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(0049 – 3241)

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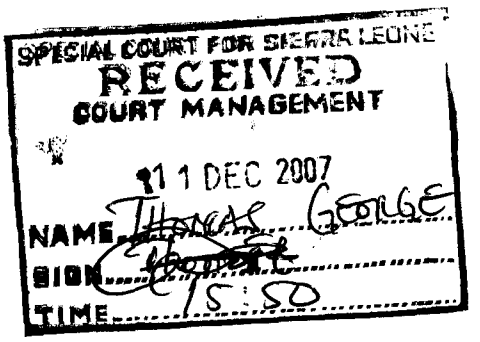
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

IN THE APPEALS CHAMBER

Before: Hon. Justice George Gelaga King, President
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice A. Raja N. Fernando
Hon. Justice Jon Kamanda

Registrar: Mr. Herman Von Hebel

Date filed: 11 December 2007



THE PROSECUTOR **Against** **Moinina Fofana**
Allieu Kondewa

Case No. SCSL-04-14-A

PUBLIC
PROSECUTION APPEAL BRIEF

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1. Introduction

1.1 Pursuant to Rule 111 of the Rules of Procedure and Evidence, the Prosecution hereby files this **Appeal Brief** containing the submissions of the Prosecution in its appeal against the "Judgement" of the Trial Chamber dated 2 August 2007 in Case No. SCSL-04-14-T, *Prosecutor v. Moinina Fofana and Allieu Kondewa*[1] (the "**Trial Chamber's Judgement**") and the "Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa" of the Trial Chamber dated 9 October 2007 in the same case[2] (the "**Sentencing Judgement**").

1.2 Some authorities and documents are referred to in this Appeal Brief by abbreviated citations. The full references for these abbreviated citations are given in Appendix B to this Appeal Brief.

1.3 The Prosecution's grounds of appeal against the Trial Chamber's Judgement are set out in the Prosecution's Notice of Appeal, filed on 23 October 2007 (the "**Prosecution's Notice of Appeal**").[3] References below to the Prosecution's Grounds of Appeal are to the grounds as set out in the Prosecution's Notice of Appeal.

1.4 The Prosecution does not proceed on Ground 2 of the Prosecution's Grounds of Appeal, and no submissions are made in this Appeal Brief in respect of that Ground of Appeal.

1.5 The standards of review to be applied by the Appeals Chamber in an appeal against a judgement of a Trial Chamber are well established in the case law of the International Criminal Tribunal for the Former Yugoslavia ("**ICTY**")[4] and the

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1 **Trial Chamber's Judgement**, SCSL-14-785, Registry page nos. 21048-21487.
2 **Sentencing Judgement** , SCSL-14-796, Registry page nos. 22021-22064.
3 **Prosecution Notice of Appeal,** SCSL-14-801, Registry page nos. 005-021.
4 See, for instance, ***Tadić* Appeal Judgement**, para. 64; ***Furundžija* Appeal Judgement**, paras 34-40; ***Čelebići* Appeal Judgement**, paras 434-435; ***Kunarac* Appeal Judgement**, paras 35-48; ***Vasiljević* Appeal Judgement**, paras 4-12; ***Kordić and Čerkez* Appeal Judgement**, paras 13-20; ***Nikolić* Appeal Judgement,** paras 6-9; ***Blaškić* Appeal Judgement**, paras 8-24; ***Marijačić* Appeal Judgement**, paras 15-18.

International Criminal Tribunal for Rwanda ("**ICTR**").[5] It is submitted that the same standards of review are applicable under the Statute and Rules of the Special Court.

1.6 The remedy requested in each of the Prosecution's Grounds of Appeal is without prejudice to the remedies requested by the Prosecution in respect of each of its other Grounds of Appeal.

2. Prosecution's *Ground 1*: Acquittal of Moinina Fofana and Allieu Kondewa of Murder and Other Inhumane Acts as Crimes Against Humanity

A. Introduction

2.1 The Indictment charged the Accused with two counts of crimes against humanity, namely **murder** punishable under Article 2(a) of the Statute of the Special Court ("**Statute**") (Count 1) and **other inhumane acts** punishable under Article 2(i) of the Statute (Count 3).

2.2 The material facts on which the charge of murder (Count 1) was based are set out in paragraph 25 of the Indictment. In respect of these material facts, the Accused were charged not only with murder as a crime against humanity (Count 1), but also with violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute (Count 2).

2.3 The material facts on which the charge of other inhumane acts (Count 3) was based are set out in paragraph 26 of the Indictment. In respect of these material facts, the Accused were charged not only with other inhumane acts punishable under Article 2(i) of the Statute (Count 3), but also with violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a

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[5] See, for instance, ***Semanza* Appeal Judgement**, paras 7-11; ***Gacumbitsi* Appeal Judgement**, paras 6-10; ***Musema* Appeal Judgement**, paras 13-21; ***Akayesu* Appeal Judgement**, para. 178; ***Kayishema* Appeal Judgement**, para. 320.

violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute (Count 4).

2.4 Both Fofana and Kondewa were convicted on both Counts 2 and Count 4. However, they were both acquitted on both Counts 1 and 3. The reason for this was that the Trial Chamber found that the general requirements (or chapeau elements) for war crimes ***were*** satisfied in this case,[6] but that the general requirements (or chapeau elements) for crimes against humanity were ***not*** satisfied in this case.[7] Accordingly, in respect of the conduct charged in paragraphs 25 and 26 of the Indictment, the Trial Chamber found that the Accused could be convicted of war crimes (Counts 2 and 4), but not of crimes against humanity (Counts 1 and 3).

2.5 In this Ground of Appeal, the Prosecution contends that the Trial Chamber erred in law and in fact in finding that the chapeau elements of crimes against humanity were not satisfied in this case. As a result of this error, in respect of each of the acts charged in paragraphs 25 and 26 of the Indictment for which each of the Accused was found to be individually responsible, each Accused was convicted only of a war crime under Count 2 or 4, but not of a crime against humanity under corresponding Counts 1 or 3.

2.6 If an Accused has been charged with both a war crime and a crime against humanity in respect of the same conduct, and if the elements of the war crime and the crime against humanity are satisfied in respect of that conduct, the Accused should be convicted of both crimes. 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.[8] As crimes against humanity and war crimes each have distinct chapeau elements, cumulative convictions under Article 2 of the Statute and under Article 3 of the Statute are therefore permissible in respect of the same conduct.[9]

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6 **Trial Chamber's Judgement**, paras. 696-697.

7 *Ibid.*, paras. 690-694.

8 ***Čelebići* Appeal Judgement**, paras 412-413 (see also para. 421). See also the Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna, paras 13-23.

9 **AFRC Trial Judgement**, para. 2107; ***Vasiljević* Appeal Judgement**, para. 145; ***Kordić and Čerkez* Appeal Judgement**, para. 1038; ***Brđanin* Trial Judgement**, para. 1086; ***Blagojević and Jokić* Trial**

2.7 Cumulative convictions for more than one crime in respect of the same conduct "serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct."[10] As a result of the Trial Chamber's error in finding that the general requirements of crimes against humanity were not satisfied, the convictions entered against each of the Accused in respect of the acts charged in paragraphs 25 and 26 of the Indictment failed to reflect the full culpability of each of the Accused. In particular, the convictions entered failed to reflect the fact that these acts occurred as part of a widespread or systematic attack against the civilian population, and were not merely war crimes, but also crimes against humanity.

2.8 In this Ground of Appeal, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's Judgement in so far as it finds Fofana and Kondewa not guilty on Counts 1 and 3, and requests the Trial Chamber to enter corresponding convictions against Fofana and Kondewa on Counts 1 and 3 in respect of all acts for which they were found by the Trial Chamber to be guilty on Counts 2 and 4, and in respect of all other acts of which they may stand guilty on Counts 2 and 4 following the determination of all of the Prosecution's other Grounds of Appeal. The Prosecution also requests a revision of the sentences imposed on Fofana and Kondewa to take account of the additional criminal culpability.

B. The Trial Chamber's findings

2.9 The Trial Chamber found that the general requirements (or chapeau elements) for crimes against humanity are as follows:

(1) There must be an attack;

(2) The attack must be widespread or systematic;

(3) The attack must be directed against any civilian population;

(4) The acts of the accused must be part of the attack; and

Judgement, para. 800, ***Kunarac* Appeal Judgement**, paras 176-178, ***Kupreškić* Appeal Judgement**, para. 387, ***Jelisić* Appeal Judgement**, para. 82.

[10] ***Kunarac* Appeal Judgement**, para. 169 (footnote omitted).

(5) The Accused knew or had reason to know that his or her acts constitute part of a widespread or systematic attack directed against any civilian population.[11]

2.10 The Prosecution takes no issue with the Trial Chamber's articulation of these chapeau requirements for crimes against humanity.[12]

2.11 In respect of the first two of these chapeau requirements, the Trial Chamber found that the requirement of a widespread attack had been established on the evidence in this case.[13] The Prosecution relies on this finding.[14]

2.12 In relation to the third of these chapeau requirements, the Trial Chamber found that:

> ... the evidence adduced does not prove beyond reasonable doubt that the civilian population was ***the primary object of the attack***. By contrast, there is evidence that these attacks were directed against the rebels or juntas that controlled towns, villages, and communities throughout Sierra Leone. In this regard the Chamber recalls the admission of the Prosecutor that "***the CDF and the Kamajors fought for the restoration of democracy***".[15]

2.13 The Prosecution submits that the Trial Chamber erred in law in this paragraph in its articulation of the third of the chapeau elements of crimes against humanity. The Prosecution submits that the only conclusion open to any reasonable trier of fact, when the correct legal definition of the chapeau requirements are applied to the Trial Chamber's own findings and the evidence it accepted, is that this third chapeau requirement of crimes against humanity was satisfied in this case. (See Sections C and D below.)

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[11] **Trial Chamber's Judgement**, paras. 110, 690. See also **Rule 98 Decision**, para. 55; ***Kunarac* Appeal Judgement**, para. 85, ***Limaj* Trial Judgement**, para. 181; ***Vasiljević* Trial Judgement**, para. 28.

[12] See **Prosecution Final Trial Brief**, para. 52. See also, for instance, **AFRC Rule 98 Decision**, para. 42.

[13] **Trial Chamber's Judgement**, para. 692.

[14] The Trial Chamber further found that since the requirement that an attack be widespread ***or*** systematic is disjunctive, the Trial Chamber did not need to consider whether the attack was also systematic: **Trial Chamber's Judgement**, para. 692. The Prosecution submits that the Trial Chamber correctly found that it is sufficient to establish that the attack was ***either*** widespread ***or*** systematic, and that it is ***not*** necessary to establish that it was ***both*** widespread or systematic: see, for instance, ***Kunarac* Appeal Judgement**, para. 97; ***Limaj* Trial Judgement**, para. 183.

[15] **Trial Chamber's Judgement**, para. 693 (footnotes omitted, emphasis added).

2.14 The Trial Chamber did not consider whether the fourth and fifth chapeau requirements referred to in paragraph 2.9 above were satisfied in this case. The Prosecution submits that the only conclusion open to any reasonable trier of fact, based on the Trial Chamber's own findings and the evidence it accepted, is that these requirements were satisfied in this case. (See Section E below.)

2.15 Because the Trial Chamber found that the chapeau requirements for crimes against humanity were not satisfied, it did not proceed to consider whether the specific elements of the crimes against humanity of murder (Count 1) and of other inhumane acts (Count 3) were satisfied in this case in respect of the acts charged in paragraphs 25 and 26 of the Indictment. The Prosecution submits that the only conclusion open to any reasonable trier of fact, based on the Trial Chamber's own findings and the evidence it accepted, is that these elements were satisfied in this case. (See Section F and G below.) The Prosecution therefore submits that all of the chapeau requirements and elements for Count 1 and Count 3 are satisfied in this case, and that the Appeals Chamber should revise the Trial Chamber's Judgement by adding convictions of Fofana and Kondewa on Count 1 and Count 3.

C. The chapeau requirement that the attack "*be directed against any civilian population*"

2.16 The Trial Chamber's finding that the chapeau requirements for crimes against humanity were not satisfied in this case rested on the Trial Chamber's finding, at paragraph 693 of the Trial Chamber's Judgement, that "the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack". The Trial Chamber based this conclusion on the "evidence that these attacks were directed against the rebels or juntas that controlled towns, villages, and communities throughout Sierra Leone". It is apparent from this finding that the Trial Chamber considered, as a matter of law, that an attack will not be one that is "directed against" a civilian population if civilians are attacked in the course of attacks directed against opposing forces.

2.17 The Prosecution submits that this is incorrect in law. If a force in an armed conflict attacks the civilian population in a widespread or systematic manner in the course of attacks against opposing forces, that force will have undertaken a widespread or systematic attack against a civilian population.

2.18 For the proposition that the civilian population must be "the primary object of the attack", the Trial Chamber relied[16] on the *Kunarac* Appeal Judgement, in which the ICTY Appeals Chamber said that:

> [T]he expression "directed against [any civilian population]" is an expression which "specifies that in the context of a crime against humanity the civilian population is the primary object of the attack".[17]

2.19 The statement that the civilian population must be "the primary object of the attack" is one that has been repeated in other judgements of international criminal tribunals.[18]

2.20 However, it is submitted that that statement has not been intended to mean that attacks against the civilian population committed in a widespread or systematic manner will not be crimes against humanity merely because the attacks against civilians occur during attacks on opposing forces, or in the course of an operation that had a military objective.

2.21 The statement in the *Kunarac* Appeal Judgement, to the effect that the civilian population must be "the primary object of the attack", and similar statements in other judgements, must be read in context. In the *Kunarac* case, the defence argued on appeal that "the Trial Chamber erred in establishing that there was an attack against the non-Serb civilian population of Foca, as opposed to a purely military confrontation between armed groups",[19] and that "the regrettable consequences which may have been borne by non-Serb citizens of the municipality of Foca were not the consequence of an attack directed against the civilian population as such, but the unfortunate result of a legitimate military

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16 **Trial Chamber's Judgement**, para 114.

17 ***Kunarac* Appeal Judgement**, para 91.

18 ***Kordić and Čerkez* Appeal Judgement**, para. 96; ***Kunarac* Trial Judgement**, para. 421; ***Vasiljević* Trial Judgement**, para. 33; ***Naletilić and Martinović* Trial Judgement**, para. 235; ***Galić* Trial Judgement**, para. 142; ***Limaj* Trial Judgement**, para. 185; ***Brđanin* Trial Judgement**, para. 134; ***Stakić* Trial Chamber Judgement**, para. 624; ***Semanza* Trial Judgement**, para. 330.

19 ***Kunarac* Appeal Judgement**, para. 72.

operation, in other words, that "these were 'collateral damages'".[20] In response, the prosecution argued that "the Trial Chamber was correct in finding that the notion of 'attack against a civilian population' is not negated by the mere fact that a parallel military campaign against the Muslim armed forces might have co-existed alongside the attack against the civilian population".[21] It is submitted that it is evident that the ICTY Appeals Chamber accepted the prosecution argument and rejected the defence argument. The ICTY Appeals Chamber said that:

> It is sufficient to show that enough individuals were targeted ***in the course of the attack***, or that they were targeted ***in such a way*** as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.[22]
>
> The Appeals Chamber is satisfied that the Trial Chamber correctly defined and identified the "population" which was being attacked and that it correctly interpreted the phrase "directed against" as requiring that the civilian population which is subjected to the attack must be the primary ***rather than an incidental target*** of the attack. The Appeals Chamber is further satisfied that the Trial Chamber did not err in concluding that the attack in this case was directed against the non-Serb civilian population of Foca.[23]

2.22 In other words, it is submitted that the ICTY Appeals Chamber found that an attack will not be an attack "directed against the civilian population" if civilians are merely "an incidental target" in an attack against a non-civilian target, but that an attack ***will*** be an attack "directed against the civilian population" if civilians are directly and specifically targeted in an attack, even if non-civilian targets are being attacked simultaneously.[24] In other words, as submitted by the prosecution

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20 *Ibid.*, para. 73.

21 ***Kunarac* Appeal Judgement**, para. 78.

22 *Ibid.*, para. 90 (emphasis added). See also ***Blaškić* Appeal Judgement**, para. 105; ***Kordić and Čerkez* Appeal Judgement**, para. 95; ***Limaj* Trial Judgement**, para. 187; ***Vasiljević* Trial Judgement**, para. 34; ***Naletilić and Martinović Trial Judgement***, para. 235; ***Brđanin* Trial Judgement**, para. 134; ***Galić* Trial Judgement**, para. 143; ***Simić* Trial Judgement**, para. 42; ***Stakić* Trial Judgement**, para. 624.

23 ***Kunarac* Appeal Judgement**, para. 92 (emphasis added).

24 Prosecutor v. *Perišić*, IT-04-81-PT, Decision on Preliminary Motions, Trial Chamber, 29 August 2005, ("***Perišić* Preliminary Motions Decision**") para. 23: "If forces engage in deliberate shelling or sniping in an area known to be populated by civilians, they are acting in the knowledge that civilian deaths will likely, if not probably, result. Thus civilians cannot be said to be merely "incidental" victims of such an attack."

in the *Kunarac* appeal case, there can be a direct attack against the civilian population that co-exists alongside a simultaneous attack against military targets.[25]

2.23 Furthermore, it is submitted that even where an attack may initially be characterised as a military attack against a legitimate military target, attacks against civilians that take place in the wake or aftermath of that military operation should be characterised as a separate attack against the civilian population, rather than as an "incidental" effect of the earlier military operation. Thus, in the *Blagojević and Jokić* Appeal Judgement, the ICTY Appeals Chamber found that the Trial Chamber did not err in characterising the Srebrenica massacre of thousands of civilians as an attack against the civilian population, and rejected the defence argument that the attack against Srebrenica as a whole was a legitimate military operation known as "Krivaja 95".[26]

2.24 The Prosecution submits that this conclusion is supported by the case law generally. It has been consistently held that:

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[25] See, for instance, ***Mrkšić* Trial Judgement**, paras. 470, 472: "What occurred ***was not***, in the finding of the Chamber, ***merely an armed conflict between a military force and an opposing force in the course of which civilians became casualties and some property was damaged***. The events, when viewed overall, disclose ***an attack*** by comparatively massive Serb forces, well armed, equipped and organised, ***which slowly and systematically destroyed a city and its civilian and military occupants to the point where there was a complete surrender of those that remained***. ... It is in this setting that the Chamber finds that, at the time relevant to the Indictment, there was in fact, ***not only*** a military operation against the Croat forces in and around Vukovar, ***but also*** a widespread or systematic attack by the JNA and other Serb forces directed against the Croat and other non-Serb civilian population in the wider Vukovar area. ... It was an unlawful attack. Indeed it was also directed ***in part*** deliberately against the civilian population." (Footnotes omitted, emphasis added.) See also ***Blaškić* Trial Judgement**, para. 627: "There is no doubt whatsoever that the attacks carried out by the HVO in April and June 1993 were not justified by strictly military reasons but ***also*** targeted Muslim civilians and their possessions" (emphasis added).

[26] ***Blagojević and Jokić* Appeal Judgement**, paras. 36-42, especially para. 39, in which the Appeals Chamber, in rejecting the defence appeal against the finding that there was a widespread and systematic attack against the civilian population, said: "In particular, the Trial Chamber explained that '[t]he attack continued ***after*** the fall of Srebrenica and affected the approximately 40,000 people who lived within the Srebrenica enclave at the time of that attack.' The Trial Chamber also expressly focused its findings on "the effect of the attack on the civilians." (Emphasis added, footnote omitted.) See also ***Naletilić and Martinović* Trial Judgement**, para. 238 ("The Chamber is satisfied that there was a widespread and systematic attack against the Muslim civilian population in Mostar, Sovici and Doljani at the time relevant to the Indictment. The attack took many forms. It started with the collection and detention of Muslim civilians ***after the fierce fighting around Sovici and Doljani*** and their subsequent transfer to detention centres and, later, to territory controlled by the ABiH") and para. 239 ("The campaign against the BH Muslim population in the area reached a climax after the attack on Mostar in early May 1993, when ***following the hostilities***, the BH Muslim civilian population was forced out of West Mostar in concerted actions") (emphases added).

(1) There is an absolute prohibition against targeting civilians in customary international law;[27]

(2) The requirement of an "attack directed against the civilian population" is intended to exclude ***isolated*** or ***random*** acts from the scope of crimes against humanity and to ensure that generally, the attack will not consist of one particular act but of a course of conduct;[28]

(3) The expression "population" does not mean that the *entire* population of the geographical entity in which the attack is taking place (a state, a municipality or another circumscribed area) must be subject to the attack;[29]

(4) The targeted population must be of a predominantly civilian nature. However, the presence of certain non-civilians in its midst does not change the character of the population;[30]

(5) The term 'civilian population' must be interpreted broadly;[31]

(6) Civilians who are targeted on the basis that they are perceived "collaborators" of an opposing combatant force are entitled to be

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27 ***Blaškić* Appeal Judgement**, para 109; ***Limaj* Trial Judgement**, para. 186.

28 ***Kunarac* Trial Judgement**, para. 422.

29 ***Kunarac* Appeal Judgement**, para. 90; ***Kordić* and *Čerkez* Appeal Judgement**, para. 95; ***Kunarac* Trial Judgement**, para. 424; ***Limaj* Trial Judgement**, para. 187; ***Vasiljević* Trial Judgement**, para. 34.

30 ***Kunarac* Trial Judgement**, para. 425; ***Limaj* Trial Judgement**, para. 186; ***Galić* Trial Judgement**, para. 143; ***Blagojević and Jokić* Trial Judgement**, para. 544; ***Naletilić and Martinović* Trial Judgement**, para. 235; ***Kordić and Čerkez* Trial Judgement**, para. 180; ***Brđanin* Trial Judgement**, para. 134; ***Simić* Trial Judgement**, para. 42; ***Blaškić* Trial Judgement**, para. 214; ***Jelisić* Trial Judgement**, para. 54; ***Limaj* Trial Judgement**, para. 186. See also ***Kupreskić* Trial Judgement**, para. 549 ("[T]he presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity"); ***Brđanin* Trial Judgement**, para. 134 ("[T]he presence of soldiers, provided that they are on leave and do not amount to 'fairly large numbers,' within an intentionally targeted civilian population does not alter the civilian nature of that population"); ***Blaškić* Appeal Judgement**, para. 115, quoting the ICRC Commentary to the effect that "... in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population"; and adding that "in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined".

31 ***Kupreskić* Trial Judgement**, para. 547; ***Jelisić* Trial Judgement**, para. 54; ***Limaj* Trial Judgement**, para. 223.

considered civilians for the purposes of this requirement of crimes against humanity.[32]

2.25 The Prosecution submits that it would defeat the purposes of the criminalisation of crimes against humanity if a widespread or systematic attack against a civilian population was excluded from the scope of crimes against humanity, merely because the attacks against civilians occurred simultaneously with attacks against military targets. The question is not whether attacks against civilians coincided with attacks against military targets. The question is whether the civilian population was *deliberately targeted* in a widespread or systematic manner, or whether civilians were merely victims of "unavoidable incidental civilian casualties and damage which may result from legitimate attacks upon military objectives".[33]

2.26 Indeed, there is an overarching theme in the case law that the focus of the inquiry is this contrast between an attack that *deliberately targets* the civilian population and one of which individual members of the civilian population were merely *incidental or collateral* victims. This is apparent from the judicial reliance on the norms of international humanitarian law, for purposes of determining the legitimacy of an attack against a civilian population for purposes of questions of crimes against humanity arising in the context of warfare.

2.27 For the proposition that the civilian population must be "the primary object of the attack", the Trial Chamber relied[34] on the *Kunarac* Appeal Judgement, in which the ICTY Appeals Chamber said that:

> In order to determine whether the attack may be said to have been so directed [against a civilian population], the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and ***the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war***. To the extent that the alleged crimes against humanity were committed in the course

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[32] ***Limaj* Trial Judgement**, paras 223-224.

[33] See UK Ministry of Defence, *The Manual of the Law of Armed Conflict* [Oxford: Oxford University Press, 2004] p. 23.

