances promulgated in occupied Netherlands had enacted precise rules for the trial of saboteurs; according to the court the shooting in question was so clearly at variance with international law that even a police officer of inferior rank could not have known that it was unlawful (at 685–6).

Similarly, in *William L. Calley* a US Court of Military Review held that the accused could not rely upon the defence of mistake of law for he had willingly summarily executed enemy civilians in custody. The Court stated the following:

'The absence of a sense of criminality is . . . not mitigating, for any contrary view would be an excrescent addition to the fundamental rule that ignorance of the very law violated is no defence to violating it. The maxim *ignorantia legis neminem excusat* applies to offences in which intent is an element . . . "It matters not that appellant realized his conduct was unlawful. He knew exactly what he was doing; and what he did was in violation . . . [of a nature which had to be shown to be knowing and wilful]. He intended to do what he did, and that is sufficient' (*United States* v. *Gris*, at 864) (at 1180).

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'no sailor and no soldier can carry with him a library of international law'.[40] As a *countervailing factor to these flaws of international criminal law*, courts therefore tend to attach to mistake of law *a greater weight than the one most national legal systems attribute to the same excuse.*

This point was well made in 1921 by the German Supreme Court in *Llandovery Castle*. After noting that the law of nations prohibits the killing of enemies counter to the conditions and limitations imposed by such law, the Court added:

> The fact that his deed is a violation of international law must be well known to the doer, apart from acts of carelessness, in which negligent ignorance (*fahrlässige Unkentniss*) is a sufficient excuse. In examining the question of the existence of this knowledge, the ambiguity of many of the rules of international law as well as the actual circumstances of the case must be borne in mind, because in war time decisions of great importance have frequently to be made on very insufficient material. (At 2585.)

However, the Court went on to add that these considerations did not apply to the case at issue, because the relevant rule of international law (on the duty not to attack shipwrecked persons) was 'simple and universally known' (at 2585).

A generally balanced approach to the delicate legal issue can be found in the Dutch jurisprudence. Some cases need in particular to be mentioned. In *Wintgen* the Special Court of Cassation upheld the defence. The accused, a member of the German Security Police in occupied Netherlands, acting under orders set fire to a number of houses near Amsterdam as a reprisal for acts of sabotage perpetrated by unknown persons on a nearby railway line. The Court held that his action amounted to a war crime, for it was contrary to Article 50 of the Hague Regulations of 1907: 'No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible'. Nevertheless, the accused could not be punished, for he was not aware that his conduct constituted a war crime. According to the court, the force of the plea of mistake of law depended on the intellectual status and military position of the individual concerned and on the nature of the acts committed. The accused held a very subordinate rank in the Security Police and the destruction of property was generally held to be morally a less grave offence than, for example, the killing of innocent civilians or prisoners of war (at 484–6).

In *B.*, a case brought before a Dutch Court Martial, the Court again upheld the

[40] Addressing the question of superior orders, he stated the following: 'It is quite obvious that no sailor and no soldier can carry with him a library of International law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one' (at 129). With specific regard to the case at bar (alleged killing of shipwrecked persons), the Judge Advocate note that 'If this were a case which involved the careful consideration of questions of International Law as to whether or not the command to fire at helpless survivors struggling in the water was lawful, you might well think it would not be fair to hold any of the subordinates accused in this case responsible for what they are alleged to have done, but it was not fairly obvious to you that if in fact the carrying out of Eck's command involved the killing of these helpless survivors, it was not a lawful command, and that it must have been obvious to the most rudimentary intelligence that it was not a lawful command, and that those who did that shooting are not to be excused for doing it upon the ground of superior orders?' (at 129).

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defence. The accused B. was commander of a unit of the Dutch Resistance movement which had been granted the status of armed forces as part of the Royal Dutch Army, by a Dutch royal decree of 1944. In April 1945 the unit joined with a detachment of French parachutists who had landed in the Netherlands. Shortly thereafter the group took prisoner four Dutch Nazis, members of the NSB, in civilian clothes; they regarded those Dutch Nazis as *franc-tireurs* and traitors. One of them escaped. As Germans had surrounded the group, there was a danger that with the help of the escaped prisoner, the Germans would attack them. Under these circumstances the presence of the prisoners (meanwhile the group had captured other Dutch Nazis and released others) presented a serious danger to the unit. B. consulted with the French commander, who did not instruct him to kill the prisoners. However, 'he did gather from his behaviour, and also from that of the other French parachutists who were present, consisting of pointing to their Sten guns and drawing their hands across their throats, that, in his position, they would have proceeded to liquidate [the prisoners].' B. then ordered v. E. to kill the prisoners with the assistance of other members of the unit. When the case was brought before a Dutch Field Court Martial in 1950, the Prosecuting Officer, in his statement, argued that the conduct of the accused was unlawful. However, with regard to the accused's defence that he was mistaken as to the unlawfulness of the offence, he stated that:

> This is not in itself sufficient to relieve him of responsibility; for that the error must also have been pardonable. Only if there was no intent and no negligence as to the unlawfulness, is the accused not liable criminally.

In conclusion he asked the Court to find the accused guilty of being an accomplice to manslaughter and to sentence him to six months' imprisonment. The Court Martial agreed with the Prosecuting Officer that the action by B. was unlawful, for the prisoners' legal status was 'even inferior to that of *franc-tireurs*' but they could not be shot and killed immediately after being caught. However, the Court noted, the views among the Dutch unit were that the shooting and killing of the Dutch prisoners was not unlawful. This conclusion resulted from the instructions issued to those units. In addition, it was 'general knowledge that the broadcasts of Radio Orange from England were intended to give the impression that members of the N.S.B. were to be regarded as traitors and that it was unnecessary to show them any consideration, nor that they be shown any'. Consequently, according to the Court, 'the accused believed that he was entitled to act as he did and [his] intent was not therefore directed at the unlawfulness of his actions'. He 'had to take his decision without being able to consult his superior, he was placed in a position for which he was not trained and in circumstances in which it was practically impossible quietly to consider the relative merits of the various interests'. The Court concluded that the accused was 'mistaken as to the unlawfulness of his actions', hence was 'not criminally liable' and must be acquitted [illegible].[41]

[41] Another Dutch case where the court upheld the defence of excusable mistake of law is *Arlt*, decided on [illegible] 1949 by the Special Court of Cassation. The accused, a German judge, had been charged with a war

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In principle, and as can be inferred from these cases, a court should take into account various factors: (i) whether the international rule allegedly breached is universally admitted and recognized or is instead obscure or controversial; (ii) the intellectual status including the education, training, etc. of the person relying upon this defence; (iii) his position within the military hierarchy (clearly, a commander is expected and required to know the laws of war and more generally, international prohibitions, while a subordinate, particularly if he ranks very low, may not be required to possess such knowledge); (iv) the importance of the value protected by the rules allegedly breached (normally such values as life and dignity of a human being are universally protected, even under national criminal law, and one may therefore be more demanding with regard to such values).[42]

crime for having sentenced to death a Dutchman who had participated in a strike. The Court held that the establishment by the civil administration of the German Occupying Power of a summary Court Martial (*Polizeistandgericht*) was contrary to international law. Nevertheless, it stated that:

> With regard to the question of what penalty the accused deserves—perhaps even to the question of whether he deserves at all punishment on the ground of excusable error in law—the judgment should take into account the manner in which he, within the established framework, has discharged his judicial functions. (At 2.)

In contrast, in *Zimmermann* the same Court held that the defence under discussion was not available to the accused. Zimmermann, during the German occupation of the Netherlands, was a German official attached to the Dutch Provincial Labour Office of Meppel; in this capacity he was responsible for the deportation of many Dutch workers to Germany for forced labour there. His reliance, in the appeal to the Court, on 'his alleged ignorance of the criminal nature of the German deportation of Dutch men to slave labour to Germany' was of no avail. The Court stressed that 'similar practices applied by Germany on a much smaller scale in the First World War in Belgium and Northern France gave rise to general outrage and even prompted attempts at intervention on the part of neutral countries . . .; such responsible German officials as the then Head of the Political Department and Representative of the Foreign Office [*Auswärtiges Amt*] in Belgium, von der Laneken, and the then Governor-General, von Bissing, opposed this measure as a violation of international law or as a dangerous error . . . [hence] it must be regarded as a matter of general knowledge that public opinion condemned these practices' (at 30–2).