[34] **Trial Chamber's Judgement**, para 114.

> of an armed conflict, ***the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.***[35]

2.28 Similarly, the need to rely upon norms of international humanitarian law for purposes of determining whether an attack, during an armed conflict, was directed against a civilian population, for purposes of crimes against humanity, is clear from the *Blaškić* Appeal Judgement, in which the ICTY Appeals Chamber observed that:

> Before determining the scope of the term "civilian population," the Appeals Chamber deems it necessary to rectify the Trial Chamber's statement, contained in paragraph 180 of the Trial Judgement, according to which "*[t]argeting* civilians or civilian property is an offence when not justified by military necessity." The Appeals Chamber underscores that there is an absolute prohibition on the *targeting* of civilians in customary international law.[36]

2.29 In that case, the ICTY Appeals Chamber proceeded to rely on norms of international humanitarian law for purposes of characterising who is a civilian for purposes of crimes against humanity in the context of armed conflicts, stating that:

> In determining the scope of the term "civilian population," the Appeals Chamber recalls its obligation to ascertain the state of customary law in force at the time the crimes were committed. In this regard, it notes that the Report of the Secretary General states that *the Geneva Conventions "constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts*." Article 50 of Additional Protocol I to the Geneva Conventions contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law. *As a result, they are relevant to the consideration at issue under Article 5 of the Statute, concerning crimes against humanity.*[37]

2.30 The International Court of Justice ("**ICJ**") has furthermore affirmed that:

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[35] ***Kunarac* Appeal Judgement**, para. 91 (emphasis added). See also ***Kordić and Čerkez* Appeal Judgement**, para. 96; ***Blaškić* Appeal Judgement**, para. 106; ***Limaj* Trial Judgement**, para. 185; ***Brđanin* Trial Judgement**, para. 134; ***Galić* Trial Judgement**, para. 142; ***Simić* Trial Judgement**, para. 42; ***Semanza* Trial Judgement**, para. 330; ***Naletilić and Martinović* Trial Judgement**, para. 235.

[36] ***Blaškić* Appeal Judgement**, para. 109 (emphasis added).

[37] ***Blaškić* Appeal Judgement**, para. 110 (emphasis added).

> The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. ...[38]

2.31 Not only did the ICJ describe these principles as the "cardinal principles ... constituting the fabric of humanitarian law", but also said that they constitute "'intransgressible principles' of international customary law".[39]

2.32 For all these reasons, the Prosecution submits that the third of the chapeau requirements for crimes against humanity, referred to in paragraph 2.9 above, is satisfied where civilians are *specifically targeted* in a widespread or systematic attack, as opposed to where civilians are merely *incidental or collateral* victims of an attack against a military target. The Prosecution notes that the statement in the *Kunarac* Appeal Judgement, that the civilian population must be "the primary object of the attack", has also for instance been understood in this way by the Supreme Court of Canada, which has said that:

> The attack must also be directed against a civilian population. This means that the civilian population must be "the primary object of the attack", ***and not merely a collateral victim of it.***[40]

2.33 In determining whether this chapeau requirement was satisfied in this case, the Trial Chamber should, it is submitted, have had regard to the factors identified by the ICTY Appeals Chamber in the *Kunarac* Appeal Judgement, referred to in paragraph 2.27 above. It is submitted that the these factors must not be viewed as elements that must be cumulatively satisfied, but matters to be considered in determining whether an attack was *intended* to target the civilian population. That intention may be established beyond a reasonable doubt, even if not all of these factors are present. Furthermore, such an intention may be established even

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[38] ***Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion***, *ICJ Reports 1996*, p. 226, para. 78.

[39] *Ibid.*, para. 79.

[40] ***Mugesera v. Canada*** *(Minister of Citizenship and Immigration)*, 2005 SCC 40 (CanLII), (Canada: Supreme Court of Canada), para. 161 (emphasis added).

where none of these factors is present, for instance, where there is an expressly declared intention to specifically target the civilian population.

2.34 The Prosecution submits that the Trial Chamber erred in failing to give any consideration at all to whether such factors were present in this case. Rather, the Trial Chamber proceeded on the erroneous assumption that attacks against the civilian population will not be "directed against" the civilian population if they occur in the course of attacks against military targets. The Prosecution submits that the Trial Chamber erred in characterising the attacks in this case as possible attacks "directed against the ***rebels or juntas*** that controlled towns, villages, and communities throughout Sierra Leone", as opposed to attacks directed against the civilian population. Even if there were attacks "directed against rebels or juntas", the Trial Chamber should, for the reasons given above, have considered whether there were additionally, simultaneously or subsequently, attacks directed against the civilian population. For the reasons given below, the Prosecution submits that on the findings of the Trial Chamber, or alternatively, on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that attacks committed by CDF forces were specifically intended to target the civilian population.

D. The facts in this case

2.35 At paragraph 691 of the Trial Chamber's Judgement, the Trial Chamber found the following attacks to have constituted part of a widespread attack:

(1) The attacks by Kamajors on Tongo in late November/early December 1997; in early January 1998; and on 14 January 1998;

(2) The attack by Kamajors on Koribondo between 13 and 15 February 1998;

(3) The attack of Kamajors on Bo Town between 15 and 23 February 1998;

(4) The attack by Kamajors on Bonthe on 15 February 1998; and

(5) The attack by Kamajors on Kenema between 15 and 18 of February 1998.

2.36 In relation to **the attacks by Kamajors on Tongo in late November/early December 1997, in early January 1998, and on 14 January 1998**, evidence relating to these three attacks was reviewed by the Trial Chamber from

paragraphs 376 to 410 of the Trial Chamber's Judgement. It is apparent from these paragraphs of the Trial Chamber's Judgement that the Trial Chamber accepted this evidence. The Prosecution submits that on the basis of these findings and this evidence, the only conclusion open to any reasonable trier of fact is that civilians were deliberately targeted and attacked during these attacks.

2.37 It is unnecessary to repeat all of the findings and evidence in these paragraphs of the Trial Chamber's Judgement, which are extensive. To give just one example, paragraphs 383 to 387 of the Trial Chamber's Judgement show that during the second attack on Tongo, a party of 47 Kamajors (under the command of one Kamabote) had in their detention a group of civilians numbering over 1000.[41] The personal effects of these civilians were taken away from them by the Kamajors.[42] The civilians were separated into three queues according to ethnicity: the first queue comprising 150 men and one 12-year old boy named Foday Koroma was formed for members of the Loko, the Limba and the Temne ethnic groups; the second queue was formed for members of the Mandingo, the Susu and the Fullah ethnic groups; and the third queue was formed for the Mende, the Sherbro and the Kissy ethnic groups.[43] Young Foday from the Loko-Limba-Temne queue was promptly killed by Kamabote the Kamajor commander, with a machete hit to the head, upon the boy identifying himself as a Loko and a relative of a rebel named Akim.[44] Thereafter, Kamabote ordered the Kamajors to take the remaining 150 people on the Loko-Limba-Temne queue to an area 20 to 25 feet away and kill those civilians there. The civilians were killed as commanded, using machetes. Afterwards, the Kamajors slit open the stomach of one victim and displayed his innards in a bucket before the remaining civilians.[45] The remaining civilians were thereafter taken to the hospital quarters in Panguma where one BJK Sei (Kamajor Chiefdom Commander for the Lower Bambara Chiefdom[46]) addressed them,

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41 **Trial Chamber's Judgement**, para 383.
42 *Ibid.*,, para 384.
43 *Ibid.*, para 385.
44 *Ibid.*, para 386.
45 *Ibid.*, para 386.
46 *Ibid.*, para 382.

declaring that upon their next attack on Tongo, the Kamajors would kill everyone that had not left the town.[47]

2.38 In relation to the **attack by Kamajors on Koribondo between 13 and 15 February 1998**, a strikingly similar pattern of victimisation of civilians is apparent from a review of the evidence accepted and recounted by the Trial Chamber from paragraphs 421 to 430. In the aftermath of the Kamajor capture of Koribondo, civilian men and women were beheaded[48] by Kamajors and the bodies of the victims were mutilated,[49] disembowelled[50] and desecrated.[51] Two civilian women married to rebels were sadistically killed in a sexually ghastly manner.[52]

2.39 In relation to **the attack by Kamajors on Bo Town between 15 and 23 February 1998**, the evidence reviewed by the Trial Chamber from paragraphs 450 to 533 of the Trial Chamber's Judgement reveals again the same pattern of victimisation of civilians by Kamajors.

2.40 In relation to **the attack by Kamajors on Bonthe on 15 February 1998**, the evidence is dealt with in paragraphs 540 to 565 of the Trial Chamber's Judgement.

2.41 A similar pattern of civilian victimisation was yet again perpetrated by Kamajors following **the attack by Kamajors on Kenema between 15 and 18 of February 1998.**[53]

2.42 The manner of perpetration of these incidents makes clear that the attacks against the civilians were specifically intended to make victims out of the civilians. It is clear that in all of these incidents, civilians were not merely incidental casualties of an attack "directed against the rebels or juntas that controlled towns, villages, and communities throughout Sierra Leone", as suggested in paragraph 693 of the Trial Chamber's Judgement, but that civilians were *deliberately and directly* attacked.

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47 *Ibid.*, para 387.
48 *Ibid.*, paras 421 and 425.
49 *Ibid.*, para 422.
50 *Ibid.*, para 424.
51 *Ibid.*, paras 421 and 424.
52 *Ibid.*, para 423.
53 *Ibid.*, paras 576 to 609.

2.43 The conclusion that these attacks were deliberately directed against the civilian victims is even clearer in view of the instructions, directions and incitement which the Kamajor leaders explicitly gave to the Kamajors prior to these attacks against civilians or as they happened.

2.44 At the passing-out parade held in December 1997, Kamajors were primed for the Tongo and the "Black December" operations. As part of that priming, Chief Sam Hinga Norman said in the open that "there is no place to keep captured or war prisoners like the juntas, let alone their collaborators".[54] The Trial Chamber noted that "TF2-222 felt uncomfortable with this command because '[g]iving such a command to a group that was 95 percent illiterate who had been wronged, is like telling them an eye for an eye' and meant telling them not to '[...] spare the vulnerables [sic]".[55]

2.45 Subsequent to the passing-out parade, Chief Norman held a meeting with Kamajor commanders, for purposes of planning the Tongo attacks and the "Black December" operation, during which he told those present not to spare anyone working with the juntas or mining for them, and that all "collaborators" should forfeit their properties and be killed.[56]

2.46 At a meeting prior to the attack on Koribondo, Norman told the commanders that when they got to Koribondo not to "leave any house or any living thing there, except mosque, church, the *barri* and the school", that this time they should destroy or burn everything in the town and that anyone left in Koribondo should be termed an enemy or a rebel and killed.[57] Albert Nallo, the Deputy National Director of Operations, was also told by Norman prior to the Koribondo attack that the Kamajors had tried to capture Koribondo many times and that they had failed "because the civilians had given their children to the juntas in marriage and thus, they were all 'spies and collaborators'", and that in Koribondo "anybody

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54 *Ibid.*, para. 321.
55 *Ibid.*, para. 321.
56 *Ibid.*, para. 322.
57 *Ibid.*, para. 329.

that was met there should be killed" and nothing should be left "not even a farm" or "[...] a fowl".[58]

2.47 At a meeting at the end of March 1998, following the Kamajor attack and capture of Koribondo, Norman addressed both Kamajors and the people of Koribondo at the court *barri*. Approximately 200 civilians and 400 Kamajors were present on the occasion. In that address, Norman chastised the Kamajors for failing to exterminate the civilians and for failing to burn down every house in Koribondo. The Trial Chamber found that Norman said as follows:

> Hey, Kamajors, I thank you very much, but you people have not done my work which I told you to do. You have not done my work at all. Fellows, what did I tell you to do? That inside Koribondo I only want three houses, only three houses in Koribondo here. Oh, look at all these houses. I told you that I wanted the mosque, the court *barri* and one house where I would have to reside, but look at all this crowd that I am seeing here. You people are afraid of killing. Why? The soldiers killed, nothing happened; Kapras killed, nothing happened; rebels killed, nothing happened. Why are you afraid of killing? Why? Really, you've not done my work, you've disappointed me.[59]

2.48 Prior to the attack on Bo, Norman told the Kamajors to kill enemy combatants and "people who had connections with or supported the rebels and who were therefore worse than the combatants" (whom he referred to as "collaborators"), and also told the Kamajors to burn down houses and loot big shops, especially pharmacies, in the areas that were rebel-held.[60]

2.49 The Trial Chamber found that the victims of the atrocities in this case "were disarrayed Sierra Leoneans including children fleeing for their lives and for safety from the bloody exchange of enemy fire", and that "these civilian captives or fugitives, were unarmed and were not in the least, participating in hostilities".[61] Many of the crimes were committed against civilians after any military hostilities had ceased. Furthermore, in the case of Bo, for instance, there were no military hostilities at all, since the opposing forces had pulled out of Bo the previous day,

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58 *Ibid.*, para. 335.
59 *Ibid.*, para. 434.
60 *Ibid.*, para. 332.
61 **Sentencing Judgement**, para. 85.

and the Kamajors met no resistance when the entered Bo Town.[62] The attack on civilians in Bo cannot in any way be characterised as merely "incidental" to military fighting, since there was none. The Trial Chamber expressly found that other crimes were committed when combat activities and operations against the enemy AFRC forces were already over.[63]

2.50 Given the sheer number of civilian victims in these attacks, the fact that the CDF forces did not discriminate between civilians and enemy combatants, the fact that the crimes were often gruesome and sadistic in character (including sexual and non-sexual mutilations and desecration of bodies of the victims, as well as instances of cannibalism associated with these killings), the fact that there is no evidence that the victims were engaged in acts of resistance to these attacks (certainly not to any level of resistance that would have led the Kamajors to mistake the resistance as acts of belligerency that called for legitimate, overpowering military response), and the fact that the Kamajors failed to comply with precautionary laws of war, the Prosecution submits that the only conclusion open to any reasonable trier of fact, weighing factors of the kind referred to in paragraph 91 of the *Kunarac* Appeal Judgement,[64] is that there was a widespread attack against the civilian population.

2.51 The Prosecution notes also that the Trial Chamber stated, in paragraph 693 of the Trial Chamber's Judgement, when finding that it had not been established that the attacks were directed against the civilian population, that the alleged perpetrators "fought for the restoration of democracy". The Prosecution submits that the Trial Chamber erred in finding that this was in any way a material consideration in determining whether the general requirements for crimes against humanity existed in this case. International humanitarian law applies equally to all parties in a conflict. It would be contrary to the most fundamental principles of international humanitarian law to suggest that certain conduct is a crime against humanity if committed by the "wrong" side in a conflict, but that the same conduct is legitimate if committed by the "right side". In international law, there is a

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62 **Trial Chamber's Judgement**, para. 449.
63 **Sentencing Judgement**, para. 85.
64 See paragraph 2.27 above.

fundamental distinction between *jus ad bellum* (the law which regulates the circumstances in which a party is entitled to use force or resort to war), and *jus in bello*, which regulates only those aspects of the conflict which are of humanitarian concern, and the provisions of which "apply to the warring parties irrespective of the reasons for the conflict and whether or not the cause upheld by either party is just".[65] This distinction is so fundamental in international humanitarian law that it is spelled out in a basic questions and answers book published by the ICRC,[66] which states that:

> In the case of international armed conflict, it is often hard to determine which State is guilty of violating the United Nations Charter. The application of humanitarian law does not involve the denunciation of guilty parties as that would be bound to arouse controversy and paralyse implementation of the law, since each adversary would claim to be a victim of aggression. Moreover, IHL [international humanitarian law] is intended to protect war victims and their fundamental rights, no matter to which party they belong. That is why *jus in bello* must remain independent of *jus ad bellum* or *jus contra bellum*.

2.52 This distinction between *jus ad bellum* and *jus in bello* applies not only to international armed conflicts, but to non-international armed conflicts.[67]

E. The other general requirements for crimes against humanity

2.53 The chapeau requirements of crimes against humanity are referred to in paragraph 2.9 above. As noted in paragraph 2.11 above, the Trial Chamber found that the first two of these chapeau requirements had been established on the evidence in

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65 **"What are jus ad bellum and jus in bello?"**, Extract from ICRC publication "International humanitarian law: answers to your questions".

66 *Ibid.*

67 See, François Bugnion, "**Ius Ad Bellum, Jus in Bello and Non-International Armed Conflicts**", 28 October 2004, originally published in the *Yearbook of International Humanitarian Law*, T. M. C. Asser Press, vol. VI, 2003, pp. 167-198, which states at p. 7 that: "In the absence of a mechanism to determine aggression and to designate the aggressor in every case and in such a way as to be binding equally on all belligerents, each of the latter would claim to be the victim of aggression and take advantage of this to deny his adversary the benefits afforded by the laws and customs of war. In practice, therefore, this solution would lead to the same result as the hypothesis whereby wars of aggression cannot be regulated: a surge of unchecked violence. The autonomy of *jus in bello* with regard to *jus ad bellum* must therefore be preserved."

this case. Because the Trial Chamber erroneously found that the third of the chapeau requirements was not satisfied, it gave no consideration to whether the fourth and fifth chapeau requirements were met.

2.54 The **fourth chapeau requirement** for crimes against humanity is that the acts of the Accused must be part of the attack. The Prosecution submits that on the basis of the findings of the Trial Chamber and the evidence that it accepted, referred to in Section D above, the only conclusion open to any reasonable trier of fact is that the crimes that were committed were part of the attack against the civilian population.

2.55 The **fifth chapeau requirement** for crimes against humanity is that the Accused knew or had reason to know that his or her acts constitute part of a widespread or systematic attack directed against any civilian population.

2.56 The Prosecution submits that on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that both Fofana and Kondewa did know this. In relation to the attacks on Tongo, Koribondo and Bo, the Trial Chamber expressly found that both Fofana and Kondewa were present at meetings with commanders prior to these attacks in which Norman gave express instructions that all civilians were to be killed in the attacks.[68] Furthermore, for the reasons given below in relation to the Prosecution's Grounds 3 and 4, it is submitted that Fofana was amongst those who planned these attacks and that Kondewa aided and abetted these attacks.

2.57 In relation to the attacks on Bonthe and Kenema, the Prosecution submits that on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Fofana and Kondewa also knew or had reason to know that the crimes committed in these attacks constituted part of the widespread attack against the civilian population, given that:

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[68] **Trial Chamber's Judgement**, paras 320-321 (Fofana and Kondewa), 322 (Fofana and Kondewa), 328-329 (Fofana and Kondewa), 332-333 (Fofana and Kondewa), 334-336 (Fofana).

(1) the attacks on Bonthe and Kenema formed part of the same "all-out offensive" as the attacks on Koribondo and Bo, and all of these attacks occurred at the same time;[69]

(2) Fofana and Kondewa, together with Norman, were the three people regarded as the "Holy Trinity" at Base Zero; the three of them were the ***key and essential*** components of the leadership structure of the organisation and were the executive of the Kamajor society,[70] and were the ones actually making the decisions and ***nobody could make a decision in their absence***;[71]

(3) in the case of Fofana, he the "Director" or "Director of War",[72] whose duties were to plan and execute the strategies for war operations.[73]

Furthermore, for the reasons given below in relation to the Prosecution's Ground 2, it is submitted that Fofana and Kondewa were amongst those who planned the attacks on Bonthe and Kenema.

2.58 The Prosecution therefore submits that on the basis of the findings of the Trial Chamber and the evidence that it accepted, the only conclusion open to any reasonable trier of fact is that this fifth chapeau requirement was satisfied.

F. The specific elements of Count 1

2.59 As the Trial Chamber found that the general requirements for crimes against humanity were not satisfied, it gave no consideration to the question whether the specific elements of Count 1 were satisfied.

2.60 Count 1 charged the Accused with murder as a crime against humanity punishable under Article 2(a) of the Statute. The specific elements of this crime are set out in paragraph 143 of the Trial Chamber's Judgement. The Prosecution takes no issue with the Trial Chamber's articulation of these elements.

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69 See the submissions below in relation to the Prosecution's Grounds 3 and 4.
70 **Trial Chamber's Judgement**, para. 337.
71 *Ibid.*, para. 337.
72 *Ibid.*, para. 339.
73 *Ibid.*, para. 340.

2.61 These specific elements of this crime are the same as the specific elements of the crime of murder as a serious violation of Common Article 3 and Additional Protocol II, which are set out in paragraph 146 of the Trial Chamber's Judgement.[74] The Accused were charged with this crime in Count 2 of the Indictment.

2.62 It follows that in each case in which the Trial Chamber found the specific elements of Count 2 to be satisfied, the specific elements of Count 1 were also satisfied. It follows also that in respect of all acts for which the Accused may be found to satisfy the specific elements of Count 2 following the determination of all of the Prosecution's other Grounds of Appeal, the specific elements of Count 1 will also be satisfied.

G. The specific elements of Count 3

2.63 Count 3 charged the Accused with the crime against humanity of other inhumane acts punishable under Article 2(i) of the Statute.

2.64 The specific elements of this crime are set out in paragraph 150 of the Trial Chamber's Judgement. The Prosecution takes no issue with the Trial Chamber's articulation of these elements.

2.65 These specific elements of this crime are materially the same as the specific elements of the crime of cruel treatment as a serious violation of Common Article 3 and Additional Protocol II, which are set out in paragraph 156 of the Trial Chamber's Judgement.[75] The Accused were charged with this crime in Count 4 of the Indictment.

2.66 It follows that in each case in which the Trial Chamber found the specific elements of Count 4 to be satisfied, the specific elements of Count 3 were also satisfied. It follows also that in respect of all acts for which the Accused may be found to satisfy the specific elements of Count 4 following the determination of

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[74] See ***Naletilić* Trial Judgement**, para. 248. See also para. 249 where the Chamber said: 'The general requirements under Articles 2, 3 and 5 of the Statute apply to these crimes.' See also ***Blagojević and Jokić* Trial Judgement**, para. 556; and ***Brđanin* Trial Judgement**, para. 380.

[75] Compare ***Blaškić* Appeal Judgement**, paras 634, 653; ***Čelebići* Trial Judgement**, para. 1026.

all of the Prosecution's other Grounds of Appeal, the specific elements of Count 3 will also be satisfied.

H. Conclusion

2.67 For the reasons given above, the Prosecution requests the relief in paragraph 2 of the Prosecution's Notice of Appeal.

3. Prosecution's *Ground 3*: Failure to find superior responsibility and/or responsibility for planning, ordering, instigating or otherwise aiding and abetting in the planning, preparation or execution of certain criminal acts in Kenema District

and

Prosecution's *Ground 4*: Failure to find responsibility for planning, ordering, instigating or otherwise aiding and abetting in the planning, preparation or execution of certain criminal acts in the towns of Tongo Field, Koribondo and Bo District

A. Introduction

3.1 As the Prosecution's arguments in respect of both of these Grounds of Appeal are to a large degree common, for convenience they are dealt with together in this Brief.

3.2 In the present Grounds of Appeal, the Prosecution does not seek to challenge any of the factual crimebase findings of the Trial Chamber with respect to the attacks committed by Kamajors/CDF forces in Kenema District, or in Tongo, Koribondo or Bo Distict, or with respect to the crimes which the Trial Chamber found to have been committed in those locations. However, in these Grounds of Appeal,

the Prosecution contends that the Trial Chamber erred in its findings with respect to the individual responsibility of Fofana and Kondewa, under Article 6(1) of the Statute in respect of the crimes that the Trial Chamber found to have been committed in those attacks.[76]

3.3 In respect of crimes in some of these locations, the Trial Chamber found that Fofana and/or Kondewa had no individual responsibility at all. In respect of crimes in other locations, the Trial Chamber did find one or both Accused to be individually responsible under Article 6(1) or Article 6(3), but, in the Prosecution's contention in these Grounds of Appeal, these findings fail to reflect the full criminal culpability of the Accused.

B. Relevant findings of the Trial Chamber

3.4 The Trial Chamber found that for a period of about six months from about 15 September 1997 to about 10 March 1998, the headquarters of the CDF High Command was at "Base Zero", in Talia, Bonthe District.[77] The background to the establishment of Base Zero is dealt with in particular in paragraphs 288-303 of the Trial Chamber's Judgement. Norman arrived in Base Zero around 15 September 1997.[78] During this period, thousands of civilians and Kamajors travelled to Base Zero for military training and initiation into the Kamajor society.[79]

3.5 The Trial Chamber found that upon his arrival at Base Zero, Norman attempted to synchronise the command structure, so that everyone could abide by the centralised commands coming from Base Zero.[80]

3.6 The Trial Chamber found that during this period:

> Norman, Fofana and Kondewa were regarded as the "Holy Trinity". "Norman was the God, [...] Fofana was the Son, and [Kondewa] was the Holy Spirit." The three of them were the key and essential components of the leadership structure of the

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[76] The Prosecution's Notice of Appeal indicated that, in relation to Ground 3, the Prosecution was also challenging the Trial Chamber's findings with respect to the Article 6(3) responsibility of Fofana and Kondewa for the crimes committed in Kenema. The Prosecution is not proceeding with this aspect of Ground 3.

[77] **Trial Chamber's Judgement**, paras. 288, 303.

[78] *Ibid.*, para. 302.

[79] *Ibid.*, para. 303.

[80] *Ibid.*, para. 356.

> organisation and were the executive of the Kamajor society. They were the ones actually making the decisions and nobody could make a decision in their absence. Whatever happened, they would come together because they were the leaders and the Kamajors looked up to them.[81]

3.7 The Trial Chamber found that the job of deciding when and where to go to war lay with Norman, Kondewa, Fofana, the Deputy Director of War, the Director of Operations, his deputy, and the battalion commanders.[82]

3.8 The Trial Chamber found that numerous persons who came to Base Zero underwent military training in order to become combatants, that at any given time there were up to 5000 trainees, and that at the end of the training a passing out parade would be held at Base Zero.[83]

3.9 The Trial Chamber found that numerous persons who came to Base Zero underwent "initiations" into the Kamajor society, and also underwent "immunisations" conducted by "initiators", who were believed to have developed mystical medical herbs which rendered people immune to bullet wounds.[84] The initiation procedure had previously been coordinated at the local or chiefdom level, but the Chiefs were in disarray, and everybody came to Base Zero to seek refuge and join the Kamajors there.[85] The primary purpose of the initiation was to prepare the fighters for the war and to receive protection against bullets by "immunisation", although some initiates chose only to be immunised and not to fight in battles.[86]

3.10 As to the role of **Fofana**, the Trial Chamber found that at Base Zero he was known as the "Director" or "Director of War".[87] His duties of the Director of War

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81 **Trial Chamber's Judgement**, para. 337.

82 *Ibid.*, para. 349. The Trial Chamber found that for a period a War Council was established consisting of representatives from every region to advise Norman on various matters, including decisions on when and where to go to war and how many Kamajors should be committed to the effort, but that it quickly became ineffective and the three Accused and the commanders ultimately did all of the planning for the prosecution of the war without the War Council's involvement: *Ibid.*, para. 304-306.

83 *Ibid.*, para. 318-319.

84 *Ibid.*, para. 313-317.

85 *Ibid.*, para. 315.

86 *Ibid.*

87 *Ibid.*, para. 339.

were to plan and execute the strategies for war operations,[88] and to select commanders to go to battle and to act as the overall boss of the commanders who were at Base Zero, although the final authority regarding the deployment of Kamajors belonged to Norman.[89] Fofana also dealt with the receipt and provision of logistics for the frontline by instructing the Director of Logistics on what to make available, although he could only give out ammunition if and when directed to do so by Norman.[90] Base Zero was a central storage and distribution site for all of the CDF's logistics, including weapons, ammunition, fuel and food.[91] Fofana was never seen on the battlefield or even with a gun.[92]

3.11 As to the role of **Kondewa**, the Trial Chamber found that he was known as the High Priest of the entire CDF organisation and was performing initiations at Talia. He was also appointed by Norman. He was the head of all the CDF initiators initiating the Kamajors into the Kamajor society in Sierra Leone.[93] The Trial Chamber found that Kondewa himself never went to the war front or into active combat, but that whenever a Kamajor was going to war, he would go to Kondewa for advice and blessing, and that Kondewa's role was to decide whether a Kamajor could go to the war front that day.[94] The Trial Chamber further found that the Kamajors believed in the mystical powers of the initiators, especially Kondewa, and believed that the process of the initiation and immunisation would make them "bullet-proof". The Trial Chamber found that the Kamajors looked up to Kondewa, that because of the mystical powers Kondewa possessed, he had command over the Kamajors from every part of the country, and that no Kamajor would go to war without Kondewa's blessing.[95]

3.12 The Trial Chamber found that during the period that the CDF High Command was headquartered at Base Zero, numerous attacks were committed by

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88 *Ibid.*, para. 340.
89 *Ibid.*, para. 341.
90 *Ibid.*, para. 342.
91 *Ibid.*, para. 311-312.
92 *Ibid.*, para. 343.
93 *Ibid.*, para. 344.
94 *Ibid.*, para. 345.
95 *Ibid.*, para. 346.

Kamajors/CDF forces, in which crimes within the jurisdiction of the Special Court were committed.

3.13 In particular, the Trial Chamber found that numerous crimes were committed by CDF forces against persons who were alleged "collaborators" of the rebels.[96] In the Sentencing Judgement, the Trial Chamber expressly reaffirmed "that the crimes were particularly serious insofar as they were committed against unarmed and innocent civilians, solely on the basis that they were unjustifiably perceived and branded as 'rebel collaborators'".[97] The Trial Chamber added that:

> We find that these atrocities were perpetrated, even though the evidence clearly established, and we so found, that the victims in fact, were disarrayed Sierra Leoneans including children fleeing for their lives and for safety from the bloody exchange of enemy fire, and further, that these civilian captives or fugitives, were unarmed and were not in the least, participating in hostilities. In fact, we note here that the crimes for which they have been found guilty were perpetrated by the Accused Persons and CDF/Kamajor fighters when combat activities and operations against the enemy AFRC forces were already over.[98]

3.14 The Trial Chamber found that crimes were committed by Kamajors/CDF forces in Bonthe District in September 1997,[99] Bo District in November 1997,[100] Kenema District between mid-September and December 1998,[101] in Moyamba District in November-December 1997,[102] and in Tongo Town in November 1997.[103] The Trial Chamber also found that at Talia there was a "Death Squad" that had been formed before Norman's arrival,[104] and which after Norman's arrival was answerable only to him,[105] which was originally responsible for the security in

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96 See, for instance, **Trial Chamber's Judgement**, paras. 48, 441, 464, 469, 547, 613, 631, 639, 750(iv) and (v), 751, 786(i), 787, 831, 834, 836, 840, 875, 884, 889, 890(ii), 892, 934.
97 **Sentencing Judgement**, para. 47.
98 *Ibid.*, para. 85.
99 **Trial Chamber's Judgement**, paras. 558-562.
100 *Ibid.*, paras. 515-521.
101 *Ibid.*, paras. 606-607.
102 *Ibid.*, paras. 641-652.
103 *Ibid.*, paras. 377-379.
104 *Ibid.*, paras. 293, 359.
105 *Ibid.*, para. 360.

and around Talia,[106] but whose members were subsequently responsible for torturing and killing people, and looted properties.[107]

3.15 The Trial Chamber found that between 10 and 12 December 1997, a passing out parade was held at Base Zero, witnessed by many civilians and Kamajors at Talia, at which instructions for the **Tongo** and Black December operations were given (the "**December 1997 Passing Out Parade**").[108]

3.16 The Trial Chamber found that at this passing out parade, Norman said in the open that "the attack on Tongo will determine who the winner or the looser of the war would be" and that "[...] there is no place to keep captured or war prisoners like the juntas, ***let alone their collaborators***".[109]

3.17 The Trial Chamber found that TF2-222 felt uncomfortable with this command because "[g]iving such a command to a group that was 95 percent illiterate who had been wronged, is like telling them an eye for an eye" and meant telling them not to "[...] spare the vulnerables [*sic*]".[110] Norman also told the fighters, amongst other things, to "spare the houses of those men who burnt down your own houses", which TF2-222 took to be very ironical, and which he understood to be an instruction telling the fighters indirectly ***not*** to spare house of the juntas.[111]

3.18 The Trial Chamber found that after Norman spoke, Fofana also spoke at the passing out parade, and said, "[n]ow, you've heard the National Coordinator [...] any commander ***failing to perform accordingly*** and losing your own ground, just decide to kill yourself there and don't come to report to us".[112]

3.19 The Trial Chamber further found that:

> Then all the fighters looked at Kondewa, admiring him as a man with mystic power, and he gave the last comment saying "a rebel is a rebel; surrendered, not surrendered, they're all rebels [... t]he time for their surrender had long since been exhausted, so we

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106 *Ibid.*, para. 360.
107 *Ibid.*, para. 361. See also *Ibid.*, para. 306, indicating that the Death Squad was involved in looting and killing.
108 *Ibid.*, para. 320.
109 *Ibid.*, para. 321 (emphasis added).
110 *Ibid.*, para. 321. The quote, which is in the Trial Chamber's Judgement, is from TF2-222.
111 *Ibid.*, para. 321.
112 *Ibid.* (emphasis added).

> don't need any surrendered rebel." He then said, "I give you my blessings; go my boys, go."[113]

3.20 Following the December 1997 Passing Out Parade, a meeting was held by Norman, attended by Fofana, Kondewa, and other commanders, where further instructions for the Tongo and Black December operations were given by Norman (the "**December 1997 Commanders' Meeting**"). Norman repeated that whoever took Tongo would win the war and that it should be taken at all costs. He told them not to spare anyone working with the juntas or mining for them, and that ***all collaborators should forfeit their properties and be killed.*** Everyone in the meeting contributed to the discussion, including Fofana and Kondewa. Norman then ordered Fofana to provide logistics for the operation.[114]

3.21 In early January 1998, Kamajors/CDF forces conducted the attack on Tongo (referred to in the Trial Chamber's Judgement as the "**second attack on Tongo**").[115] The Trial Chamber's findings in respect of this attack, and the crimes committed by the Kamajors/CDF forces subsequent to that attack, are contained in paragraphs 383 to 388 of the Trial Chamber's Judgement. These crimes included the mass killing of 150 civilians with cutlasses.[116] The stomach of one of the victims was slit open, and his entrails were displayed in a bucket before the remaining civilians.[117]

3.22 The Trial Chamber found that Norman addressed the Kamajors at another meeting in early January 1998 (the "**January 1998 Passing Out Parade**"), attended by Fofana, Kondewa and other commanders, to plan an "**all-out offensive**" in all of the areas occupied by the juntas. The Trial Chamber found that:

> Norman thanked the Kamajors for the training they had undergone and talked about the operations that had been undertaken and those that were pending and their importance. Norman said that he had given instructions for the pending

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113 *Ibid.*
114 *Ibid.*, para. 322.
115 *Ibid.*, para. 383.
116 *Ibid.*, para. 386.
117 *Ibid.*

> operations and that the Kamajors should follow those instructions. Norman also said that "whoever knows that he is used to fighting with the cutlass, it is time for him to take up the cutlass[; w]hoever knows that he's used to fighting with a gun, it is time for him to take up the gun[; w]hoever knows that he's used to fight with a stick, it is time to him to take up his stick."[118]

3.23 The Trial Chamber found that Fofana spoke at this meeting, and said:

> [T]he advice that Pa Norman had given to us, that the training that we underwent for a long time, the time has come for us to implement what we've learned. Now that we have received the order that we shall attack the various areas where the juntas are located, they have done a lot for the trainees. They've spent a lot on them. So any commander, if you are given an area to launch an attack and you fail to accomplish that mission, do not return to Base Zero.[119]

3.24 The Trial Chamber further found that Fofana told the fighters to attack the villages where the juntas were located and "to destroy the soldiers finally from where they were [...] settled", that the failure to take Koribondo was "a disgrace to the Kamajors that [*sic*] were [*sic*] close to Base Zero because [...] medicine that is given to Kamajors comes from there [and] [t]hat's where they come from to attack Koribondo [*sic*] many [times]", and that "[...] this time around, he wants them to go and capture Koribondo."[120]

3.25 The Trial Chamber additionally found that Kondewa also spoke at the meeting, and said that "I am going to give you my blessings [... and] the medicines, which would make you to be fearless if you didn't spoil the law," and that all of his powers had been transferred to them to protect them, so that no cutlass would strike them and that they should not be afraid.[121]

3.26 The Trial Chamber found that after the January 1998 Passing Out Parade, on the same day, Norman held a meeting attended by Fofana, Kondewa and other commanders (the "**First January 1998 Commanders' Meeting**").[122] Norman

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118 *Ibid.*, para. 323.
119 *Ibid.*, para. 324.
120 *Ibid.*, para. 325.
121 *Ibid.*, para. 326.
122 *Ibid.*, para. 328.

said that they should take Koribondo "at all costs", and told the commanders that when they got to Koribondo not to "leave any house or any living thing there, except mosque, church, the *barri* and the school."[123] The Trial Chamber said that Norman "specified that this time they should destroy or burn everything in the town and that ***anyone left in Koribondo should be termed an enemy or a rebel and killed*** since they had been forewarned of such consequences".[124]

3.27 The Trial Chamber found that on the same evening of the January 1998 passing out parade, a second commanders' meeting was held by Norman (the "**Second January 1998 Commanders' Meeting**"), which Fofana and Kondewa attended, together with others. Norman told the Kamajors that they had an assignment to attack Bo Town, and that they were to kill enemy combatants and "people who had connections with or supported the rebels and who were therefore worse than the combatants". Norman referred to these other people as "collaborators". The Kamajors were also told to burn down houses and loot big shops, especially pharmacies, in the areas that were rebel-held.[125] Norman also told three of the commanders present to go on a test case for Bo and to attack Kebi town where the rebel brigade headquarters was located, and added that they should get ammunitions for the attack directly after the meeting. Fofana provided the commanders with arms, ammunitions and a vehicle.[126]

3.28 Albert J Nallo ("**Nallo**"), a subordinate of Fofana, did all the planning for the Koribondo attack and then submitted it to Fofana, who then submitted it to Norman.[127]

3.29 Norman called Nallo before the Koribondo and Bo attacks and gave him specific instructions for these two attacks. Fofana was present.[128] Norman told Nallo that the Kamajors had tried to capture Koribondo many times and that they had failed because the civilians were all "spies and collaborators", and that therefore "anybody that was met there should be killed" and nothing should be left "not

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123 **Trial Chamber's Judgement**, para. 329.
124 *Ibid.* (emphasis added).
125 **Trial Chamber's Judgement**, para. 332.
126 *Ibid.* para. 333.
127 *Ibid.* para. 334.
128 *Ibid.* para. 334.

even a farm" or "[...] a fowl". All houses were to be burnt, and Nallo was given petrol for the job. Some names were mentioned of specific people who were to be killed of have their houses burned.[129] Regarding the Bo, Norman told Nallo that he should loot the Southern Pharmacy and bring the medicines to Norman, and named certain individuals who were to be killed or have their houses burned.[130]

3.30 On **14 January 1998**, Kamajors/CDF forces conducted another attack on Tongo (referred to in the Trial Chamber's Judgement as the "**third attack on Tongo**").[131] The Trial Chamber's findings in respect of this attack, and the crimes committed by the Kamajors/CDF forces subsequent to that attack, are contained in paragraphs 389 to 410 of the Trial Chamber's Judgement. These crimes included killings of large numbers of civilians, including the killing of 64 civilians in one incident, 56 by shooting, and 8 by being hacked to death with machetes.[132]

3.31 On **13 February 1998**, around 700 Kamajors conducted an attack on **Koribondo**.[133] The Trial Chamber found that this attack was conducted pursuant to the order given by Norman at the Second January 1998 Commanders' Meeting.[134] The Trial Chamber's findings in respect of this attack, and the crimes committed by the Kamajors/CDF forces subsequent to that attack, are contained in paragraphs 418 to 431 of the Trial Chamber's Judgement. The troops conducting the attack were all under Nallo's command.[135] These crimes included killings of civilians,[136] burning of houses,[137] and looting.[138] Some of the crimes were particularly gruesome: two of the civilian victims were women who were killed by having sticks inserted through their genitals until they came out through their mouths, after which they were disemboweled, their entrails were put in a

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129 *Ibid.* para. 335.
130 *Ibid.* para. 336, 446.
131 *Ibid.* para. 389.
132 *Ibid.* para. 406.
133 *Ibid.* para. 420.
134 *Ibid.* paras. 328, 418.
135 *Ibid.* para. 420.
136 *Ibid.* paras. 421-426.
137 *Ibid.* paras. 427-429.
138 *Ibid.*, para. 430.

bucket, their stomachs were removed, their guts were made into checkpoints so that anyone coming past could see them, and part of their entrails were eaten.[139]

3.32 Some time after this attack, in March 1998, Norman addressed a meeting in Koribondo at which about 200 people from Koribondo and 400 Kamajors were present, at which he complained that his instructions had not been carried out: he said that he had ordered that the only buildings that he wanted to see left in Koribondo were the mosque, the court *barri* and one house, but that many houses had been left standing.[140] He said to them "You people are afraid of killing. Why? The soldiers killed, nothing happened; Kapras killed, nothing happened; rebels killed, nothing happened. Why are you afraid of killing? Why? Really, you've not done my work, you've disappointed me".[141] At a subsequent meeting at the court *barri* in Koribondo in April 1998, Norman called on the audience to stop blaming the Kamajors because "anything that the Kamajors did here I commanded them to do it".[142]

3.33 On **15 February 1998**, two days after the previous attack on Koribondo, around 2,000 Kamajors/CDF forces conducted an attack on Bo Town in **Bo District**.[143] As previously planned,[144] an initial attack had been launched on Kebi Town in early January 1998.[145] The Trial Chamber found that this attack was conducted pursuant to the orders previously given by Norman referred to above, to kill certain identified individuals labelled as "collaborators" and to burn their houses.[146] The Trial Chamber's findings in respect of this attack, and the crimes committed by the Kamajors/CDF forces during and in the three days subsequent to that attack, are contained in paragraphs 449 to 478 of the Trial Chamber's Judgement. These crimes included killings of police,[147] killings of other civilians,[148] mutilation and personal injury,[149] mistreatment of civilians,[150]

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139 *Ibid.*, paras. 423-424.
140 *Ibid.*, para. 434.
141 *Ibid.*, para. 434.
142 *Ibid.*, para. 436.
143 *Ibid.*, paras. 449, 450.
144 *Ibid.*, paras. 333, 442.
145 *Ibid.*, paras. 443.
146 *Ibid.*, para. 446.
147 *Ibid.*, paras. 451-452.
148 *Ibid.*, paras. 459, 461-462, 468-478.

looting,[151] and burning of property.[152] Crimes continued to be committed by Kamajors after an attack by juntas on 18 February 1998,[153] and after the arrival in Bo Town of ECOMOG forces on 23 February 1998,[154] as ECOMOG was unable to control the Kamajors.[155]

3.34 The Trial Chamber found that about a week after the capture of Bo, Norman convened a public meeting attended by Kamajors and civilians, at which he said that people should not grumble or blame the Kamajors because he is the one who gave directives to Kamajors and he took responsibility for their actions.[156] Later, in April 1998, Norman complained that the police barracks in Bo had not been burned down as he had instructed,[157] and at a later meeting again, in July or August 1998, Norman gave a speech in which he took responsibility for the Kamajors' actions.[158]

3.35 On **15 February 1998**, the same day as the attack on Bo District, Kamajors conducted an attack on Bonthe Town in **Bonthe District**.[159] The attack was on the towns of Blama and Bonthe Town.[160] The Trial Chamber's findings in respect of this attack, and the crimes committed by the Kamajors/CDF forces during and in the few days subsequent to that attack, are contained in paragraphs 539 to 553 of the Trial Chamber's Judgement. These crimes included killings[161] and looting.[162] About a week later, on 23 February 1998, Norman addressed a public

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149 *Ibid.*, paras. 457-458.
150 *Ibid.*, paras. 453, 454.
151 *Ibid.*, paras. 454, 456, 460, 463, 466-467.
152 *Ibid.*, paras. 463-467.
153 *Ibid.*, paras. 479-481.
154 *Ibid.*, paras. 482-504.
155 *Ibid.*, para. 482.
156 *Ibid.*, para. 509.
157 *Ibid.*, para. 511.
158 *Ibid.*, para. 512.
159 *Ibid.*, para. 539 (the forces left Freetown in a navy boat on 14 February 1998, and arrived in Bonthe Town the following day). The Prosecution's Notice of Appeal, in relation to Grounds 3 and 4, did not indicate that the Prosecution was appealing in relation to Bonthe. Therefore, in these Grounds of Appeal, the Prosecution does not seek any remedy in relation to Bonthe. However, the Trial Chamber's findings in relation to Bonthe are relevant to the present Grounds of Appeal, and the Prosecution's submissions in relation to this Ground of Appeal would apply equally to Bonthe, and references below to Bonthe are included for this purpose.
160 This attack was not included in the Prosecution's Grounds 3 or 4.
161 *Ibid.*, paras. 541-542, 545-551.
162 *Ibid.*, paras. 540-543.

meeting in Bonthe and stated that "Any complaint against the Kamajors is useless as [sic] they had fought and saved the nation".[163]

3.36 On **15 February 1998**, the same day as the attacks on Bo District and Bonthe District, Kamajors conducted an attack on **Kemena District** consisting of attacks against Blama town and Kenema Town.[164] The Trial Chamber found that it was a reasonable inference that the order to attack Kenema Town was included in the instructions given by Norman at the January 1998 Passing Out Parade.[165] The Trial Chamber's findings in respect of the attack against Blama, and the crimes committed by the Kamajors/CDF forces on that day and the following day, are contained in paragraphs 576 to 581 of the Trial Chamber's Judgement. The Trial Chamber's findings in respect of the attack against Kenema Town, and the crimes committed by the Kamajors/CDF forces on 15 February 1998, are contained in paragraphs 584 to 594 of the Trial Chamber's Judgement. These crimes included killings[166] and looting.[167] The Trial Chamber's found that these crimes continued on subsequent days,[168] and included killings[169] and looting.[170]

3.37 The Trial Chamber further found that crimes were committed by Kamajors/CDF forces in and around Base Zero itself, including the killing of civilians and captured enemy combatants.[171]

3.38 The Prosecution submits that on the findings of the Trial Chamber, and/or the evidence that it accepted, the only conclusion open to any reasonable trier of fact, and in fact, the conclusion that the Trial Chamber reached, is that the **second attack on Tongo** in January 1998 was a planned operation, that the commission of crimes against civilians was part of that plan, and that both Fofana and Kondewa knew this, apart from anything else, from their participation at the December 1997 Passing Out Parade and at the December 1997 Commanders'

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163 *Ibid.*, para. 554.
164 *Ibid.*, paras. 576, 582.
165 *Ibid.*, para. 905.
166 *Ibid.*, paras. 584-593.
167 *Ibid.*, paras. 594.
168 *Ibid.*, paras. 599-609.
169 *Ibid.*, paras. 599, 602, 604-605.
170 *Ibid.*, paras. 600-601.
171 *Ibid.*, paras 622-630.

Meeting, at which Norman instructed that collaborators should be killed in the attack and should "forfeit their properties".[172]

3.39 The Prosecution further submits that on the findings of the Trial Chamber, and/or the evidence that it accepted, the only conclusion open to any reasonable trier of fact, and in fact, the conclusion that the Trial Chamber reached, is that the **third attack on Tongo** on 14 January 1998 was a similarly planned operation, that the commission of crimes against civilians was part of that plan, and that the plan was made at Base Zero. The Trial Chamber found that the third attack on Tongo was in fact also, like the second attack on Tongo, conducted pursuant to the instruction given by Norman at the December 1997 Passing Out Parade,[173] in which Norman called for the Kamajors to kill "collaborators" in the attack.[174]

3.40 The Prosecution additionally submits that on the findings of the Trial Chamber, and/or the evidence that it accepted, the only conclusion open to any reasonable trier of fact is that the attacks on **Koribondo**, **Bo District**, **Kenema District** and **Bonthe District**, which all occurred around the same time (13 February 1998 in the case of Koribondo, and two days later on 15 February 1998 in the case of Bo, Kenema and Bonthe), were all part of the same "all-out offensive" announced by Norman at the January 1998 Passing Out Parade.