[42] Other examples of cases where the excuse in question might be raised can be mentioned. For instance, the Occupying Power, while it normally may appropriate the produce of public immovable property (land and buildings) belonging to the occupied State, under Article 56 of the Hague Regulations may not appropriate (i) the produce of those immovable assets belonging to the occupied State that have been set aside for religious purpose, for the maintenance of charitable or educational institutions or for the benefit of art and science, or (ii) the produce of the immovable property belonging to municipalities. Hence, if it can be proved that the officer of an Occupying Power selling the produce of foreign immovable property *bona fide* ignored that a certain immovable of the enemy State had been set aside for educational purposes, or that it belonged to a municipality, and mistakenly believed that it instead belonged to the enemy State, this mistake of law might be relied upon as an excuse if it can also be proved that, as a consequence of that ignorance the officer lacked the requisite criminal intent.

Similarly, under the Third Geneva Convention of 1949 prisoners of war may only be punished for offences against the law in force in the armed forces of the Detaining Power after a trial has been conducted before a court offering all the essential guarantees of justice. If the officer of the Detaining Power charged with enforcing the penalties meted out by courts of that Power ignores that in particular cases the international prescriptions on the proper conduct of trials against prisoners of war have not been complied with, he may raise his ignorance as a defence provided he can prove that as a result of his mistake of law he did not have the requisite *mens rea* when executing the penalty.

Another example may be taken from *Hinrichsen*, brought before the Dutch Special Court of Cassation in 1950. Article 53(2) of the Hague Regulations of 1907 provides that the Occupant may seize 'all the appliances . . . adapted . . . for the transport of persons or things, even if they belong to private individuals', but then must 'restore' them and 'fix compensation' when peace is made. In the spring of 1945 Hinrichsen

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13.4.3 MISTAKE OF LAW AND SUPERIOR ORDER

A subordinate executing an unlawful order is relieved of criminal responsibility if he can prove his ignorance of law, under the conditions set out above with regard to this defence. Clearly, if the rules of international law on a particular matter, instead of being universally and clearly established, are confused and controversial, the subordinate may not be aware that the order he has to carry out is contrary to international humanitarian law or to international criminal law. This mistake of law may be such as to negate *mens rea*. If that is the case, the subordinate is not criminally liable, not however because the order is lawful, but simply because the law on the matter is not straightforward and universally recognized, and the subordinate is not required to settle controversial legal issues when deciding whether or not to execute an order. This is the approach taken by most courts (for some exceptions where in contrast the plea was upheld, see *supra*, 13.1.4(3)).

In *Wagener and others* in 1950 the Italian High Military Tribunal upheld the plea in theory but rejected it *in casu*. According to defence counsel, General Wagener, when obeying the order to take reprisals against Italian internees in territory occupied by Germany, had erred, not however about criminal law, but about international law (as far as the lawfulness of reprisals was concerned) and constitutional and international law (with regard to the power to issue military proclamations). The Court, while implicitly conceding the admissibility of the defence, rejected it in the case at bar, noting first, that the violation of the laws of warfare entailed criminal punishment and, second, that

> a military may not invoke as a defence ignorance of the duties inherent in his military status. The commander of a big unit in time of war may not ignore international obligations deriving from the laws of war, the more so when these obligations coincide with the principles, prevailing in any law, directed to safeguard the life and limb of individuals. (At 763.)