3.41 In the case of the attacks on **Koribondo** and **Bo**, this is evident from the fact that at the January 1998 Passing Out Parade, at which the "all-out offensive" was announced, Norman said that "a commanders" meeting was yet to be held where he would reveal which operations were going to be undertaken".[175] On the very same day, two commanders' meetings were in fact held by Norman, the first (the First January 1998 Commanders' Meeting) to discuss the attack on Koribondo, and the second (the Second January 1998 Commanders' Meeting) to discuss the attack on Bo Town. It is also necessarily implicit that the Trial Chamber found these attacks to be part of the "all-out offensive" announced at the January 1998 Passing Out Parade, since they treat the evidence of what both Fofana and

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172 *Ibid.*, para. 322.
173 This is necessarily implicit in **Trial Chamber's Judgement**, para. 723, and see also para. 727.
174 *Ibid.*, para. 322.
175 *Ibid.*, para. 327.

Kondewa said at the January 1998 Passing Out Parade to be the first evidence relevant to determining both Fofana's and Kondewa's individual responsibility for the crimes committed in these attacks.[176]

3.42 It is furthermore clear from the findings of the Trial Chamber, and was accepted by the Trial Chamber, that it was part of the plan for these attacks that crimes would be committed in the course of these attacks. At the First January 1998 Commanders' Meeting, Norman expressly gave instructions that when the forces got to Koribondo, they should not "leave any house ***or any living thing*** there, except mosque, church, the *barri* and the school",[177] and that "this time they should destroy or burn everything in the town and that ***anyone left in Koribondo should be termed an enemy or a rebel and killed*** since they had been forewarned of such consequences".[178] In the subsequent meeting with Nallo, which Fofana attended, Norman repeated this instruction.[179]

3.43 It is furthermore clear from the Trial Chamber's findings that both Kondewa and Fofana knew of the plan that crimes would be committed in the course of these attacks, since they both attended the First January 1998 Commanders' Meeting and the Second January 1998 Commanders' Meeting, at which Norman gave instructions for the killing of civilians and the destruction of houses, and Fofana further attended a meeting with Norman and Nallo at which further instructions were given for the commission of crimes during the Koribondo and Bo attacks.[180]

3.44 In the case of the attack on **Kenema**, the Trial Chamber drew the inference that the order to attack Kenema Town was included in the instructions given by Norman at the January 1998 Passing Out Parade.[181] This finding is also necessarily implicit in paragraph 274 of the Trial Chamber's Judgement, where the Trial Chamber again treated the evidence of what Fofana said at the January 1998 Passing Out Parade to be the first evidence relevant to determining Fofana's

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176 **Trial Chamber's Judgement**, paras. 766, 799. See also at para. 857 (necessarily implying that Bo, Kenema and Bonthe attacks were all part of this same "all-out offensive").
177 *Ibid.*, para. 329 (emphasis added).
178 *Ibid.* (emphasis added).
179 *Ibid.*, para. 335.
180 See paragraphs 3.26 to 3.29 above.
181 **Trial Chamber's Judgement**, para. 905.

individual responsibility for the crimes committed in these attacks.[182] The Trial Chamber based this finding on the facts that (1) at the January 1998 Passing Out Parade, Norman had announced an an "all-out offensive" ***in all of the areas occupied by the juntas***",[183] and Kenema Town was one of those areas; and (2) the attack on Kenema Town took place on the same day as the attack on Bo and Bonthe Towns.[184]

3.45 The Trial Chamber found that the attack on **Bonthe District** was part of the same "all-out offensive" for the same reasons.[185]

3.46 The Prosecution submits that on the findings of the Trial Chamber, and/or the evidence that it accepted, the only conclusion open to any reasonable trier of fact is that it was part of the plan that crimes would be committed during the attacks on Kenema and Bonthe. If the attacks on Kenema and Bonthe District were part of the same "all-out offensive" as the attacks on Koribondo and Bo District, which occurred at the same time, and if similar crimes were committed in all of these attacks, no reasonable trier of fact could conclude that the commission of crimes was planned in the case of the Koribondo and Bo District, but somehow spontaneous and unplanned in the case of Kenema and Bonthe District.

C. The individual responsibility of Fofana

(i) Tongo

(a) Aiding and abetting

3.47 The Trial Chamber found that Fofana was individually responsible, under Article 6(1) of the Statute, for *aiding and abetting* the crimes committed during the second and third attacks on Tongo, on the basis of the statement he made to the assembled Kamajors at the December 1997 Passing Out Parade. On that occasion, Norman said to the assembled Kamajors that "[...] there is no place to

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[182] **Trial Chamber's Judgement**, para. 766. See also at para. 857 (necessarily implying that Bo, Kenema and Bonthe attacks were all part of this same "all-out offensive").
[183] *Ibid.*, para. 905.
[184] *Ibid.*, para. 905.
[185] *Ibid.*, para. 857.

keep captured or war prisoners like the juntas, let alone their collaborators",[186] and said with irony that they should "spare the houses of those men who burned down your houses".[187] The Trial Chamber found this to be a direction to the assembled Kamajors to commit criminal acts during the Tongo attack. In particular, the Trial Chamber found that this statement was an instruction by Norman to kill captured enemy combatants and "collaborators", to inflict physical injury or suffering upon them, and to destroy their houses.[188] The Trial Chamber found that the words spoken by Fofana at the December 1997 Passing Out Parade after Norman had spoken gave clear encouragement and support to the Kamajors to comply with Norman's instruction,[189] that Fofana's statement had a substantial effect on the perpetration of those criminal acts,[190] and that Fofana knew that it was probable that the Kamajors would commit at least one of those acts in compliance with Norman's instructions.[191] The Trial Chamber accordingly found that the elements of aiding and abetting were satisfied in relation to the crimes committed in the second and third attacks on Tongo.

3.48 However, the Trial Chamber found that no evidence had been adduced that Fofana planned, instigated, ordered or committed any of these crimes.[192]

3.49 The Prosecution takes no issue with the Trial Chamber's finding that the elements of aiding and abetting were satisfied. However, the Prosecution submits, for the reasons given below, that the Trial Chamber erred in fact in finding that the elements of instigating and planning were not also satisfied on the part of Fofana in relation to these crimes. As the Trial Chamber observed, "The jurisprudence of the ICTY and ICTR indicates that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation".[193] Therefore, if the elements of instigating and/or planning were also satisfied in relation to these crimes, the existing conviction for these crimes

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186 **Trial Chamber's Judgement**, para. 321.
187 *Ibid.*, para. 321.
188 *Ibid.*, paras. 722, 727.
189 *Ibid.*, para. 722.
190 *Ibid.*, para. 723.
191 *Ibid.*, para. 724.
192 *Ibid.*, para. 732.
193 **Sentencing Judgement**, para. 50.

on the basis of aiding and abetting does not describe the full criminal culpability of Fofana. If the Appeals Chamber upholds the Prosecution submissions below, and finds that the elements of instigating and/or planning were also satisfied, the Prosecution requests the Appeals Chamber to revise the Trial Chamber's finding of liability for aiding and abetting, by adding a finding that Fofana is individually responsible for instigating and/or planning the crimes committed in the second and third attacks on Tongo.

(b) Instigating

3.50 The Trial Chamber found that the elements of instigating are:

Actus reus

(1) an act or omission, covering both express and implied conduct of the Accused, which is shown to be a factor substantially contributing to the conduct of another person committing the crime;

(2) a causal relationship between the instigation and the perpetration of the crime must be demonstrated; although it is not necessary to prove that the crime would not have occurred without the Accused's involvement;

Mens rea

(3) the Accused intended to provoke or induce the commission of the crime, or had reasonable knowledge that a crime would likely be committed as a result of that instigation.[194]

3.51 The Prosecution takes no issue with the Trial Chamber's articulation of these elements.

3.52 In finding Fofana responsible for aiding and abetting these crimes, the Trial Chamber effectively found that the elements of the *actus reus* of instigating were satisfied in this case.[195] Furthermore, the Prosecution submits that the only conclusion open to any reasonable trier of fact is that Fofana's speech at the December 1997 Passing Out Parade went far beyond merely giving encouragement and support to the commission of these crimes. He said on that

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[194] **Trial Chamber's Judgement**, para. 223.

[195] *Ibid.*, para. 723 ("Fofana's speech had a substantial effect on the perpetration of those criminal acts").

occasion that "any commander failing to perform [according to Norman's instruction] ..., just decide to kill yourself there and don't come to report to us".[196] Given Fofana's seniority at Base Zero, including the fact that he was regarded as one of the "Holy Trinity" together with Norman and Kondewa, such a statement can only be understood as a direct threat to the Kamajors that they would face death or other serious consequences if they failed to carry out Norman's orders. The Trial Chamber found, for instance, that Nallo testified that "if the Kamajors did not follow orders they would cut off your ear or kill you".[197]

3.53 The main difference between aiding and abetting and instigating is the *mens rea* requirement. For aiding and abetting, it is not necessary for the aider and abettor to have the intent that the crime be committed; it is sufficient that the aider and abettor merely has knowledge that his acts assist in the commission of the principal perpetrator's crime.[198] For instigating, it is necessary to show that the accused had intent, in the sense that the accused "intended to provoke or induce the commission of the crime, or had reasonable knowledge that a crime would likely be committed as a result of that instigation".

3.54 The Prosecution submits, for the reasons given in paragraph 3.74 below, that on the basis of the Trial Chamber's findings and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Fofana had the necessary intent for instigating, and that the elements of instigating are therefore satisfied.

(c) Planning

3.55 The Trial Chamber found that the elements of planning are:

Actus reus

(1) one or several persons plan or design the commission of a crime at both the preparatory and execution phases, or design the criminal conduct constituting one or more crimes provided for in the Statute;

(2) the crimes are later perpetrated;

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[196] *Ibid.*

[197] **Trial Chamber's Judgement**, para. 336.

[198] See, for instance, ***Blaškić* Appeal Judgement**, para. 49.

(3) the planning was a factor substantially contributing to such criminal conduct;

Mens rea

(4) the Accused acted with an intent that a crime provided for in the Statute be committed or with reasonable knowledge that the crime would likely be committed in the execution of that plan.[199]

3.56 The Prosecution takes no issue with the Trial Chamber's articulation of these elements. Given that the planning may be undertaken by one or more persons, it is not necessary that the accused was responsible for all of the planning. Responsibility is incurred when the level of the accused's participation is substantial.[200]

3.57 In relation to these elements, the Prosecution submits, for the reasons given above, that the only conclusion open to any reasonable trier of fact on the findings of the Trial Chamber and the evidence it accepted, is that these crimes were committed pursuant to a plan, that it was specifically part of the plan that crimes would be committed in the second and third attacks on Tongo, that the crimes were in fact perpetrated, and that Fofana acted with an intent that a crime provided for in the Statute be committed or with reasonable knowledge that the crime would likely be committed in the execution of that plan. The only issue is whether Fofana participated substantially in the planning.

3.58 The Trial Chamber found that Fofana was at the December 1997 Commanders' Meeting where the Tongo attack was discussed, but found that "In the absence of any evidence showing how Fofana contributed to the discussion and decision at this meeting ... there is no evidence to prove beyond reasonable doubt that Fofana either planned the commission of this additional crime of looting or that he aided and abetted in the planning, preparation or execution of this additional crime in Tongo".[201]

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199 **Trial Chamber's Judgement**, para. 221.
200 ***Bagilishema* Trial Judgement**, para. 30; ***AFRC* Trial Judgement**, para. 765.
201 **Trial Chamber's Judgement**, para. 725.

3.59 This finding appears to suggest that an accused can only be convicted of planning where there is *direct* evidence of the specific contribution that the accused made to the plan in question.

3.60 The Prosecution submits that this is not the case. In a given case, some or all of the elements of a crime may be established circumstantially on the basis of the evidence in the case as a whole.[202] In making findings on whether alleged crimes have been committed, or on whether the individual responsibility of a particular Accused in respect of those crimes has been established, the Trial Chamber is always required to consider all of the evidence in the case as a whole. Even if the details of the specific contribution that an accused made to the planning cannot be known, the accused will nonetheless satisfy the elements of planning if it is established beyond a reasonable doubt, on the evidence as a whole, that the accused ***did*** in fact participate substantially in the planning of the crimes, and that the planning ***was*** a factor substantially contributing to such criminal conduct.

3.61 The Prosecution submits, for the reasons given in paragraphs 3.67 to 3.71 and 3.74 below, that on the basis of the Trial Chamber's findings and the evidence it accepted, including the findings as to the Commanders' Meetings that Fofana attended prior to the attacks on Tongo, the only conclusion open to any reasonable trier of fact is that Fofana had the intent, and that did make such a substantial contribution to the planning. The Prosecution submits that the elements of planning were therefore satisfied.

(ii) Koribondo, Bo, and Kenema

(a) Introduction

3.62 The Trial Chamber found that Fofana was not responsible under Article 6(1) for the crimes committed in any of these attacks.[203] The Prosecution submits that the

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[202] See ***Brđanin* Appeal Judgement**, paras. 12-13, 25, 337; ***Gacumbitsi* Appeal Judgement**, paras. 72, 115 ("it is also permissible to rely on circumstantial evidence to prove material facts"); ***Kamuhanda* Appeal Judgement**, para. 241 ("nothing prevents a conviction being based on circumstantial evidence"); ***Ntakirutimana* Appeal Judgement**, para. 262; ***Naletilić and Martinović* Appeal Judgement**, paras. 491-538.

[203] Fofana was however held to have Article 6(3) responsibility in relation to the crimes committed in the attacks on Tongo and Bo.

Trial Chamber thereby erred in fact, and/or erred in law in the approach that it took to the evaluation of the evidence in the case. The Prosecution submits that on the findings of the Trial Chamber and/or the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Fofana at least satisfied the elements of planning, or in the alternative, aiding and abetting in relation to these crimes.

(b) Planning

3.63 The elements of planning are referred to in paragraph 3.55 above.

3.64 In relation to these elements, the Prosecution submits, for the reasons given above, that the only conclusion open to any reasonable trier of fact on the findings of the Trial Chamber and the evidence it accepted, is that all of these attacks were part of the plan for the "all-out offensive" announced at the January 1998 Passing Out Parade, and that it was part of that plan that crimes would be committed in the course of that offensive (in particular, the killing of civilians considered or suspected of being "collaborators" and the burning of their houses), and that the crimes were in fact perpetrated pursuant to that plan.[204]

3.65 The only issue is whether Fofana was one of those who participated substantially in the planning, and whether Fofana acted with the intent that the crimes be committed or with reasonable knowledge that the crime would likely be committed in the execution of that plan.

3.66 The Trial Chamber found that Fofana was present at the December 1997 Commanders' Meeting at which the second and third attacks on Tongo were discussed, and at the First and Second January 1997 Commanders' Meetings at which the attacks on Koribondo and Bo were discussed. He was furthermore present at a meeting with Norman and Nallo (the latter being Fofana's subordinate), in which the attacks on Koribondo and Bo were further discussed.[205]

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[204] See paragraphs 3.38 to 3.46 above.

[205] **Trial Chamber's Judgement** para. 334.

3.67 The Trial Chamber appeared to find that Fofana's mere presence at these meetings, even where he was found to have contributed to the discussions,[206] did not establish that he participated substantially in the planning that occurred in those meetings.[207] The Prosecution submits that on the findings of the Trial Chamber and the evidence it accepted, that conclusion was not open to any reasonable trier of fact, when the findings of the Trial Chamber are viewed as a whole.

3.68 The Trial Chamber found that Fofana, together with Norman and Kondewa, was one of the three people regarded as the "Holy Trinity" at Base Zero, and that the three of them were the ***key and essential*** components of the leadership structure of the organisation and were the executive of the Kamajor society.[208] It further found that they were the ones actually making the decisions and that ***nobody could make a decision in their absence***.[209] The Trial Chamber found that "***Whatever happened, they would come together*** because they were the leaders and the Kamajors looked up to them".[210]

3.69 At Base Zero, Fofana was known as the "Director" or "Director of War", and was appointed to this position solely by Norman.[211] His duties as Director of War were ***to plan and execute*** the strategies for war operations,[212] to select commanders to go to battle and to act as the overall boss of the commanders who were at Base Zero.[213] The Trial Chamber found, for instance, that Fofana, and his deputy Nallo, were the architects of the Black December Operation.[214]

3.70 It is submitted that given his seniority as one of the top three figures at Base Zero, and given his express responsibility as Director of War for the ***planning*** of operations, no reasonable trier of fact could have concluded that Fofana may have been only a "passive" participant at all of these meetings. Indeed, in relation to

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206 **Trial Chamber's Judgement**, para. 322.
207 For instance, *Ibid.*, paras. 725, 768-769, 811-812.
208 *Ibid.*, para. 337.
209 *Ibid.*
210 *Ibid.*
211 *Ibid.*, para. 339.
212 *Ibid.*, para. 340.
213 *Ibid.*, para. 341.
214 *Ibid.*,para 340.

the attack on Koribondo, the Trial Chamber found that Nallo initially did the planning, and then submitted the plan ***to Fofana***, who then submitted it to Norman.[215] The Prosecution submits that the only conclusion open to any reasonable trier of fact is that at these meetings, Fofana was not just "present", but that he was an active participant.

3.71 Nallo testified that the strategies for war operations, which Fofana and Nallo planned together, did not include the killing of innocent civilians, looting of property or raping of women.[216] However, that evidence must be understood in context. It is clear from the Trial Chamber's findings that perceived "collaborators" of the rebels were not regarded by the CDF as "innocent civilians", even though they were protected by international humanitarian law. Furthermore, even if Fofana did not expressly plan the details of crimes to be committed in these attacks, he participated in the planning of attacks that he knew were to involve the commission of crimes.

3.72 It is submitted that to satisfy the elements of planning, it is sufficient that the accused contributes substantially to the planning of an operation in which it is intended that crimes will be committed. The accused need only contribute substantially to the planning. The accused need not plan in detail every aspect of the operation, and therefore need not necessarily plan in detail, or at all, the actual crimes that are committed in the course of the operation. It is submitted that provided that the operation is one that is launched with the purpose, in whole or in part, of committing crimes, an accused who participates substantially in the planning of that operation has participated substantially in the planning of those crimes, and satisfies the *actus reus* of this mode of liability. If the accused has the intent that the crimes be committed, or contributes substantially to the planning of the operation in the reasonable knowledge that the crimes will be committed when the plan is executed, the accused also has the requisite *mens rea*. As the ICTY Appeals Chamber has said:

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215 **Trial Chamber's Judgement**, para. 334.
216 *Ibid.*, para. 340.

> ... a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute [= Special Court Statute, Article 6(1)] pursuant to planning. Planning with such awareness has to be regarded as accepting that crime.[217]

3.73 Given the nature of the instructions that Norman had given for the crimes to be committed in the attacks (for instance, his instruction in relation to the attack on Bo that nothing should be left "not even a farm" or "[...] a fowl"[218]), Fofana must have had awareness of the substantial likelihood that the Kamajors would go on a rampage in Koribondo (which the Trial Chamber found that they did[219]), and that they would commit crimes in addition to those that had been expressly included in Norman's instruction, such as looting. It is therefore submitted that Fofana's responsibility for planning includes not only those crimes that were expressly included in Norman's instruction, but all crimes which the Trial Chamber found to have been committed in the attacks, the substantial likelihood of the commission of which was foreseeable by Fofana.

3.74 It is furthermore submitted that Fofana acted with the intent that the crimes be committed or with reasonable knowledge that the crime would likely be committed in the execution of that plan. It is submitted that any reasonable trier of fact would have to infer this intent from the very fact of his making a substantial contribution to this planning, in the very clear knowledge of the crimes that Norman had instructed were to be committed in the execution of the plan. Furthermore, the Trial Chamber made findings on the basis of which it must be inferred that Fofana also acted with direct intent, namely, the statement made by Fofana at the December 1997 Passing Out Parade, which the Trial Chamber found to be a statement encouraging the killing of civilians by Kamajors and which, in the Prosecution's submission above, also amounted to instigating those crimes. His direct intent can also be inferred from the fact that four days after the capture

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217 ***Kordić and Čerkez* Appeal Judgement**, para. 31.

218 See paragraph 3.29 above.

219 See **Trial Chamber's Judgement**, para. 428 ("after the capture of Koribondo, Kamajors went on a rampage").

of Bo, one of the commanders who participated in the operation was questioned by Fofana as to his reasons for not killing Sheku Gbao during the attack as instructed.[220]

3.75 The Prosecution therefore submits that on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Fofana is individually responsible, under Article 6(1) for planning the crimes committed in the attacks on Tongo, Koribondo and Bo.

3.76 There were no express findings that Fofana participated in meetings held for the specific purpose of planning the attack on Kenema. However, given Fofana's seniority at Base Zero described above, his express role as Director of War in the planning of operations, and the fact that the attacks on Koribondo, Bo, Bonthe and Kenema were all part of a single "all-out offensive", and given that the attacks on Koribondo, Bo, Bonthe and Kenema all occurred at the same time, the Prosecution submits that the only conclusion open to any reasonable trier of fact is that Fofana also participated substantially in the planning of the attack on Kenema, with the knowledge that the commission of crimes was a purpose of these attacks.

3.77 The Prosecution submits that the elements of planning are therefore satisfied in relation to the crimes committed in these attacks.

(c) Aiding and abetting

3.78 The Trial Chamber found that the elements of aiding and abetting are:

Actus reus

(1) the accused carried out an act specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime;

(2) this act of the aider and abettor had a ***substantial effect*** upon the perpetration of the crime (although proof of a cause-effect relationship between the conduct of the aider or abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required);

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[220] **Trial Chamber's Judgement** para. 432.

Mens rea

(4) the accused had knowledge that the acts performed by the accused assist the commission of the crime by the principal offender.[221]

3.79 The Prosecution takes no issue with the Trial Chamber's articulation of these elements.

3.80 As the Trial Chamber found, "aiding and abetting" can include providing assistance, helping, encouraging, advising, or being sympathetic to the commission of a particular act by the principal offender,[222] and the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated and at a location geographically removed from the location of the principal crime.[223] Additionally, the Accused need not share the *mens rea* of the principal offender, but he must be aware of the principal offender's intention.[224] Furthermore, as the Trial Chamber found, the aider and abettor need not know the precise crime that is intended by the principal offender: if he is aware that one of a number of crimes will probably be committed by the principal offender, and one of those crimes is in fact committed, then he has intended to assist or facilitate the commission of that crime, and may be guilty of aiding and abetting.[225]

3.81 Furthermore, to be individually responsible for aiding and abetting a crime, the accused need not necessarily aid or abet the ***direct*** perpetrator, or directly assist the ***execution*** of the crime. Under Article 6(1) of the Statute, it is sufficient that the accused aided and abetted in the ***planning, preparation or*** execution of a crime. In other words, an accused can be individually responsible for aiding and abetting a crime where the accused provides assistance and support to those planning or preparing the crime.

3.82 For the reasons given above, the Prosecution submits that the only conclusion open to any reasonable trier of fact on the basis of the Trial Chamber's findings and the evidence it accepted is that Fofana had knowledge that crimes would be

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221 **Trial Chamber's Judgement**, paras. 229-231.
222 *Ibid.*, para. 228.
223 *Ibid.*, para. 229.
224 *Ibid.*, para. 231.
225 *Ibid.*, para. 231.

committed in the course of the attacks committed as part of the "all-out offensive". Furthermore, the Prosecution submits that the only conclusion open to any reasonable trier of fact on the basis of the Trial Chamber's findings and the evidence it accepted is that Fofana's substantial contribution to the planning of the operations in which these crimes were committed assisted planners and executors of the crimes. Furthermore, given Fofana's seniority and stature at Base Zero, and that the meetings attended by Fofana at which these operations were discussed were also attended by CDF commanders who were junior in the hierarchy to Fofana and who were subsequently involved in the execution of the operations, Fofana's participation in those meetings must also have encouraged or lent moral support to the planners and executors of the crimes committed in the attacks on Koribondo, Bo and Kenema.