Other cases worth mentioning are *Grumpelt* (*Scuttled U-Boats* case)[43] and *Thomas*

[43] ember of the German Frontier Customs Guard seized in occupied Netherlands two privately-owned otorcycles without payment or receipt. After the war he pleaded before a Dutch Criminal Court that his on was not at variance with international law. The Special Court of Cassation held on the contrary that his on was contrary to Article 53(2), for the accused did not provide the means for later verification of the e. It added however that in determining the penalty it was appropriate to take into consideration the at, unlike the case of requisition under Article 52 of the Regulations, giving a receipt was not expressly ed for seizure of means of transport; consequently, the punishment must not be severe (at 486–7). clearly a case where international law is not absolutely clear and unambiguous and therefore invoca- he defence at issue might be regarded as admissible.

his case Grumpelt, an officer in the German Navy, had scuttled two German U-boats after the ns had signed the terms of surrender, providing among other things that all German vessels would over to the British Command on 5 May 1945. A few hours after the signature of the Instrument of but before the cessation of hostilities, the German Naval Command had issued a coded order that must be scuttled. A few hours later the same Command issued another order countermanding the ccused claimed that (i) he had received the first order but not the second, and (ii) when he had cuttle the two submarines he was not apprised of the terms of surrender; had he known them, he been able to refrain from obeying the first order. He thus implied that he lacked *mens rea*, for, erms of surrender, he honestly believed that the (first) order was legal. The Judge Advocate put

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L. Kinder, heard by a US Court Martial in 1954. In the latter case the defendant, a US airman serving in a US airbase in Korea situated south of the actual battle line, and assigned to the air police section to perform guard duty at a bomb dump, had been accused of killing a detained Korean civilian, who had been apprehended near the base, and whose legal status was uncertain. In addition to invoking superior orders, the defence counsel also urged in defence to the murder charge a mistake of law on the part of the accused as to (i) the legality of the order of the superior officer, and as to (ii) whether or not the airman was required to obey all orders without exception of a superior officer. The US Air Force Board of Review, on appeal from the General Court Martial, admitted the plea in principle, but dismissed it on the facts. It first cited paragraph 154*a*(4) of the 1951 Manual for Courts Martial, whereby:

> As a general rule, ignorance of law . . . is not an excuse for a criminal act. However, if a special state of mind on the part of the accused, such as specific intent, constitutes an essential element of the offence charged, an honest and reasonable mistake of law, including an honest and reasonable mistake as to the legal effects of known facts, may be shown for the purpose of indicating the absence of such a state of mind. (At 775.)

The Court then went on to say that 'As the offence of murder charged in the instant case involves a specific intent to kill, "mistake of law" is in principle an applicable defence to negative the unlawfulness of the element of the specific intent to kill.' Turning to the case at issue, the Court pointed out the following:

> However, viewing the defence of mistake of law as based on a claim in the instant case that the accused was mistaken in law as to the legality of the order of the superior officer, the defence fails for a prerequisite of such defence is that the mistake of law was an honest and reasonable one and as pointed out in the preceding paragraph the evidence not only does not raise a reasonable doubt as to whether or not the accused possessed an honest and reasonable belief that the order was legal, but justifies the inference that the accused was aware of the illegality of the order. Viewing the defence of mistake of law as based on a claim that the accused mistakenly believed the law to be that a soldier must without exception obey every order of a superior officer, we must also reject the defence for not [only] is such a view unreasonable, but is so absurd as to render unbelievable an honest belief by the accused that he entertained such an opinion of the law. The absurdity of such a belief can be illustrated by innumerable examples such as a superior officer's orders to commit rape, to steal for him, for the subordinate to cut off his own head, etc. Accordingly, under the circumstances of the instant case, we find no merit to a defence based on the principle of mistake of law. (At 775–6.)

As is clear from this case law, courts only admit mistake of law as a defence to the

the question to the Military Court as follows: 'Are you satisfied that the man's state of mind at the time the question was this: "I honestly believed I had an order: I did not know anything about any surrender; it was not for me to inquire why the higher command should be scuttling submarines; I honestly, conscientiously and genuinely believed I had been given a lawful command to scuttle these submarines and I have carried out that command and I cannot be held responsible"? Gentlemen, that is a matter for you to consider (at 70). The Court found the accused guilty of the charge of committing a war crime.

execution of an illegal superior order when it may be proved that the subordinate acted under the *honest and reasonable belief* that the law allowed the execution of that superior order. It follows that this defence is not admissible when the law on the matter is clear or should be known to any serviceman engaged in armed conflict (or, more generally, to any person of average intelligence and education).

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