3.83 Additionally, in relation to the attack on Bo, the Trial Chamber found that at the Second January 1988 Commanders' Meeting, which Fofana attended:

> Norman told them [the commanders who were to undertake the attack] to get ammunitions for the attack directly after the meeting. .... Fofana provided the commanders with arms, ammunitions and a vehicle.[226]

3.84 In respect of this finding, the Trial Chamber concluded that:

> We found that although Fofana was responsible at Base Zero for the receipt and the provision of ammunitions to the commanders, he could only perform these acts, if and when directed to do so by Norman. Furthermore, the Chamber finds that Fofana provided logistics to launch military attacks on Kebi and Bo Towns. Although at this stage Fofana knew that the plan to attack Bo Town included the commission of criminal acts, it is not the only reasonable inference that the logistics provided by Fofana were used to commit specific criminal acts in Bo Town or that such provision had a substantial effect upon the perpetration of these specific criminal acts in Bo. Therefore, these actions by Fofana do not constitute aiding and abetting in the planning, preparation or execution of the criminal acts committed by Kamajors subsequently in Bo.[227]

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[226] **Trial Chamber's Judgement**, para. 333.
[227] *Ibid.*, para. 813.

3.85 The Prosecution submits that this was a conclusion that was not open to any reasonable trier of fact. The Trial Chamber also found that Fofana, as Director of War, was responsible for the receipt and provision of logistics.[228] The Trial Chamber further expressly found that Norman gave the instruction at the Second January 1998 Commanders' Meeting that the commanders should obtain ammunition for the Bo attack directly after the meeting. It is submitted that the only conclusion that any reasonable trier of fact could draw from the Trial Chamber's finding is that Fofana provided the commanders with the arms, ammunition and vehicle in response to that instruction, specifically for the purposes of the Bo attack, in the knowledge, that Fofana had from what was said at the Second January 1998 Commanders' Meeting, that crimes were to be committed in the course of that attack.[229] Indeed, the Trial Chamber expressly found that "Fofana provided logistics to launch military attacks on Kebi and Bo Towns".[230] It is submitted that the only conclusion that any reasonable trier of fact could draw from the Trial Chamber's finding is that Fofana's act of supplying the arms, ammunition and vehicle had a substantial effect upon the perpetration of the crime.

3.86 As to the Trial Chamber's conclusion that Fofana could only provide logistics "if and when directed to do so by Norman",[231] the Prosecution submits that this is immaterial. Under Article 6(4) of the Statute, the fact that the accused acted under superior orders is not a defence. If Fofana only aided and abetted the crimes because he was ordered to do so by Norman, this does not mean that he is not individually responsible for aiding and abetting those crimes.

3.87 As to the Trial Chamber's finding that "it is not the only reasonable inference that the logistics provided by Fofana were used to commit specific criminal acts in Bo Town",[232] the Prosecution submits, first, that this was not a conclusion open to any reasonable trier of fact. The Trial Chamber expressly found that "Fofana

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228 **Trial Chamber's Judgement**, para. 342.
229 *Ibid.*, para. 333. ("Norman told them to get ammunitions for the attack directly after the meeting").
230 *Ibid.*, para. 813.
231 *Ibid.*, para. 813.
232 *Ibid.*, para. 813.

provided logistics ***to*** launch military attacks on Kebi and Bo Towns".[233] On the evidence as a whole, no reasonable trier of fact could conclude that they might not in fact have been used for the purposes of the attack. Furthermore, even if the logistics provided by Fofana were for some reason ultimately not used in the attack, this would not affect the conclusion that Fofana is individually responsible for aiding and abetting those crimes, provided that the provision of logistics nonetheless had a substantial effect on the commission of the crimes. The Prosecution submits that the only inference open to a reasonable trier of fact is that the provision of logistics for use in an attack in which crimes are to be committed is of substantial assistance to those who carry out the attack, whether or not they ultimately use the logistics for that purpose, and in any event, that it is an act which provides encouragement and moral support to the perpetrators.

3.88 The Prosecution therefore submits that the only conclusion open to any reasonable trier of fact based on the Trial Chamber's findings and the evidence it accepted is that by this act of providing logistics for the attack on Bo, Fofana additionally aided and abetted the crimes committed in the Bo attack.

3.89 Furthermore, the Prosecution submits that as the attack on Bo was part of a single "all-out offensive" in which crimes were committed, Fofana by this act of providing logistics for the attack on Bo aided and abetted the crimes as a whole, that were committed in the "all-out offensive" as a whole.

D. The individual responsibility of Kondewa

(i) Tongo

3.90 As in the case of Fofana, the Trial Chamber found that Kondewa was individually responsible, under Article 6(1) of the Statute, for *aiding and abetting* the crimes committed during the second and third attacks on Tongo, on the basis of the statement he made to the assembled Kamajors at the December 1997 Passing Out

[233] **Trial Chamber's Judgement**, para. 813.

Parade.[234] However, the Trial Chamber found that no evidence had been adduced that Kondewa planned, instigated, ordered or committed any of these crimes.[235]

3.91 The Prosecution takes no issue with the Trial Chamber's finding that the elements of aiding and abetting were satisfied. However, as in the case of Fofana, the Prosecution submits, for the reasons given below, that the Trial Chamber erred in fact and/or erred in law in its approach to the evaluation of the evidence in finding that the elements of instigating were not satisfied on the part of Kondewa in relation to these crimes. The Prosecution requests the Appeals Chamber to revise the Trial Chamber's finding of liability for aiding and abetting, by adding a finding that Kondewa is individually responsible for ***instigating*** these crimes.

3.92 In finding Kondewa responsible for aiding and abetting these crimes, the Trial Chamber found effectively that the elements of the *actus reus* of instigating were satisfied in this case.[236]

3.93 The Prosecution further submits that on the basis of the Trial Chamber's findings and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Kondewa had the necessary intent for instigating. At the December 1997 Passing Out Parade, he made a statement that the Trial Chamber expressly found encouraged the commission of crimes during the second and third attacks on Tongo, and, in the Prosecution's submission, amounted to instigating those crimes. His intent that crimes be committed is further evidenced by the fact that Kondewa on previous occasions had threatened others (including members of the War Council) who had made accusations that the Kamajors had committed crimes,[237] that while at Base Zero he personally committed one killing of a civilian and personally ordered the killing of another civilian,[238] and that he

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234 **Trial Chamber's Judgement**, para. 739.

235 *Ibid.*, para. 744.

236 *Ibid.*, para. 736 ("Kondewa's words had a substantial effect on the perpetration of those criminal acts").

237 *Ibid.*, paras. 306, 308.

238 *Ibid.*, paras 921(iii) and (v), 934. In relation to the incident in which Kondewa was found to have ordered a civilian killed, the Trial Chamber was not satisfied that it occurred within the timeframe pleaded in the Indictment (*ibid.*, para. 923). It is submitted that while this mean that Kondewa could not be convicted of this crime, the finding that it occurred and that Kondewa ordered it can be taken into account in determining Kondewa's intent at the time of the attacks on Koribondo, Bo and Kenema.

renewed the initiation of certain Kamajors to prepare them to attack Bo in the knowledge that they were going to commit crimes in that attack.[239] Although these findings did not relate specifically to the attacks on Tongo, it is submitted that the only conclusion open to any reasonable trier of fact, based on the findings of the Trial Chamber as a whole, is that Kondewa was an active supporter or proponent of the commission of crimes by Kamajors. The Prosecution submits that the elements of instigating are therefore satisfied.

(ii) Koribondo, Bo and Kenema

3.94 The Trial Chamber found that Kondewa was not responsible under Article 6(1) for the crimes committed in any of these attacks. As in the case of Fofana, the Trial Chamber appeared to find that Kondewa's mere presence at meetings at which these attacks were discussed, even where he was found to have contributed to the discussions, did not establish that he participated in the planning that occurred in those meetings.[240] The Prosecution submits that on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Kondewa aided and abetted the crimes committed in these attacks.

3.95 The Trial Chamber found that Kondewa was present at the December 1997 Commanders' Meeting at which the second and third attacks on Tongo were discussed, and the First January 1998 and Second January 1998 Commanders' Meetings at which the attacks on Koribondo and Bo were discussed. The Trial Chamber found that Kondewa, together with Norman and Fofana, was one of the three regarded as the "Holy Trinity" at Base Zero, and that the three of them were the ***key and essential*** components of the leadership structure of the organisation and were the executive of the Kamajor society.[241] It further found that they were the ones actually making the decisions and that ***nobody could make a decision in their absence***.[242] The Trial Chamber found that "***Whatever happened, they would***

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239 See paragraph 3.99 below.
240 For instance, **Trial Chamber's Judgement**, paras. 738, 801, 848.
241 *Ibid.*, para. 337.
242 *Ibid.*

come together because they were the leaders and the Kamajors looked up to them".[243]

3.96 The Trial Chamber found that ***the three Accused and the commanders ultimately did all of the planning*** for the prosecution of the war,[244] and that the job of deciding when and where to go to war lay with Norman, Kondewa, Fofana, the Deputy Director of War, the Director of Operations, his deputy, and the battalion commanders.[245]

3.97 The seniority of Kondewa is evident from the findings of the Trial Chamber in respect of a number of matters. Kondewa arrived in Talia before Norman, within two weeks of the first Kamajors arriving after the Kamajors took control in late 1996 or early 1997.[246] He was at that stage, prior to the establishment of Base Zero, already the chief initiator.[247] At that stage, he was giving orders to Kamajors to mount attacks, and to set up checkpoints.[248] When the Kamajors in Talia decided to resist the rebels, it was Kondewa who they sought out for a meeting.[249] When the Kamajors were looking for Norman to tell him that they supported him, they sent a letter written by Kondewa and a cassette with Kondewa speaking on it.[250] When a delegation from Bonthe District wanted to complain about the behaviour of Kamajors in Bonthe Town in August 1997 (again prior to the establishment of Base Zero), they sent a delegation to Kondewa, "***who was considered the supreme head of Kamajors***".[251] Kondewa was at the time living in a house guarded by armed Kamajors.[252] He had the power to order people to be tried and executed if convicted.[253]

3.98 The Trial Chamber found that Kondewa attended the December 1997 Commanders' Meeting, the First January 1998 Commanders' Meeting and

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243 **Trial Chamber's Judgement**, para. 337.
244 *Ibid.*, para. 306.
245 *Ibid.*, para. 349.
246 *Ibid.*, para. 292.
247 *Ibid.*, para. 293.
248 *Ibid.*, para. 295.
249 *Ibid.*, paras. 293-294.
250 *Ibid.*, para. 296.
251 *Ibid.*, paras. 297-301 (also paras. 535-537).
252 *Ibid.*
253 *Ibid.*

Second January 1998 Commanders' Meeting, at which the participants discussed the attacks on Bo and Koribondo, and instructions for the commission of crimes in those attacks were given. Kondewa, a member of the "Holy Trinity", and a revered figure as High Priest of the Kamajors, was more senior to many of the others who attended the meetings, including commanders who were involved in the further planning and execution of those attacks. It is submitted that the only conclusion open to any reasonable trier of fact is that Kondewa, by attending the meetings that he did at which the commission of crimes during the attacks were discussed, gave encouragement and moral support to the planners of the attacks and the crimes, and that he therefore aided and abetted in the planning of those crimes.

3.99 The Prosecution submits furthermore that on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Kondewa, through the performance of his functions as High Priest, in initiating Kamajors and giving them his blessing when they went to battle, gave encouragement and moral support to the Kamajors who, he knew, were about to commit crimes in the attacks. The Trial Chamber found that because of the mystical powers Kondewa possessed, he had command over the Kamajors from every part of the country, and that no Kamajor would go to war without Kondewa's blessing,[254] and that it was Kondewa's role to decide whether a Kamajor could go to the war front that day.[255] In relation to the attack on Bo in particular, the Trial Chamber expressly found that Kondewa renewed the initiation of certain Kamajors to prepare them to attack Bo,[256] who Kondewa knew, from his participation at the Second January 1998 Commanders' Meeting, would be committing crimes in the course of that attack. He therefore certainly knew that he was giving encouragement and moral support to the Kamajors in the commission of the crimes in the attack on Bo.

3.100 Although there were no express findings that Kondewa participated in meetings to plan the attack on Kenema, given Kondewa's seniority at Base Zero described

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254 **Trial Chamber's Judgement**, para. 346.
255 *Ibid.*, para. 345.
256 *Ibid.*, para. 445.

above, and the fact that the attacks on Koribondo, Bo, Bonthe and Kenema were all part of a single "all-out offensive", and given that the attacks on Koribondo, Bo, Bonthe and Kenema all occurred at the same time, the Prosecution submits that the only conclusion open to any reasonable trier of fact is that Kondewa, in the same way, also provided encouragement and support to the planners of the Kenema attack, and to the Kamajors who committed crimes in the Kenema attack.

3.101 The Prosecution submits that the only conclusion open to any reasonable trier of fact on the basis of the Trial Chamber's findings and the evidence it accepted is that these acts had a ***substantial effect*** upon the perpetration of the crime, and that Kondewa was aware of this.

3.102 The Prosecution submits that the elements of aiding and abetting are therefore satisfied in relation to these crimes.

E. Conclusion

3.103 For the reasons given above, the Prosecution requests the Trial Chamber to to revise the Trial Chamber's Judgement by adding findings that:

(1) Fofana is individually responsible, under Article 6(1) of the Statute, for instigating and/or planning all of the crimes which the Trial Chamber found were committed during the second and third attacks on Tongo;

(2) Fofana is individually responsible, under Article 6(1) of the Statute, for planning, or in the alternative, for aiding and abetting in the planning, preparation or execution of all of the crimes which the Trial Chamber found were committed during the attacks on Koribondo, Bo and Kenema;

(3) Kondewa is individually responsible, under Article 6(1) of the Statute, for instigating all of the crimes which the Trial Chamber found were committed during the second and third attacks on Tongo;

(4) Kondewa is individually responsible, under Article 6(1) of the Statute, for aiding and abetting in the planning, preparation or execution of all of the crimes which the Trial Chamber found were committed during the attacks on Koribondo, Bo and Kenema.

3.104 The Prosecution also requests that the sentences imposed on the Accused be increased to reflect the additional criminal responsibility.

4. Prosecution's *Ground 5*: Acquittal of Fofana of enlistment of children into armed forces or groups or their active use in hostilities and failure clearly to describe the full extent of Kondewa's responsibility for the crime

A. Introduction

4.1 Count 8 of the Indictment charged Fofana and Kondewa under Article 6(1) of the Statute and, or alternatively, under Article 6(3), with the crime of enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities. The material facts alleged as the basis of their liability were that at all material times, the CDF enlisted under-aged children into their armed group and/or used them to participate actively in hostilities,[257] and that Fofana knew and approved of such practices.[258]

4.2 The Trial Chamber found that the "trial record contains ample evidence that the CDF as an organisation was involved in the recruitment of children under the age of 15 to an armed group, and used them to participate actively in hostilities".[259] Nevertheless, the Trial Chamber held by majority (Judge Itoe dissenting) that it was not demonstrated beyond reasonable doubt that Fofana was personally involved in such crimes.[260] Additionally, Judge Thompson held that Fofana would, at any rate, be absolved from criminal responsibility upon a defence of necessity, since he and the CDF/Kamajors were fighting a war in support of a democratically elected government.[261] Accordingly, the majority of the Trial Chamber found that Fofana was not criminally responsible for this crime under

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257 See Indictment, para. 29.
258 See Indictment, para. 17.
259 **Trial Chamber's Judgement**, para. 962.
260 *Ibid.*
261 See Separate Concurring and Partially Dissenting Opinion of Justice Thompson, paras 62-92.

Article 6(1).[262] It also found that he was not individually responsible under Article 6(3).[263] The Prosecution submits that the Trial Chamber erred in law and/or fact in so acquitting Fofana on this Count. The Prosecution submits that on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Fofana is individually responsible, under Article 6(1) of the Statute, for ***aiding and abetting*** the enlistment of under-aged children into armed forces or groups, and/or their use to participate actively in hostilities.

4.3 As described below, the Trial Chamber did convict Kondewa on this Count under Article 6(1) for ***committing*** this crime,[264] and considered that in view of this conviction under Article 6(1), it was unnecessary to consider his individual responsibility under Article 6(3).[265] However, for the reasons given below, the Prosecution submits that the findings of the Trial Chamber on which this conviction was based fail clearly to describe the full extent of Kondewa's responsibility for the crime.

4.4 In this Fifth Ground of Appeal, the Prosecution requests the Appeals Chamber to reverse these findings of the Trial Chamber in respect of the individual responsibility of Fofana for this crime, and to revise the Trial Chamber's Judgement by substituting findings that both Fofana and Kondewa bear individual criminal responsibility under Article 6(1) on Count 8 of the Indictment for enlistment of an unknown number of children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities.

B. The individual responsibility of Fofana

(i) Introduction

4.5 It is recalled that the Trial Chamber found it established beyond reasonable doubt that the CDF as an organisation enlisted under-aged children and used them to

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[262] **Trial Chamber's Judgement**, para. 963.
[263] *Ibid.*, paras. 964-966.
[264] *Ibid.*, paras. 968-972.
[265] *Ibid.*, para. 973.

participate actively in hostilities.[266] In particular, the Trial Chamber found, that there was evidence that during the time period relevant to the Indictment, under-aged children were conscripted, enlisted, or used to participate actively in hostilities in the following locations: Kenema, Base Zero, Bo, Daru, Masiaka, Port Loko, Yele and Ngiehun.[267]

4.6 Without limiting the generality of the foregoing, the Chamber's findings include the following:

(1) initiators, including Kondewa, used child soldiers as body guards at Base Zero;[268]

(2) there was a Kamajor named 'Junior Spain' at Base Zero who was around 12 to 15 years of age;[269]

(3) at Ngiehun, the Kamajor commander named Kamabote ordered a child soldier named Small Hunter, who was about 12 years old, to shoot TF2-035;[270]

(4) in May 1998, in Daru, children as young as 13 years were present and were armed with knives, cutlasses and guns, at a time when Daru was an active combat zone;[271]

(5) children were involved in monitoring checkpoints in Daru;[272]

(6) it was the responsibility of a small boy dressed in Kamajor clothing to carry a stick known as 'the commander' and lead the Kamajors into combat; similarly children as young as 7 years danced in front of the Kamajors as they went into battle;[273]

(7) adult Kamajors liked to use children in combat because they were obedient;[274]

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266 **Trial Chamber's Judgement**, paras 700 and 962.
267 *Ibid.*, para. 688.
268 *Ibid.*
269 *Ibid.*
270 *Ibid.*
271 *Ibid.*
272 *Ibid.*
273 *Ibid.*
274 *Ibid.*

(8) in July 1998, a small proportion of the 4,000 registered Kapras (a wing of the CDF/Kamajors) in Massingbi were children under the age of 15;[275]

(9) by mid-August 1998, between 315 and 350 children under the age of 15 had been registered in a demobilisation and reintegration programme in Bo;[276]

(10) in 1999, the CDF registered over 300 children aged less than 14 in a disarmament, demobilisation and reintegration programme in the Southern Province;[277]

(11) in January 1998, at a Kamajor commanders' meeting at Base Zero in which Norman gave orders for the Bo attack, Norman complained that the infant combatants were outperforming the adult Kamajors;[278] children also attended this meeting which was a military gathering;[279]

(12) at the passing-out parade in early January 1998, during which plans were discussed for an 'all-out offensive' everywhere occupied by the juntas, 'children who were involved in the operations' were also in attendance at this war planning meeting;[280]

(13) at 14 years of age, witness TF2-140, was used by the Kamajors in weapons raids and other battlefront operations involving captures of certain strategic points;[281] and

(14) following his capture by the Kamajors in 1997, an under-aged witness TF2-021, was initiated into the Kamajors at Base Zero and used in active combat, looting and capture of women who were then taken to Base Zero.[282]

4.7 In spite of the foregoing, the majority of the Trial Chamber, Judge Itoe dissenting, considered that its finding that the CDF/Kamajors enlisted under-aged children

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275 **Trial Chamber's Judgement**, para. 688.
276 *Ibid.*
277 *Ibid.*
278 **Trial Chamber's Judgement**, para. 689.
279 *Ibid.*, paras 332 and 689. See also TF2-017, Transcript 19 November 2004, Closed Session, pp. 89-91.
280 **Trial Chamber's Judgement**, para. 323.
281 *Ibid.*, para. 667.
282 *Ibid.*, paras 674-682.

into an armed group and used them in active combat did not demonstrate beyond reasonable doubt that Fofana was individually responsible for such crimes.[283]

4.8 As submitted earlier, the Prosecution submits that on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Fofana is individually responsible under Article 6(1) of the Statute for ***aiding and abetting*** the crimes in question. The elements of aiding and abetting are addressed in paragraph 3.78 to 3.81 above. Each of these elements, in relation to Fofana's individual responsibility under Article 6(1) of the Statute for the crimes charged in Count 8 is addressed below.

(ii) Fofana's practical assistance

4.9 The Prosecution submits that on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Fofana provided practical assistance to the CDF/Kamajors, which had a substantial effect in the military enlistment or active use in hostilities of children under 15 years of age.

4.10 The Trial Chamber found that:

(1) Norman, Kondewa and Fofana were the key and essential components of the leadership structure of the CDF/Kamajors and comprised the executive of the organisation.[284] At Base Zero, CDF headquarters, Fofana was known as "Director of War".[285] He was seen as having power and authority at Base Zero and was the overall boss of the commanders at Base Zero.[286]

(2) Base Zero was a central storage and distribution site for all of the CDF's logistics.[287]

(3) Fofana dealt with the receipt and provision of logistics for the frontline, upon the instruction of Norman. This included both fighting logistics, such

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283 **Trial Chamber's Judgement**, para. 962.
284 *Ibid.*, para. 337.
285 *Ibid.*, para. 339.
286 *Ibid.*, para. 721(vi).
287 *Ibid.*, para. 721(i).

as, arms and ammunitions, as well as social logistics, such as cigarettes, tobacco leaves and alcohol.[288]

(4) Commanders came to Base Zero from every group and location in the country to take instructions from the High Command or Norman and to receive logistics.[289]

(5) Fofana was present at the commanders' meeting during which Norman gave the orders to attack Kebi and Bo to James Kaillie, Joseph Lappia and TF2-017. Fofana subsequently provided them with arms, ammunitions and a vehicle.[290]

4.11 From the foregoing, it is apparent that Fofana was always located at the heart and pulse of the CDF/Kamajors, in terms of the organisational life, the operations, the decision-making and the activities of the very organisation whom the Trial Chamber had found it amply established to have engaged in massive enlistment of under-aged children and their active use in hostilities. It defies the common sense of justice to suggest that his heavy and central role in the organisation stopped short only of the crime of enlistment of under-aged children, though evidence reveals that the organisation committed that crime on a pervasive scale.

4.12 Furthermore, arms and ammunitions were supplied by the Accused for the Tongo[291] and the Bo attacks[292] and the Kamajors used children in these attacks.[293] Fofana was the architect of the Black December Operation[294] and the Kamajors did use children to find food, to carry guns and to fight alongside adult Kamajor fighters during this operation.[295]

4.13 The Prosecution therefore submits that Fofana's practical assistance to the CDF/Kamajors in the military enlistment of children and/or their active use in hostilities consisted of his logistical support to the CDF/Kamajors who were implicated in those crimes. Such assistance had a substantial effect on the

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288 **Trial Chamber's Judgement**, paras 342 and 721(v).
289 *Ibid.*, para. 721(ii).
290 *Ibid.*, paras 809(i) and (ii).
291 *Ibid.*, para. 721(xi).
292 *Ibid.*, paras 809 (i) and (ii); TF2-017, Transcript 19 November 2004, p. 96.
293 *Ibid.*, para. 449 for Bo; paras 388 and 688 for Tongo.
294 *Ibid.*, para. 340.
295 TF2-017, Transcript 19 November 2004, pp. 90-91.

commission of those crimes, as seen particularly in the fact that such logistical support in the shape of weapons, ammunitions, etc, did end up in the hands of the very children who were used actively in hostilities. Illustrative instances of this include the following findings of the Trial Chamber. Kamajor commander Kamabote had given 'a single-barrel bullet' to a 12 year old boy named 'Small Hunter' and ordered him to kill TF2-035 and Small Hunter shot TF2-035 five times.'[296] The Kamajor named 'German' aka 'Jahman' captured Witness TF2-021, an under-aged boy,[297] gave the boy a gun and taught him how to shoot.[298] After the training, the boy started going on missions. His first mission was to Masiaka, where he and other boys engaged in combat with the rebels. In the course of this fighting, TF2-021 shot an unarmed woman.[299]

4.14 Hence, the only reasonable inference to draw from the foregoing evidence and the Trial Chamber's findings, particularly the fact that children were widely used in hostilities by the CDF, is that the logistical support provided by Fofana also supplied the children involved in combat activities, and that Fofana thereby assisted in the commission of the crime.

(iii) Fofana's encouragement

4.15 In addition, or in the alternative, to the submission above that Fofana lent practical support, the Prosecution submits that Fofana encouraged the military enlistment of children and/or their active use in combat in ways that had substantial effect on the commission of those crimes. Notable among instances of such encouragement was the occasion of the passing out parade in early January 1998, when Norman made his 'all-out offensive' speech. In that speech, Norman was galvanizing the Kamajors to attack the AFRC/RUF wherever they were and with all available weapons. He was addressing not only adult Kamajors, but also 'children who were involved in the operations.'[300]

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296 **Trial Chamber's Judgement**, para. 388.
297 *Ibid.*, para. 674.
298 *Ibid.*, para. 676.
299 *Ibid.*, para. 676.
300 *Ibid.*, para. 323.

4.16 Fofana played an encouraging role in this event. For not only was he present, he also spoke in support of Norman's speech.[301] It is notable that in his own speech,[302] Fofana did not exclude the children then present from the members of the audience whom he was addressing. To the extent that the children in attendance were also part of the target audience for Norman's speech and Fofana's support of Norman's speech, Fofana must be held to have encouraged the military enlistment of those 'children [in the audience] who were involved in the operations', as well as their active participation in the military operations then under consideration.

4.17 Furthermore, it is notable that the Trial Chamber had rightly held that the presence of a person with superior authority at the scene of a principal crime may be probative to determining whether such person encouraged or supported the principal perpetrator.[303] It is submitted that any reasonable trier of fact ought to have found Fofana liable under this theory of responsibility, for he was an authoritative figure within the CDF and was part of its High Command. Hence, his presence during Norman's address to both adult and infant fighters, as well as his own speech to the same audience, are important *indicia* of encouragement or support to the military enlistment and use of under-aged children. But, as we have seen, his encouragement went beyond mere presence during Norman's speech. He, too, spoke on the occasion in support of Norman's speech.

4.18 Similarly, Fofana's presence, as a superior member of the CDF, also had an encouraging effect as regards the commanders' meeting during which Norman praised infant Kamajors for greater valour in the battlefield and derided adult Kamajors for eating and looting.[304]

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301 **Trial Chamber's Judgement**, para. 324.

302 As found at para. 324 of the **Trial Chamber's Judgement**, Fofana's speech was as follows: '[T]he advice that Pa Norman had given to us, that the training that we underwent for a long time, the time has come for us to implement what we've learned. Now that we have received the order that we shall attack the various areas where the juntas are located, they have done a lot for the trainees. They've spent a lot on them. So any commander, if you are given an area to launch an attack and you fail to accomplish that mission, do not return to Base Zero.'

303 **Trial Chamber's Judgement**, para. 230 citing ***Blaškić* Appeal Judgement**, para. 47. *See* also ***Limaj* Trial Judgement**, para. 517; ***Brđanin* Trial Judgement**, para. 271; ***Aleksovski* Trial Judgement**, para. 65.

304 **Trial Chamber's Judgement**, para 958.

4.19 Finally, the Trial Chamber correctly noted that a superior's failure to punish for past crimes might result in acts that would constitute aiding and abetting for *further* crimes.[305] Surely, Fofana was clearly put on notice, assuming he was not before, in virtue of Norman's speech praising the valour of infant Kamajors in the battlefield. Fofana's duty was thereby engaged to punish those who had been using children actively in the battlefield. No evidence was presented to the Trial Chamber suggesting that Fofana took any action to punish any of his subordinates for the crime of enlistment and/or use of under-aged children. His failure to do so amounted to aiding and abetting.

(iv) Fofana's *mens rea*

4.20 The *mens rea* for aiding and abetting is that the accused had knowledge that the acts performed by the accused assist the commission of the crime by the principal offender, or that one of a number of crimes that the accused is aware of will probably be committed by the principal offender.[306]

4.21 The evidence in the case leads to the following conclusion as the only reasonable one: Fofana knew or ought to have known that his conduct was giving practical assistance and encouragement to the military enlistment and use of children. This conclusion derives from the fact that he must have known that children were so enlisted and used.

4.22 Evidence of his knowledge include the following. First, he was present at the commander's meeting during which Norman expressly lauded the superior combat-aptitude of the infant fighters in comparison to the adult fighters and, notably, with the children present.[307]

4.23 Second, Fofana was present and stationed at Base Zero at all material times when children were also present there.[308] Notably, the Trial Chamber held 'that the presence of Fofana at Base Zero where child soldiers were also seen was not sufficient *by itself* to establish beyond reasonable doubt that Fofana had any

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[305] **Trial Chamber's Judgement**, para. 230 citing ***Blaškić* Trial Judgement**, para. 337.
[306] **Trial Chamber's Judgement**, para. 231 (see paras 3.78-3.80 above); ***Blaškić* Appeal Judgement**, paras 46 and 49-50.
[307] **Trial Chamber's Judgement**, para. 689.
[308] *Ibid.*, para. 961.

involvement in the commission of these criminal acts under any of the modes of liability charged in the Indictment.'[309] [Emphasis added.] Indeed, it may be correct to say that Fofana's liability as an aider and abettor is not established exclusively on the fact of his contemporaneous presence with the infants at Base Zero. It is, however, wholly unreasonable to suggest that Fofana's presence at Base Zero together with child soldiers was insufficient to establish beyond reasonable doubt that Fofana *knew or was in a position to know*, for purposes of the theory of aiding and abetting, that those children were part of the military organisation in question.

4.24 Third, Fofana's knowledge is further evident from the testimony of TF2-140 whose evidence was accepted in the following respect. He stayed in a compound adjacent to Fofana's Mahei Boima Road residence. He gradually became involved with the Kamajors in Fofana's compound and acted as part of the security team for the house and its occupants.[310] While there, he met Fofana and Norman.[311]

4.25 Fourth, the responsibility of Kondewa for this crime also bears on the responsibility of Fofana. Notably, the Trial Chamber found that the evidence established beyond reasonable doubt that Kondewa was guilty of enlistment of children.[312] The evidential basis for this finding includes the following:

(1) Witness TF2-021, along with 20 other young boys, were initiated into the CDF/Kamajors. During the initiation, Kondewa told the boys that they

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309 **Trial Chamber's Judgement**, para. 961.

310 As clearly mentioned in the **ICRC Commentary to the Additional Protocols**, [ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions, p. 925], the Trial Chamber II recalled in the AFRC Judgement that the use of children to participate actively in hostilities encompasses a range of actions and do not only cover actual combat: "It is the Trial Chamber's view that the use of children to participate actively in hostilities is not limited to participation in combat. An armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat." (AFRC Trial Judgement, para. 737.) Accordingly, is it reasonable to infer from the reasoning of Trial Chamber II in paras 1266 to 1268 that the use of children as body guards to commanders does put the child at sufficient risk to consider such conduct illegal.

311 Although the Trial Chamber found that this witness was 15 years old at the time (**Trial Chamber's Judgement**, paras 670-672), the presence of such a young child should have alerted Fofana to the likely presence of under-aged child soldiers.

312 *Ibid.*, para. 970.

would be made powerful for fighting.[313] The Chamber, having examined the prevailing circumstances,[314] found that the initiation was 'the first step in [turning the initiates into] fighters.'[315] Given the close association between Kondewa and Fofana in the hierarchy and affairs of the CDF/Kamajors, it is unreasonable to conclude that Fofana was unaware that Kondewa had been initiating children into the CDF/Kamajors in the manner that the Trial Chamber found to have constituted the first step in turning the boys into fighters.

(2) Following his military training, Witness TF2-021 was sent on various military missions. Those missions included an occasion in 1999 when he was flown by helicopter into Freetown with three other small boys and their commanders to fight at Congo Cross.[316] Noting that the matter of flying the children by helicopter into Freetown is a matter of military logistics which was within the administrative domain of Fofana, it is unreasonable not to consider it at the very least as evidence tending to show that he knew or ought to have known of the crime.[317]

4.26 Finally, Fofana's knowledge must be inferred from the central role that he played in the operations of the CDF/Kamajors, as revealed in the following findings of fact:

(1) Norman, Fofana and Kondewa were regarded as the 'Holy Trinity.' 'Norman was the God, [...] Fofana was the Son, and [Kondewa] was the Holy Spirit.' The three of them were the key and essential components of the leadership structure of the organisation and were the executive of the Kamajor society. They were the ones actually making the decisions and nobody could make a decision in their absence. Whatever happened, they

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313 *Ibid.*, para. 968 (ii).

314 Among other things, these circumstances included the following: the initiates being given potions to rub on their bodies before going into battle; the initiates being told that they would be made strong for fighting; the initiates subsequently receiving military training; and the initiates being sent into battle following their initiation: **Trial Chamber's Judgement**, para. 970.

315 **Trial Chamber's Judgement**, paras 970-971.

316 *Ibid.*, para. 968(iii).

317 *Ibid.*, paras 968(iii)-971.

would come together because they were the leaders and the Kamajors looked up to them.[318]

(2) Norman, as the National Coordinator, Fofana, as the National Director of War, and Kondewa, as the High Priest, were the key and essential components of the leadership structure of the organisation. They were the executives of the CDF actually taking the decisions. They were the leaders of the CDF and all the Kamajors looked up to them.[319]

(3) The job of deciding when and where to go to war lay with Norman, Kondewa, Fofana, the Deputy Director of War, the Director of Operations, his deputy, and the battalion commanders.[320]

(4) The duties of the Director of War were to plan and execute the strategies for war operations. He received frontline reports, both written and verbal, from the commanders in the field and passed them to Norman.[321] It is noted in particular that the Deputy National Director of Operations, Nallo transmitted general and specific instructions from Norman to the warfront; collected reports from the warfront, both written and verbal, and brought them to Base Zero to Fofana before giving them to Norman; if they were written, he would sit with Fofana and go over them before taking them to Norman. Nallo took arms and ammunitions to the warfront for the fighters, visited the frontlines to receive reports and ascertain the position of the troops, and planned with Fofana strategies for war operations for the Southern Region because Fofana was illiterate.[322]

(5) Fofana was seen as having power and authority at Base Zero and was the overall boss of the commanders at Base Zero.[323]

(6) Thousands of civilians and Kamajors travelled to Base Zero for initiation and military training.[324]

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318 *Ibid.*, para. 337.
319 **Trial Chamber's Judgement**, para. 721(i).
320 *Ibid.*, paras 349 and 721(iii).
321 *Ibid.*, paras 340 and 721 (iv).
322 *Ibid.*, para. 350.
323 *Ibid.*, paras 341 and 721(vi).
324 *Ibid.*, para. 721(ii).

(7) Fofana selected commanders to go to battle and could, on occasion, issue direct orders to these commanders. For example, he issued the order to Joe Tamidey not to release captured vehicles and other items to any other person until they are registered with the CDF Headquarters. Fofana was responsible for the receipt and provision of ammunitions at Base Zero to the commanders upon the instruction of Norman.[325]

(v) Conclusion

4.27 It is therefore submitted that given the clear finding that the CDF/Kamajors enlisted and used children in active combat, the superior position of Fofana within the CDF and the centrality of his role in the operations of the CDF/Kamajors as shown above, any reasonable trier of fact would come to the conclusion that Fofana was aware of the commission of the crime and that his actions constituted practical assistance or encouragement which had a substantial effect on the commission of that crime. In the circumstances, any reasonable trier of fact would have found him guilty of aiding and abetting CDF/Kamajors' crime of enlistment of under-aged children and their active use in combat.

4.28 On this ground of appeal, the Prosecution submits that the Dissenting Opinion of Judge Itoe does reflect a more reasonable appreciation of evidence in the case and the correct application of the law to the evidence. Judge Itoe had found Fofana, together with Kondewa, criminally responsible, in virtue of aiding and abetting pursuant to article 6(1), for the enlistment and use of child soldiers as charged in Count 8 of the Indictment.[326]

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[325] **Trial Chamber's Judgement**, para. 721 (v).

[326] **Separate and Partially Dissenting Opinion Only on Count 8 of Hon. Justice Benjamin Mutanga Itoe**, Presiding Judge of the Trial Chamber on the Judgement of the Learned Justices of Trial Chamber I in the case of Moinina Fofana and Allieu Kondewa, para. 80.

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C. The individual responsibility of Kondewa

(i) Introduction

4.29 The Trial Chamber concluded that Kondewa was individually criminally responsible for committing the crime of enlistment of *a child* under the age of 15 into an armed force or group.

4.30 The Trial Chamber's reasoning to find Kondewa's liability reads as follows:

> 970. Having considered the evidence outlined above, that during the first initiation of TF2-021 initiates were given potions to rub on their bodies before going into battle, were told that they would be made strong for fighting, were subsequently given military training, and soon afterwards were sent into battle, the evidence is absolutely clear that on this occasion, the initiates had taken the first step in becoming fighters. **It is beyond reasonable doubt that Kondewa, in these circumstances, when initiating the boys, was also performing an act analogous to enlisting them for active military service.** TF2-021 was eleven years old when Kondewa enlisted him. In the Chamber's view, there can be no mistaking a boy of eleven years old for a boy of fifteen years or older, especially for a man such as Kondewa who regularly performed initiation ceremonies. Kondewa knew or had reason to know that the boy was under fifteen years of age, and too young to be enlisted for military service. Although the Chamber found this evidence entirely sufficient to establish enlistment beyond a reasonable doubt, TF2-021 was given a second initiation, into the Avondo Society, headed by Kondewa himself, when he was thirteen years old. Exhibit 18, dated 10 June 1999, bears Kondewa's signature and stamp of approval and lists the boy's age (incorrectly) as twelve.
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> 971. Thus, the Chamber concludes that this evidence has established beyond reasonable doubt that Kondewa committed the crime of enlisting **a child** under the age of 15 into an armed force or group.
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> 972. The Indictment charges use of child soldiers as an alternative to enlistment. Therefore, **having found that Kondewa is individually criminally responsible for enlisting child soldiers**, the Chamber need not consider the evidence in relation to their use actively participating in armed hostilities.[327]

4.31 The Prosecution submits that the Trial Chamber erred in failing to clearly describe the full extent of Kondewa's responsibility for that crime, since it seems to refer

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[327] Emphasis added.

to Kondewas's liability for enlistment only *vis-à-vis* one child, namely TF2-021[328]. The Trial Chamber concluded in paragraph 971 of its Judgement that Kondewa "committed the crime of enlisting *a child* under the age of 15 into an armed force or group". However, it held in the subsequent paragraph that "having found that Kondewa was individually criminally responsible for enlisting *child soldiers*, [it] need not consider the evidence in relation to their use actively participating in armed hostilities". Furthermore, before pronouncing on Kondewa's responsibility, the Trial Chamber made a clear finding regarding the fact that Kondewa, "when initiating *the boys* was also performing an act analogous to enlisting them for active military service." The Prosecution submits that the extent of Kondewa's liability does not clearly stem from the foregoing findings, and more importantly, is not sufficiently captured given the evidence presented and accepted by the Trial Chamber.

(ii) Kondewa's responsibility in respect of children other than TF2-021

(a) Introduction

4.32 The Prosecution submits that Kondewa is individually criminally responsible for committing, and alternatively, aiding and abetting the crime of enlistment and/or use of under-aged children to participate actively in hostilities in respect of children other than the one child TF2-021. The Prosecution therefore requests the Appeals Chamber to make a clear finding as to the scope of Kondewa's responsibility for the crime of enlistment and/or use of under-aged children to participate actively in hostilities.

(b) Committing

4.33 In that regard, the Prosecution wishes to stress firstly that the Trial Chamber found that TF2-021 was initiated along with around 20 other young boys at Base Zero. The Trial Chamber found that Kondewa performed the initiation and told

[328] TF2-021 is the only child in respect of whom the Trial Chamber made a finding in relation to his age.

the boys that they would be made powerful for fighting. He then gave them a potion to rub on their bodies before going into battle.[329] It is to be noted that TF2-021 provided the Trial Chamber with further evidence regarding the 20 other young boys initiated with him at Base Zero: he testified that the day he was initiated in Base Zero, there were altogether 400 persons being initiated with him by Kondewa and that he counted about 20 of them as "being of the same age group as him".[330] TF2-021 was eleven years old when he was enlisted. The Prosecution submits that the only reasonable inference, based on the evidence of TF2-021, which a reasonable trier of fact could make, was that at least some, if not all, of these other 20 boys as identified by TF2-021 were under the age of 15.

4.34 Furthermore, other evidence and findings of the Trial Chamber confirming the presence of children under the age of 15 in Base Zero and the role which these other children played whilst at Base Zero was provided to the Trial Chamber and further bolsters the Prosecution's contention that no reasonable trier of fact could have reached the conclusion that Kondewa only enlisted one child soldier. The Prosecution refers to the following additional evidence and findings by the Trial Chamber in support of its contention:

(1) TF2-079 testified that he saw children between 10 and 14 present in Base Zero, "some were carrying AK-47, grenades and some were carrying machetes". He also said that among them, Kondewa had a child soldier acting as one of his bodyguard in Base Zero.[331]

(2) TF2-014 (Albert Nallo) gave evidence that at Base Zero, there were Kamajors as young as 6, 8 and 12 years old and that he knew a Kamajor called Junior Spain, who he estimated to be between 12 to 15 years old.[332] Nallo explicitly said that he "knew him as a Kamajor".

(3) TF2-201, Fofana's Deputy, also testified that while in Talia/Base Zero he saw child combatants whose age he estimated around 10, 12 and 13 years old. He specifically said that he saw one "who was even up to 8 years old"

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329 **Trial Chamber's Judgement**, para. 968 (ii).
330 TF2-021, Transcript 2 November 2004, p. 38.
331 **Trial Chamber's Judgement**, para. 347; TF2-079, Transcript 27 May 2005, pp. 12-13.
332 **Trial Chamber's Judgement**, para. 688 (b); TF2-014, Transcript 11 March 2005, pp. 15-16.

and explained that the child combatants he saw were armed with AK/47's and assigned to man checkpoints.[333]

(4) The Trial Chamber found that TF2-140, who was initiated by Kondewa when he was 15 years at Mano Junction, was initiated along with 28 other boys and that some of them who took part in the initiation were the same age as TF2-140 while others were as young as 10 or 11 years.[334]

(5) The presence of under-aged children within CDF ranks generally is evident from the Trial Chamber's finding that in 1999, the CDF registered over 300 children aged less than 14 in a disarmament, demobilization and reintegration program in the Southern Province.[335]

(6) The Trial Chamber acknowledged that it was a usual and systematic practice of the CDF to enlist and/or use children and found that "children who *appeared to be aged less than 15* were conscripted, enlisted, or used to participate actively in hostilities in the following locations: Kenema; Base Zero; Bo; Daru; Masiaka; Port Loko; Yele; and Ngiehun."[336] The Trial Chamber also specifically found that children were present at various times in Base Zero,[337] notably at a meeting held at the passing out parade in January 1998 during which Norman, Fofana and Kondewa spoke.[338]

4.35 The above contention of the Prosecution, namely that no reasonable trier of fact could have concluded that Kondewa only enlisted one child solider is additionally bolstered by the findings of the Trial Chamber in connection with Kondewa's position of authority at Base Zero and in particular Kondewa's primary role in initiating Kamajors, as set out below:

> 344. Kondewa was known as the High Priest of the entire CDF organisation and was performing initiations at Talia. He was also appointed by Norman. He was the head of all the CDF initiators initiating the Kamajors into the Kamajor society in Sierra Leone.Kondewa created different types of initiations within the Kamajor movement.

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333 Prosecution Final Brief, para. 457; TF2-201, 5 November 2004, Closed Session, pp 62-63.
334 **Trial Chamber's Judgement**, para. 670; TF2-140, Transcript 14 September 2004, pp. 77-80.
335 **Trial Chamber's Judgement**, para. 688(i).
336 *Ibid.*, para. 688.
337 *Ibid.*, para. 958 (ii).
338 *Ibid.*, para. 323.

> 345. Kondewa's job was to prepare herbs which the Kamajors smeared on their bodies to protect them from bullets. Kondewa was not a fighter, he himself never went to the war front or into active combat, but whenever a Kamajor was going to war, he would go to Kondewa for advice and blessing. Kondewa's role was to decide whether a Kamajor could go to the war front that day. Before combat, the Kamajors would go in a line and Kondewa would say, "You, don't go to war this time." Although, he could say, "don't go [...] you go", it was similar to a fortune teller saying so.
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> 346. The Kamajors believed in the mystical powers of the initiators, especially Kondewa, and that the process of the initiation and immunisation would make them "bullet-proof". The Kamajors looked up to Kondewa and admired the man with such powers. They believed that he was capable of transferring his powers to them to protect them. Because of the mystical powers Kondewa possessed, he had command over the Kamajors from every part of the country. No Kamajor would go to war without Kondewa's blessing. For example, he did this for the Kamajors leaving Base Zero for Tongo.

4.36 Significantly, the Trial Chamber made the following finding based on TF2-021's testimony: "Having considered the evidence outlined above, that during the first initiation of TF2-021 initiates were given potions to rub on their bodies before going into battle, were told that they would be made strong for fighting, were subsequently given military training, and soon afterwards were sent into battle, the evidence is absolutely clear that on this occasion, the initiates had taken the first step in becoming fighters. It is beyond reasonable doubt that Kondewa, in these circumstances, when initiating the boys, was also performing an act analogous to enlisting them for active military service".[339]

4.37 After having made such a finding, given the evidence presented before the Trial Chamber in relation to the presence of children under 15 years old in Talia/Base Zero and Kondewa's role as head of initiation there, the Prosecution submits that no reasonable trier of fact could have come to the conclusion that Kondewa only initiated one child at Base Zero.

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[339] *Ibid.*, para. 970.

(c) Aiding and abetting

4.38 Given the foregoing analysis, the Prosecution submits that, in addition to committing the offence of enlisting, Kondewa is also liable for the offence of **aiding and abetting** the enlistment of child soldiers in respect of more than one child (TF2-021). In particular the Prosecution refers to the 20 children of the same age group initiated along with TF2-021.

4.39 As the Trial Chamber correctly found, the *actus reus* of aiding and abetting consists of rendering practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime.[340] It is not necessary that the aider and abettor know the precise crime that was intended or actually committed, as long as he was aware that one or a number of crimes would probably be committed, and one of those crimes was in fact committed.[341]

4.40 The Prosecution submits that, as an aider and abettor, Kondewa specifically assisted, encouraged and supported the perpetration of the crime by initiating children, with the knowledge that his conduct would assist the enlistment and/or use of under-aged children to participate in combat activities.

4.41 The initiation process conducted by Kondewa in Base Zero both on adult and child fighters was a substantial contribution to the crime of enlistment and/or use of under-aged children to participate in combat activities.[342] Even if initiation did not automatically give rise to enlistment, as found by the Trial Chamber[343], it provides "an evidentiary element and a preparatory stage for purposes of proving the offence of enlistment."[344] Furthermore, Witness TF2-EW2 expressly said that it was her belief that initiation was a stepping stone to the recruitment as a soldier[345] and TF2-014 explained that Kamajors would go to war at an early age,

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340 *Ibid.*, para. 228.

341 **Trial Chamber's Judgement**, para. 231; ***Strugar* Trial Judgement**, para. 350, citing ***Blaškić* Appeal Judgement**, para. 50; ***Brđanin* Trial Judgement**, para. 272.

342 ***Tadic*** Appeal Judgement, para 229; ***Vasilijevic*** Appeal Judgement, para 102; ***Blaškić*** Appeal Judgement, para 45.

343 **Trial Chamber's Judgement**, para. 969.

344 Separate and Partially Dissenting Opinion Only on Count 8 of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge of the Trial Chamber on the Judgement of the Learned Justices of Trial Chamber I in the case of Moinina Fofana and Allieu Kondewa, para. 31.

345 TF2-EW2, Transcript 16 June 2005, Closed Session, p. 91.

so long as they had been initiated into the Kamajor society.[346] Thus, the evidence clearly shows that the provision of initiation by Kondewa to under-aged children present in Base Zero was directly assisting the commission of the crime.

4.42 The Prosecution submits that Kondewa also encouraged the commission of the crime by his speeches at both passing out parades. During the first passing out parade on 10th and 12th December 1997 prior to the attack on Tongo, the Trial Chamber found the following:

> Then all the fighters looked at Kondewa, admiring him as a man with mystic power, and he gave the last comment saying "a rebel is a rebel; surrendered, not surrendered, they're all rebels [... t]he time for their surrender had long since been exhausted, so we don't need any surrendered rebel." He then said, "I give you my blessings; go my boys, go."[347]

4.43 At the meeting held after the second passing out parade in January 1998 to plan the all-out offensive, children were present and Kondewa spoke after Norman and Fofana. He addressed in the following manner all the fighters attending the meeting, including "children involved in operations":[348]

> "I am going to give you my blessings [... and] the medicines, which would make you to be fearless if you didn't spoil the law." Kondewa said that all of his powers had been transferred to them to protect them, so that no cutlass would strike them and that they should not be afraid.[349]

Kondewa's encouragement is further evident from the Trial Chamber's finding that no Kamajors would go to war without Kondewa's blessing.[350]

4.44 As to Kondewa's awareness, the Prosecution submits that it can be inferred from various findings of the Trial Chamber, for instance his presence at the commander's meeting where Norman praised the children's efficiency compared to adult fighters.[351] More importantly however, his being liable in respect of TF2-

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346 **Final Trial Brief**, para. 330; TF2-014, Transcript 11 March 2005, pp. 15-16.
347 **Trial Chamber's Judgement**, para. 321.
348 *Ibid.*, para. 323.
349 *Ibid.*, para. 326.
350 *Ibid.*, para. 346; TF2-008, Transcript 16 November 2004, pp. 57-60.
351 **Trial Chamber's Judgement**, para. 958 (i).

021 shows indisputably that he had unambiguous knowledge of the crime being committed and of his furtherance of the commission of the crime.

4.45 The Prosecution further relies on the finding of the Trial Chamber which held that "the evidence is absolutely clear that on this occasion, the initiates had taken the first step in becoming fighters. It is beyond reasonable doubt that Kondewa, in these circumstances, when initiating the boys, was also performing an act analogous to enlisting them for active military service."[352]

4.46 The Prosecution's submission is further buttressed by Judge Itoe in his Dissenting Opinion where he found Kondewa guilty for aiding and abetting the crime of enlistment and/or use of children under the age of 15.[353]

4.47 Based on the findings of the Trial Chamber referred to above and the other evidence and findings relied on in this section on aiding and abetting and further buttressed by Judge Itoe's dissenting opinion, the Prosecution submits that no reasonable trier of fact could have reached the conclusion that Kondewa was not liable for aiding and abetting the enlistment of under-aged children in the CDF fighting force at Base Zero.

5. Prosecution's *Ground 6*: The Respondents' acquittals for terrorism

A. Introduction

5.1 The Indictment charged the two Accused under Count 6 with Acts of Terrorism.[354] The *evidentiary basis* for those crimes comprised *the facts pleaded*

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352 **Trial Chamber's Judgement**, para. 970.

353 "It is my finding that no enlistment of children under the age of 15 years into the Kamajor armed group could take place, nor could they be used to participate actively in hostilities, if they were not initiated into the Kamajor society and immunized by the 3rd Accused or by any of the other Kamajor Initiators who in hierarchy were subordinate to the 3rd Accused who, for this reason was referred to as High Priest." Separate and Partially Dissenting Opinion Only on Count 8 of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge of the Trial Chamber on the Judgement of the Learned Justices of Trial Chamber I in the case of Moinina Fofana and Allieu Kondewa, para. 26. See also para. 132.

354 A crime punishable under Article 3(d) of the Statute.

in paragraphs 22 through 27 of the Indictment, in support of Counts 1 to 5 of the Indictment.[355] The crimes pleaded under Counts 1 to 5 were unlawful killings (Counts 1 and 2), physical violence (Counts 3 and 4) and looting and burning (Count 5).

5.2 The Trial Chamber held that it would "consider, under [Count 6], only those crimes which are charged and are found to have been committed under Counts 1-5 in the Indictment".[356] As the Trial Chamber clarified, "[i]f, for example, the Chamber has made a finding about a specific crime (*i.e.* a murder in Tongo) under another Count in the Indictment, (*i.e.* as a war crime under Count 2), it will consider this act in relation to Counts 6-7, but it will not consider other killings which may have occurred elsewhere in relation to these Counts".[357]

5.3 In the end, the Trial Chamber acquitted Fofana and Kondewa on Count 6 Acts of Terrorism.

5.4 In this connection, the Trial Chamber particularly found as follows:

(1) In relation to the towns of Tongo field: "while spreading terror may have been Norman's primary purpose in issuing the order to kill captured enemy combatants and "collaborators", to inflict physical suffering or injury upon them and to destroy their houses, this is not the only reasonable inference that can be drawn from the evidence."[358] Therefore the Trial Chamber found that it has not been proved beyond reasonable doubt that Fofana and Kondewa had the requisite knowledge, an essential element of the crime of Acts of terrorism".[359]

(2) In relation to Koribondo: "it is not the only reasonable inference that Fofana knew or had reasons to know that his subordinates would commit criminal acts in Koribondo with the primary purpose of spreading terror, as the commission of such acts was not explicitly included in Norman's order";[360] and that "the evidence adduced has not established beyond

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355 **Indictment**, para. 28.
356 **Trial Chamber's Judgement**, para. 49; See also paras 843 and 900.
357 *Ibid.*, para. 49.
358 *Ibid.*, para. 731.
359 *Ibid.*, para. 731 (in respect of Fofana), and para. 743 (in respect of Kondewa).
360 *Ibid.*, para. 779.

reasonable doubt that Fofana knew or had reasons to know that such acts had been committed by his subordinates subsequently."[361]

(3) In relation to Bonthe District: "it has not been established beyond reasonable doubt that Kondewa knew or had reasons to know that such acts [alleged as terrorism] had been committed by his subordinates for the primary purpose of spreading terror".[362]

5.5 In this Sixth Ground of Appeal, the Prosecution submits that the Trial Chamber erred in law and fact in making these findings in relation to the crime of terrorism. The Prosecution requests the Appeals Chamber to reverse these findings, and to revise the Trial Chamber's Judgement by substituting findings that Fofana and Kondewa bear individual criminal responsibility under Article 6(1), and/or 6(3) as appropriate, for Acts of Terrorism on Count 6 of the Indictment.

B. First error of the Trial Chamber

5.6 The Prosecution submits that the Trial Chamber made an error of law in holding that it would "consider, under [Count 6], only those crimes which are charged *and* are found to have been committed under Counts 1-5 in the Indictment".[363] For the reasons given below, the Trial Chamber in so holding added a requirement not included in the law, and contradicted its own legal findings.

5.7 The Trial Chamber found that in addition to the chapeau requirements of Article 3 of the Statute, the elements of the crime of terrorism are as follows:

(1) Acts or threats of violence directed against persons or property;

(2) The Accused intended to make persons or property the object of those acts and threats of violence or acted in the reasonable knowledge that this would likely occur; and

(3) The acts or threats of violence were committed with the primary purpose of spreading terror among those persons.[364]

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361 *Ibid.*, para. 780.
362 **Trial Chamber's Judgement**, para. 879.
363 *Ibid.*, para. 49 (emphasis added); See also paras 843 and 900.
364 *Ibid.*, para. 170.

5.8 The Prosecution takes no issue with the Trial Chamber's articulation of these elements. In relation to the first of these elements, it is noted that acts or threats of violence constitutive of the crime of terror are not limited to direct attacks against civilians or threats thereof, but may include indiscriminate or disproportionate attacks or threats thereof.[365]

5.9 It is submitted that the first element of these elements of this crime, *i.e.* the *actus reus*, need not involve an act that is otherwise criminal under international criminal law. It is clear, for instance, that the first of these elements does not necessarily require an actual act of violence, but that mere *threats* of violence, or the mere *threat* of attacks on civilians' property or means of survival, will suffice.[366] However, as is evident from the findings of the Trial Chamber, the acts of a perpetrator that satisfy these elements may also simultaneously satisfy the elements of another crime under the Statute of the Special Court. In other words, conduct may satisfy the elements of this crime, regardless of whether or not it also satisfies the elements of any other crime. There is therefore no basis in the applicable law for the Trial Chamber's finding that in order for the Accused in this case to be convicted of acts of terrorism, the acts in question must be in addition a crime that was "found to have been committed under [another] Count"[367] of the Indictment.

5.10 The Prosecution submits that the imposition by the Trial Chamber of this additional prerequisite is also not justified by the terms of the Indictment. The Prosecution pleaded in paragraph 28 of the Indictment that the alleged acts of terrorism comprised the crimes "set forth in paragraphs 22 through 27 and ***charged*** in counts 1 through 5, *including threats* to kill, destroy and loot, as part of a campaign to terrorize the civilian populations of those areas and did terrorize those populations".[368] If conduct ***charged*** under another Count was ultimately found not to satisfy the elements of that other Count, it nonetheless remains conduct that was ***charged*** under that other Count, and therefore conduct which

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365 ***Galić* Appeal Judgement**, para. 102, **Trial Chamber's Judgement**, para. 171.
366 **Trial Chamber's Judgement**, paras 170(i), 171, and 172 together with footnote 216.
367 *Ibid.*, para. 49.
368 *Ibid.*, para. 28 (emphasis added).

was alleged in relation to Count 6. Even if the conduct was ultimately found not to satisfy the elements of that other Count, there is no reason why independent consideration should not have been given to whether that conduct nonetheless satisfied the elements of Count 6. Paragraph 28 of the Indictment, for reasons of drafting economy, simply incorporated by reference the material facts alleged in relation to other paragraphs of the Indictment. The effect of paragraph 28 is the same as if the conduct alleged in the other paragraphs of the Indictment were simply repeated in relation to Count 6. Paragraph 28 does not suggest that the Indictment is only charging under Count 6 such conduct on which an Accused is ultimately ***convicted*** on another count.

5.11 This is the conclusion that was effectively reached by Trial Chamber II in the ***AFRC*** **Trial Judgement**, in relation to the charge of acts of terrorism under Count 1 of the AFRC Indictment, which was pleaded in a materially similar way to the Indictment in the present case.[369] In that case, the Trial Chamber took into account, in relation to Count 1, acts of burning which had been charged in a separate Count of pillage, but which the Trial Chamber found did not satisfy the elements of pillage.[370]

5.12 In the present case, the Trial Chamber failed to examine whether acts of burning of property, which were charged in Count 5 of the Indictment (pillage), satisfied the elements of acts of terrorism under Count 6, on the ground that the Accused had not been convicted of that conduct as pillage under Count 5.[371]

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[369] ***AFRC*** **Further Amended Consolidated Indictment**, para. 41: "Members of the AFRC/RUF subordinate to and/or acting in concert with ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, committed the crimes set forth below in paragraphs 42 through 79 and charged in Counts 3 through 14, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone, and did terrorize that population".

[370] ***AFRC*** **Trial Judgement**, para. 1438: "The Trial Chamber has found that burning, as alleged by the Prosecution, is not inclusive of the crime of pillage. However, the Trial Chamber is of the opinion that burning, unlike other evidence adduced by the Prosecution which does not go to proof of the crimes alleged, has been sufficiently particularized by the Prosecution in the Indictment under Count 14, and that therefore, the Defence has been put on adequate notice. The Trial Chamber will therefore take into consideration evidence of burning in relation to the *actus reus* of the crime of the crime of terror as an act of violence directed against protected persons or their property" (footnote omitted).

[371] **Indictment**, para. 27; **Trial Chamber's Judgement**, para. 166: "The acts of burning, as charged in some paragraphs in Count 5 of the Indictment, will not be considered for the purposes of the offence of pillage as charged under Count 5". The Trial Chamber's finding that these acts of burning

5.13 The Prosecution submits that acts of burning of property can satisfy the elements of the war crime of acts of terrorism. As the Trial Chamber said:

> [T]he offence "extend[s] beyond acts or threats of violence committed against protected persons to 'acts directed against installations which would cause victims terror as a side-effect". Thus, if attacks on property are carried out with the specific intent of spreading terror among the protected population, this will fall within the proscriptive ambit of the offence of acts of terrorism. The Chamber emphasises that all types of civilian property, including that which belongs to individual civilians, are protected. The focus of the offence is clearly on protecting persons from being subjected to acts of terrorism and the means used to spread this terror may include acts or threats of violence against persons or property.[372]

5.14 The Prosecution submits that the Trial Chamber therefore erred in law or committed a procedural error in failing to consider whether acts of burnings satisfied the elements of Count 6. For the reasons given below, the Prosecution submits that on the findings of the Trial Chamber, and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that the elements of Count 6 were satisfied, in particular in relation to the burning of nine houses in Tongo Field,[373] and the burning of over 25 houses in Koribondo.[374]

C. Second error of the Trial Chamber

(a) Introduction

5.15 The Prosecution submits that the Trial Chamber erred in law and fact in finding that Fofana and Kondewa were not individually responsible under Article 6(1) of the Statute for aiding and abetting in the planning, preparation or execution of acts of terrorism **in the towns of Tongo**.

5.16 The Trial Chamber found that Fofana and Kondewa were individually responsible for aiding and abetting murder (Count 2), cruel treatment (Count 4) and collective

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property did not fall within the definition of pillage is independently the subject of the Prosecution's Ground 7.

372 **Trial Chamber's Judgement**, para. 173.

373 *Ibid.*, para 410.

374 *Ibid.*, paras 427-429. In relation to the burnings in Koribondo, it is noted that the Trial Chamber did in fact convict Fofana for this under another Count, namely Count 4 (cruel treatment): see **Trial Chamber's Judgement**, paras. 790-793, especially para. 790.

punishment (Count 7) in the second and third attacks on Tongo.[375] However, the Trial Chamber held with respect to Count 6 that "while spreading terror may have been Norman's primary purpose in issuing the order to kill captured enemy combatants and 'collaborators', to inflict physical suffering or injury upon them and to destroy their houses, this is not the only reasonable inference that can be drawn from the evidence".[376] Therefore, the Trial Chamber concluded that it had not been "proved beyond reasonable doubt that Fofana had the requisite knowledge for aiding and abetting acts of terrorism".[377] The Trial Chamber employed identical reasoning in relation to Kondewa.[378]

5.17 It is submitted that the Trial Chamber erred in this reasoning. The error resulted from the Trial Chamber's exclusive reliance on the instruction given by Norman at the December 1997 Passing Out Parade to determine whether the *perpetrators* of the proven acts of violence had the specific intent to terrorise the civilian population. The intent to spread terror can be inferred from the circumstances of the acts in question, in particular their nature, manner, timing and duration.[379] The Trial Chamber should therefore have considered all of the circumstances of the Tongo crimes as a whole with a view to determining whether the specific intent to spread terror had been established, rather than focusing simply on the instruction given by Norman at the December 1997 Passing Out Parade. That instruction given by Norman was only one of a number of factors that should have been considered.

5.18 For the reasons given below, it is submitted that the only reasonable conclusion open to any reasonable trier of fact, based on the findings of the Trial Chamber and the evidence it accepted, is that:

(1) the perpetrators of the Tongo crimes, *i.e.* the Kamajors, had the *specific intent* of terrorizing the population; and

(2) Fofana and Kondewa as aiders and abettors, had the *knowledge/awareness* of the specific intent of the perpetrators, *i.e.* of the Kamajors.

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375 *Ibid.*, paras. 747-764.
376 **Trial Chamber's Judgement**, para. 731.
377 *Ibid.*, para. 731.
378 Compare **Trial Chamber's Judgement** para. 743 with para. 731.
379 ***Galić* Appeal Judgement**, para 104.

(b) The Kamajors' specific intent to terrorise the civilian population

5.19 The Trial Chamber found that in the town of Tongo, 150 people were lined up and killed with cutlasses because they were Lokos, Limbas and Temnes, and that "[a]fterwards, the *Kamajors slit open the stomach of one victim and displayed his entrails in a bucket* ***before the remaining civilians***."[380] The remaining civilians were told that the CDF was unable to capture Tongo during this attack, but that the CDF would attack again, and would kill everyone that had not left the town.[381]

5.20 Given the gruesomeness and cruelty of this act of violence, the fact that it targeted civilians according to their ethnicity, the *modus operandi* of the Kamajors, and the fact that the entrails of one victim were displayed *in front of* the remaining civilians, it is submitted that even if this incident *was considered in isolation*, it could not be open to any reasonable trier of fact to conclude that this incident might not have been intended to terrorise the civilian population of Tongo. The fact that the conduct in question might have additionally amounted to one or more other crimes—such as collective punishment—is immaterial.

5.21 However, this incident did not occur in isolation. The Trial Chamber found that numerous other crimes were committed during this attack.

(1) "Around noon, a Kamajor commander ordered the civilians to leave the NDMC Headquarters. Before they could do so, another commander, angry that they were trying to leave, ordered Kamajors to shoot at the crowd. ***The Kamajors began shooting sporadically.*** The civilians dropped to the ground and remained there until the firing stopped. Many were hit by stray bullets. One man next to TF2-022 was hit by a bullet. While the man was suffering from his wound, he was approached by a Kamajor who chopped at his back with a machete, then seized his belt and hit him with it, telling him to get up. The man eventually died."[382]

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380 **Trial Chamber's Judgement** para. 386 (footnote omitted; emphasis added).
381 *Ibid.*, **para.** 387.
382 *Ibid.*, **para.** 400 (footnote omitted; emphasis added).

(2) "Another Kamajor approached her brother and showed him a list of Limbas to be killed. He told him that he had come there for him and then ***cut off his ear***... The Kamajor ***cut his throat with a machete and then mutilated his body. TF2-048 witnessed this,*** but did not reveal their relationship because she knew that the Kamajors were looking for Limbas".[383]

(3) "TF2-144 saw Kamajors ***hack the right hand of a man*** who was identified as a rebel because of the shoes that he wore".[384]

(4) "In mid-February 1998, Aruna Konowa ... was forced to sleep at the Kamajors' headquarters in Lalehun that night and the following morning ***the entire town was gathered at the court barri***. Chief Baimba Aruna, one of the Kamajor bosses of Lalehun, ordered Aruna Konowa to sit on the ground, denounced him as a rebel collaborator and ordered him to be killed. Kamajors took Konowa to the school compound and slit his throat with a knife ***and disembowelled him. TF2-016 was present for the meeting at the barri and saw the body*** at the school compound afterwards".[385]

(5) ***"Brima Conteh was stripped naked and taken to Lalehun, with a cement block on his head and a rope around his neck. He was paraded around town in this condition***. Baimba Aruna denounced Brima Conteh as the chief of the rebels and ordered his death. Kamajors took Brima Conteh to a banana plantation and slit open his throat and stomach. ***Two Kamajors ate the insides of his stomach***. The Kamajors severed Brima Conteh's head and left his body in the plantation. ***A Kamajor was ordered to proceed to town with Brima Conteh's head for a celebration. Another Kamajor named Vandi took Conteh's intestines to town in a five gallon container. The Kamajors proceeded from house to house with his head and intestines***; eventually they were left at Baimba Aruna's house." [386]

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[383] *Ibid.*, para. 401 (footnote omitted; emphasis added).
[384] **Trial Chamber's Judgement**, para. 407 (footnote omitted; emphasis added).
[385] *Ibid.*, para. 408 (footnote omitted; emphasis added).
[386] *Ibid.*, para. 409 (footnote omitted; emphasis added).

(6) ***"From mid-February to at least mid-March, Kamajors... also burnt nine houses, including TF2-016's father's house."***[387]

5.22 When all of these incidents are considered together, in particular the brutality of the crimes and that fact that the crimes or their consequences were displayed before other members of the civilian population, it could not be open to any reasonable trier of fact to conclude that these acts did not have a primary purpose of spreading terror.

5.23 The specific intent of the offenders (the Kamajors) to terrorise the civilian population in Tongo can, in addition to all the circumstances set out above, also be seen from the instruction given by Norman at the December 1997 Passing Out Parade (the one factor that the Trial Chamber did consider). Norman said, for example: "any junta you capture, instead of wasting your bullet, chop off his left [hand] as an *indelible mark* [...] to be a signal to any group that will want to seize power through the barrels of the gun and not the ballot paper."[388] This order to commit amputations in order to "give a signal" can only be reasonably considered as indicating that Norman ordered the Kamajors to commit atrocious acts to terrorise the enemy, including any civilian population considered as "collaborating" with the enemy.

(c) Fofana's knowledge of the specific intent

5.24 The Prosecution further submits that the Trial Chamber erred in finding that Fofana, as an aider and abettor, did not have sufficient *knowledge* of the specific intent of the perpetators to spread terror in the towns of Tongo.

5.25 As found by the Trial Chamber, "[s]uch knowledge may be inferred from all relevant circumstances".[389] The Trial Chamber correctly observed that "[t]he accused need not share the *mens rea* of the principal offender, but he must be aware of the principal offender's intention. In the case of specific intent offences,

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387 *Ibid.*, para. 410 (footnote omitted; emphasis added).
388 **Trial Chamber's Judgement**, para. 321 (emphasis added).
389 *Ibid.*, para. 231.

the aider and abettor must have knowledge[390] that the principal offender possessed the specific intent required. The aider and abettor, however, need not know the precise crime that is intended by the principal offender." [391] It is sufficient that the aider and abettor be aware that one of a number of crimes will probably be committed by the principal offender, and that one of those crimes is in fact committed.[392]

5.26 Here, the relevant circumstances leading to the conclusion that Fofana had the required awareness, are the content of the order given by Norman,[393] as well as the prior knowledge of Fofana that civilians had been in the past terrorized by the CDF.[394]

5.27 During the passing out parade in December 1997, Norman had ordered Kamajors to kill all war prisoners and all civilians deemed to be "collaborators",[395] to destroy houses of alleged collaborators,[396] to spare no one working for the juntas or mining for them,[397] and to chop off the left hand of any captured "junta" to give an indelible mark.[398]

5.28 Furthermore, Fofana was aware "*that the Kamajors who operated in the towns of Tongo Field had previously engaged in criminal conduct,* which had been reported to Base Zero".[399] Fofana was also certainly aware of the acts perpetrated by the Death Squad,[400] and that "many atrocities" had been committed by the Kamajors in the period preceding the attack on Tongo.[401]

5.29 It is submitted that the only conclusion open to any reasonable trier of fact from these findings is that Norman's order thus issued included a purpose of terrorising

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390 Knowledge or awareness : ***Krnojelac*** **Appeal Judgement**, para. 52; ***Krstić*** **Appeal Judgement**, para. 140, footnote 235.

391 **Trial Chamber's Judgement**, para. 231.

392 **Trial Chamber's Judgement**, para. 231.

393 *Ibid.*, para. 321.

394 *Ibid.*, paras 721(ix) and 724.

395 *Ibid.*, para. 321; Kondewa also specifically instructed this, see **Trial Chamber's Judgement**, para. 321, *in fine.*

396 *Ibid.*, para. 321.

397 *Ibid.*, para. 322.

398 *Ibid.*, para. 321.

399 *Ibid.*, paras 724 and 377, 378.

400 *Ibid.*, para. 361 and paras 293, 296, 338 (these two last findings show the proximity of Fofana and Borbor Tucker, the head of the Death Squad).

401 *Ibid.*, para. 304.

the civilian population, in order to "give a signal"[402] to anyone who might contemplate sympathising with or supporting the rebels, and that Fofana was aware of this intent.

5.30 Therefore, the assistance which the Trial Chamber found Fofana to have lent, such as made him an aider and abettor to the other crimes committed pursuant to Norman's speech,[403] would also operate to his guilt for the crime of terrorism, for purposes of Count 6, to the extent that such was intended by Norman in his speech. The only reasonable conclusion from these findings is that Fofana knew that it was probable that the Kamajors would commit at least one of the acts of violence amounting to terrorism in compliance with the instructions issued by Norman.[404] Thus Fofana had knowledge that his acts would assist the commission of the crime of terrorism by the principal offenders.

5.31 In view of the foregoing, the Prosecution requests the Appeals Chamber to reverse and revise the findings of the Trial Chamber and to find Fofana guilty of aiding and abetting the crime of terrorism in the towns of Tongo.

(c) Kondewa's knowledge of the specific intent

5.32 As with Fofana, the Prosecution submits that the Trial Chamber erred. It is submitted that the only conclusion open to any reasonable trier of fact is that Kondewa had the required awareness for a finding of liability for terrorism, by virtue of aiding and abetting. As with Fofana, that awareness was triggered in Kondewa by the content of the order given by Norman, as well as the prior knowledge of Kondewa that civilians had been in the past terrorized by the CDF.[405]

5.33 As regards Norman's order, the Prosecution adopts *mutatis mutandis* its submissions in relation to Fofana.

5.34 As to Kondewa's prior knowledge of acts of violence committed apparently with the specific intent to terrorise the civilian population, it can be inferred from the

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402 **Trial Chamber's Judgement**, para. 321.
403 *Ibid.* paras 722—724.
404 *Ibid.*, para. 231; Compare with **Trial Chamber's Judgement** para. 724.
405 *Ibid.*, paras 721(ix) and 724.

various findings of the Trial Chamber detailing the crimes committed by Kamajors to the knowledge of Kondewa.[406]

5.35 In view of the foregoing, it is submitted that the only reasonable inference open to a reasonable trier of fact, based on the findings of the Trial Chamber, or alternatively the evidence on which the Chamber based its findings, is that Kondewa had knowledge that at least one of a number of crimes of terrorism would probably be committed by the Kamajors in the towns of Tongo, and one of these crimes were in fact committed.[407]

5.36 Therefore, the assistance which the Trial Chamber found Kondewa, as an aider and abettor, to have rendered in respect of the other crimes committed pursuant to Norman's speech,[408] would also count towards Kondewa's guilt for the crime of terrorism, for purposes of Count 6.

5.37 The Prosecution respectfully requests the Appeals Chamber to reverse and revise the findings of the Trial Chamber and to find Kondewa guilty of aiding and abetting the crime of terrorism in the towns of Tongo.

D. Third error of the Trial Chamber

5.38 The Trial Chamber found that Fofana could not be held liable under Article 6(3) for acts of terrorism under Count 6 in Koribondo, because, according to the Trial Chamber, "it is not the only reasonable inference that Fofana knew or had reasons to know that his subordinates would commit criminal acts in Koribondo with the primary purpose of spreading terror,"[409] and "the evidence adduced has not established beyond reasonable doubt that Fofana knew or had reasons to know that such acts had been committed by his subordinates subsequently."[410] The Prosecution submits that the Trial Chamber erred in reaching such a conclusion.

5.39 The Trial Chamber appeared to accept that crimes were committed by the Kamajors with the intent of terrorising the civilian population. The section of the

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406 *Ibid.*, paras 297 (see also 299 and 537); 304; 377 (referring notably to exhibit 86 at footnote 650), 379, 737, 923 and 626-628.
407 **Trial Chamber's Judgement**, para. 231.
408 *Ibid.*, paras 735—737.
409 *Ibid.*, para. 779.
410 *Ibid.*, para. 780.

Trial Judgement containing the factual findings on the crimes committed in Koribondo contains a section entitled "Unlawful Killings, Terrorising Civilian Population and Collective Punishment".[411] In any event, for same the reasons as given above in relation to the crimes committed in Tongo, it is submitted that given the brutality of the crimes and that fact that the crimes or their consequences were displayed before other members of the civilian population, it could not be open to any reasonable trier of fact to conclude that these acts did not have a primary purpose of spreading terror.[412]

5.40 As to the actual or constructive knowledge of Fofana, as a superior, of the acts that the Kamajors were about to perpetrate, the Trial Chamber based its negative conclusion on the sole fact that, supposedly, "the commission of such acts [of violence with the primary purpose to spread terror] was not ***explicitly*** included in Norman's order".[413]

5.41 Preliminarily, it is useful to recall the applicable law in this respect. Article 6(3) requires that the superior either (a) knew or (b) had reason to know that his subordinates were about to commit criminal acts or had already done so. Whereas the former requires proof of actual knowledge, the latter requires proof only of some grounds which would have enabled the superior to become aware of the relevant crimes of his or her subordinates.[414] The Trial Chamber considered, correctly it is submitted, that actual knowledge could not be presumed but that, in the absence of direct evidence, it might be established by circumstantial evidence.[415] Furthermore, the Trial Chamber noted that:

> "[v]arious factors or indicia may be considered by the Chamber when determining the actual knowledge of the superior. Such indicia would include: the number, type and scope of the illegal acts; the time during which the illegal acts occurred; the number and type of subordinates

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411 *Ibid.*, heading above para. 421.

412 See **Trial Chamber's Judgement**, paras. 421-425, especially paras 421 ("Sarrah and Momoh were beheaded and their heads were displayed at the junction; one was turned towards Blama Road and the other towards Sumbuya Road"); 424 ("Their guts were made into checkpoints so that anyone coming past could see them"); 425 ("Chief Kafala' was decapitated and his body was mutilated in the street opposite the hospital. This was done in the presence of four civilians. ... The Kamajors ordered the civilians present to cover him with mud: two of them did so while the Kamajors sang").

413 *Ibid.*, para. 779 (emphasis added).

414 ***Orić* Trial Judgement**, para. 317.

415 **Trial Chamber's Judgement**, para. 243; ***Orić* Trial Judgement**, para. 319.

> involved; the logistics involved, if any; the means of communication available; the geographical location of the acts; the widespread occurrence of the acts; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the superior at the time and the proximity of the acts to the location of the superior."[416]

5.42 Furthermore, the Prosecution submits that the following elements of jurisprudence, not mentioned by the Trial Chamber, are relevant in the present case to decide whether the actual knowledge was established:

(1) The superior's position *per se* is not to be understood as a conclusive criterion[417] but may appear to be a significant indication from which knowledge of a subordinate's criminal conduct can be inferred.[418] For instance, the fact that crimes were committed frequently or notoriously by subordinates of the Accused, indicates that the superior had knowledge of the crimes.[419]

(2) Additionally, the fact that a military commander "will most probably" be part of an organised structure with reporting and monitoring systems has been cited as a factor facilitating the showing of actual knowledge.[420]

5.43 Concerning imputed knowledge, the Trial Chamber accepted the jurisprudence of the *ad hoc* Tribunals that the "had reason to know" standard will only be satisfied if *information was available* to the superior which would have put him on notice of offences committed by his subordinates or about to be committed by his

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416 **Trial Chamber's Judgement, para. 243**; see also ***Čelebići* Trial Judgement**, para. 386; ***Strugar* Trial Judgement**, para. 368; ***Limaj* Trial Judgement**, para. 524; ***Blaškić* Trial Judgement**, para. 307 endorsed in ***Blaškić* Appeal Judgement**, para. 57; *see* also ***Orić* Trial Judgement**, fn 909: "With regard to geographical and temporal circumstances, it has to be kept in mind that the more physically distant the commission of the subordinate's acts from the superior's position, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, if the crimes were committed close to the superior's duty-station, the easier it would be to establish a significant indicium of the superior's knowledge, and even more so if the crimes were repeatedly committed."

417 ***Blaškić* Appeal Judgement**, para. 57; ***Bagilishema* Trial Judgement**, para. 45; ***Semanza* Trial Judgement**, para. 404; ***Kajelijeli* Trial Judgement**, para. 776.

418 ***Aleksovski* Trial Judgement**, para. 80; ***Blaškić* Trial Judgement**, para. 308.

419 The Trial Chamber held that "[t]he crimes committed in the *Čelebići* prison-camp were so frequent and notorious that there is no way that [the accused] could not have known or heard about them." ***Čelebići* Trial Judgement**, para. 770.

420 ***Naletilić and Martinović* Trial Judgement**, para. 73.

subordinates.[421] Such information need not be such that, by itself, it was sufficient to compel the conclusion of the existence of such crimes.[422] It need not, for example, take "the form of specific reports submitted pursuant to a monitoring system" and "does not need to provide specific information about unlawful acts committed or about to be committed".[423] It can be general in nature, but it must be sufficiently alarming so as to *alert* the superior to the risk of the crimes being committed or about to be committed,[424] and to *justify further inquiry* in order to ascertain whether indeed such crimes were committed or were about to be committed by his subordinates.[425]

5.44 The Prosecution submits that, in view of the applicable law, the approach of the Trial Chamber to determine the knowledge of Fofana that crimes in Koribondo would be committed with the primary purpose to spread terror, is unreasonable as it is exclusively based on the express formulation of Norman's order, *i.e.* the words used taken in the prime meaning. In other words, the Trial Chamber took into consideration direct evidence only, without looking into the possible existence of circumstantial evidence to establish the necessary knowledge. The Trial Chamber therefore misapplied the test established by the jurisprudence on superior responsibility in international criminal law, and omitted to take into consideration crucial portions of this jurisprudence, which led to an erroneous and unreasonable conclusion. The Trial Chamber thus erred in law.

5.45 The Prosecution further submits that, based on the Trial Chamber's own findings, the only reasonable conclusion is that Fofana had actual or imputed knowledge that his subordinates would commit criminal acts in Koribondo with the primary

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421 **Trial Chamber's Judgement**, para. 244; See also ***Galić* Appeal Judgement**, para. 184 referring to ***Čelebići* Appeal Judgement**, para. 241; *see also* ***Blaškić* Appeal Judgement**, paras 62-63, ***Čelebići* Trial Judgement**, para. 393, ***Strugar* Trial Judgement**, para. 369, ***Krnojelac* Appeal Judgement**, para. 154.

422 **Trial Chamber's Judgement**, para. 244; ***Čelebići* Trial Judgement**, para. 393; ***Strugar* Trial Judgement**, para. 369; ***Limaj* Trial Judgement**, para. 525.

423 **Trial Chamber's Judgement**, para. 244; ***Galić* Appeal Judgement**, para. 184 citing ***Čelebići* Appeal Judgement**, para. 238: "For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge".

424 **Trial Chamber's Judgement**, para. 244 (emphasis added); *See,* for example, ***Krnojelac* Appeal Judgement**, para. 155.

425 **Trial Chamber's Judgement**, para. 244; ***Čelebići* Appeal Judgement**, paras 233, 223; *see also* ***Limaj* Trial Judgement**, para. 525 and footnoted references.

purpose of spreading terror, not only given the substance, nature and context of Norman's order, but also given other circumstances preceding Norman's order, to which the Trial Chamber totally failed to give any consideration. Once again, the Trial Chamber adopted an incorrect piecemeal approach which led to an unreasonable conclusion.[426]

5.46 First, the Prosecution submits that a reasonable reading of Norman's order for the attack on Koribondo can only be understood as containing an order to commit international crimes, including acts of terrorism. Norman said, in early January 1998, that these commanders and their fighters should not leave, in this location "any house or any living thing there, except mosque, church, the *barri* and the school"[427]. It could not reasonably be accepted that he did not mean *also*, as a primary purpose, to terrorise the population of Koribondo. The fact that the CDF had, according to Norman "forewarned of such consequences"[428] further confirms that the stategy of Norman was to spread extreme fear among the population of Koribondo, to breach resistance, provoke displacement and gain territory. The Trial Chamber discounted the crime of terrorism because Norman did not use explicitly the words "terror" or "fear" of "primary purpose".[429] Such an approach is erroneous in law.

5.47 The same applies to the instructions that Norman gave to Nallo in Fofana's presence,[430] to kill *anybody* in Koribondo,[431] that nothing should be left "not even a farm" or "[...]a fowl",[432] and that all houses should be burnt. Again, it is submitted that the only reasonable conclusion is that Norman intended to break resistance through the terrorization of civilians.

5.48 Therefore the Prosecution submits that Norman's order provides circumstantial evidence (if not direct evidence) of Fofana's actual knowledge that his

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426 ***Ntagerura* Appeal Judgement**, para. 174 *in fine*; ***Halilović* Appeal Judgement**, paras 119-130.
427 **Trial Chamber's Judgement**, para. 329.
428 *Ibid.*, para. 329.
429 *Ibid.*, para. 779: "...as the commission of such acts was not *explicitly* included in Norman's order."(emphasis added).
430 *Ibid.*, para. 334.
431 *Ibid.*, para. 335.
432 *Ibid.*, para. 335.

subordinates were about to commit acts of violence with the primary purpose to spread terror.

5.49 Alternatively, Norman's order consisted at least of information that was available to Fofana which put him on notice of the crimes of terrorism about to be committed by his subordinates.[433] Norman's order was undeniably "*sufficiently alarming* so as to alert the superior to the risk of the crimes being committed or about to be committed."[434]

5.50 Furthermore, as explained in the previous sections above, Fofana had knowledge of previous criminal acts, including crimes that could have been qualified as terrorism.[435] In addition, the reporting system identified by the Trial Chamber[436] contributes to showing the actual knowledge of Fofana.[437] Finally, the Trial Chamber found that "Albert J Nallo did all the planning for the Koribondo attack and then submitted it to the Director of War, Fofana, who then submitted it to Norman."[438]

5.51 In view of the above, the Prosecution submits that based on the findings of the Trial Chamber, or alternatively, the findings of the Trial Chamber and the evidence accepted by the Trial Chamber in making those findings, the only reasonable conclusion is that *there is* at least circumstantial evidence (if not direct evidence), leading to the *only* reasonable inference that Fofana had knowledge or at the very least reasons to know that his subordinates were about to commit crimes of terrorism in Koribondo.

5.52 The Prosecution submits therefore that (1) the knowledge requirement for failing to prevent under Article 6(3) is satisfied; and (2) the knowledge requirement for Article 6(1) is also satisfied, in the event that the Prosecution's Ground 4 is upheld and Fofana is found to be individually responsible under Article 6(3) for the crimes committed in Koribondo.

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433 *Ibid.*, para. 244.
434 **Trial Chamber's Judgement**, para. 244 (emphasis added).
435 *Ibid.*, paras 400-401, 407-410, 777-780; See *Čelebići* Trial Judgement, para. 770.
436 *Ibid.*, paras 340 and 350; see also paras 309, 310, 321 ("don't come to report to us").
437 ***Naletilić and Martinović* Trial Judgement**, para. 73.
438 **Trial Chamber's Judgement**, para. 334.

5.53 The Prosecution submits that the Trial Chamber similarly erred in finding that "the evidence adduced has not established beyond reasonable doubt that Fofana knew or had reasons to know that such acts had been committed by his subordinates *subsequently*."[439]

5.54 The Prosecution submits that it is evident from the findings of the Trial Chamber that not only the Kamajors "might have" committed acts of violence with the specific intent to spread extreme fear, as acknowledged by the Trial Chamber,[440] but have indeed done so. This appears from the findings at paragraphs 421,[441] 422,[442] 423,[443] 424,[444] 425,[445] and 428.[446]

5.55 The Prosecution further submits that it is unreasonable to suggest that Fofana did not know or did not have reasons to know of the commission of such crimes by his subordinates, in view of the following compelling elements: (a) the orders given by Norman,[447] (b) previous instances of such acts of violence had happened, notably during the attack on Tongo,[448] (c) the fact that Fofana received reports on any military operation, in particular when Nallo was involved,[449] (d) Fofana's direct superior-subordinate relationship with Nallo, as well as Joe Tamidey, and Bobor Tucker, who were the principal and key commanders in Koribondo,[450] (e)

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439 *Ibid.*, para. 780 (emphasis added).

440 **Trial Chamber's Judgement**, para. 780.

441 The Trial Chamber gave the title to the section 2.4.5.1 "Unlawful Killings, *Terrorizing* Civilian Population and Collective Punishment, (emphasis added); See also: "Sarrah and Momoh were beheaded and their heads were displayed at the junction; one was turned towards Blama Road and the other towards Sumbuya Road."

442 "The Kamajors sang a Kamajor song while mutilating these women".

443 "Two of the women were killed by having sticks inserted through their genitals until they came out through the women's mouths."

444 "The Kamajors disembowelled the women and put their entrails in a bucket. The women's stomachs were also removed. Their guts were made into checkpoints so that anyone coming past could see them. Part of their entrails were eaten and their bodies were buried".

445 "Chief Kafala' was decapitated and his body was mutilated in the street opposite the hospital. This was done in the presence of four civilians".

446 "Kamajors went on a rampage in Koribondo and burnt down 25 houses...Some of those whose houses were burnt were discouraged; others *feared* for their lives".

447 See section above, paragraphs 5.46-5.49 (about Norman's order).

448 See paragraphs 5.19-5.21 above.

449 **Trial Chamber's Judgement**, paras 340 and 721 (iv).

450 *Ibid.*, para. 328, 335, 341, 418, 419, 773, 774, 775.

and finally the meeting that took place after the attack[451] with Tamidey, during which Fofana asked him specific questions regarding the attack on Koribondo.

5.56 These circumstantial evidence of actual knowledge and indicators of constructive knowledge found by the Chamber were sufficient to establish this requisite.

5.57 The other conditions of the responsibility under Article 6(3) of the Statute were examined by the Trial Chamber, who correctly found that they were met in the case of Fofana.[452]

5.58 In view of the foregoing, the Prosecution submits that Fofana should have been found liable under Article 6(3) for the crime of terrorism on Count 6 in respect of criminal acts perpetrated by his subordinates in Koribondo.

E. Fourth error of the Trial Chamber

5.59 The Trial Chamber found that Kondewa could not be held liable under Count 6 for Bonthe District, as "it has not been established beyond reasonable doubt that Kondewa knew or had reason to know that such acts [alleged as terrorism] *had been* committed by his subordinates for the primary purpose of spreading terror".[453]

5.60 First, the Prosecution submits that the only conclusion open to any reasonable trier of fact from the Trial Chamber's findings is that not only "might" the Kamajors have committed acts of violence with the specific intent to spread extreme fear, as acknowledged by the Trial Chamber,[454] but that they ***did*** commit acts of terrorism. This follows from the findings, for example at paragraphs 563[455] and 554.[456] The findings at paragraphs 564[457] and 565[458] also corroborate that acts

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451 *Ibid.*, para. 777.

452 *Ibid.*, para. 773-776 for the examination of the superior-subordinate relationship, and 782-783 for the measures to prevent or punish.

453 **Trial Chamber's Judgement**, para. 879 (emphasis added).

454 *Ibid.*, para. 879.

455 "Look how dead you are. Look how filthy. You are rebels. [...] They [sic] are very dirty, filthy people."

456 "the Kamajors had terrorized the civilians".

457 "Melted plastic was dropped into his eyes until he died".

458 "...they [Kamajors] split open the stomachs of three pregnant women and removed the fetuses, one after the other. The Kamajors decapitated the fetuses and put each of the skulls on a long stick. These were mounted "like a flag" at the junction which goes to Mattru."

of terrorism were committed in Bonthe, although the Trial Chamber could not find sufficient proof that these events happened during the indictment period.

5.61 Secondly, the Prosecution submits that the only conclusion open to any reasonable trier of fact, if the correct legal principles are applied to the Trial Chamber's findings, is that Kondewa had the requisite knowledge that his subordinates were about to commit crimes with the primary purpose to spread terror, or at least had the requisite knowledge that they had committed such crimes.

5.62 As to the applicable law in respect of the requirement of knowledge of the superior according to Article 6(3) of the Statute, the Prosecution refers to the paragraphs 5.41 to 5.43 above.

5.63 The Prosecution submits that the knowledge of Kondewa, at least the imputed knowledge, that his subordinates Kamajors were about to commit crimes of terrorism or had committed crime, is the only reasonable conclusion open in view of the following findings of the Trial Chamber: (a) the attack on Bonthe was part of a campaign inherent to the "all out offensive"[459] launched by the CDF and Kondewa was present during the passing out parades of December 1997 and early January 1998 where Norman gave orders that included order to commit crimes of terrorism;[460] (b) Kondewa had knowledge of such previous acts committed by the Kamajors even before the attack on Tongo;[461] (c) previous instances of such acts of violence had occurred, during the attack on Tongo in January 1998;[462] (d) Kondewa knew at least from the 15 February 1998 "that the Kamajors under his effective control were about to commit or were committing criminal acts in Bonthe District, particularly that they were targeting 'collaborators'";[463] and (e) on 1 March 1998, Kondewa came to Bonthe Town and publicly acknowledged that he had not allowed his men to enter Bonthe, but that they had not listened to his advise and had done what they had done.[464] When speaking to Father Garrick

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459 **Trial Chamber's Judgement**, para. 857.
460 *Ibid.*, paras. 321, 322, 323, 326, 328, 332.
461 *Ibid.*, para. 737.
462 See paragraphs 5.19-5.21 above.
463 **Trial Chamber's Judgement**, para. 875.
464 *Ibid.*, para. 876.

on the same day ***he also admitted that he was aware of the atrocities committed by the Kamajors during the attack.***[465]

5.64 The Trial Chamber found that the other conditions of responsibility under Article 6(3) of the Statute were met in the case of Kondewa for the crimes committed in Bonthe.[466] The Prosecution therefore submits that Kondewa should have been found liable under Article 6(3) for the crime of terrorism on Count 6 in respect of criminal acts perpetrated by his subordinates in Bonthe, as this is the only reasonable conclusion that follows from the Trial Chamber's findings, and the Trial Chamber erred in law and fact in failing to do so.

F. Conclusion

5.65 For the reasons given above, the Prosecution respectfully requests the Appeals Chamber to grant the relief requested in paragraph 24 of the Prosecution's Notice of Appeal.

6. Prosecution's *Ground 7*: Burning as pillage

A. Introduction

6.1 Count 5 of the Indictment charged the Accused with acts of pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute. The material facts on which this Count was based were alleged in paragraph 27 of the Indictment, which stated that the Accused were individually responsible for acts of looting and destruction by burning of civilian property between about 1 November 1997 and about 1 April 1998 at various locations including Kenema District, Bo District, Moyamba District and Bonthe District.

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[465] *Ibid.*, para. 876 (emphasis added).

[466] *Ibid.*, paras 868-873 for the examination of the superior-subordinate relationship, and 880 for the measures to prevent or punish.

6.2 The Trial Chamber found that numerous acts of burning occurred as alleged in the Indictment (see Section C below). However, the Trial Chamber found as a matter of law, in paragraph 166 of the Trial Chamber's Judgement, that "an essential element of pillage is the unlawful appropriation of property", and that "the destruction by burning of property does not constitute pillage". The Trial Chamber therefore determined that it would not take into account acts of destruction by burning for the purposes of determining the individual criminal responsibility of the Accused under Count 5.[467] The Prosecution submits that the Trial Chamber thereby erred in law.

B. Argument

6.3 The Prosecution accepts that the term "pillage" commonly denotes unlawful appropriation of property, in the sense of plunder or looting, during war.[468] However, in addition to forcible appropriation of property during war, "pillage" is capable of bearing the meaning of destruction of property as an act of war, even without appropriation.

6.4 From the outset, it must be said that prohibition against pillage is an aspect of the general purpose of international humanitarian law: i.e. the protection of those taking no part in the conflict, in particular civilians. That is to say, they are to be protected from loss of their property. One notorious manner in which loss of property is suffered in war is by theft and looting. It is accepted that this is the most popular connotation of the word "pillage". But if the purpose of the rule against "pillage" is the protection of victims of war from loss of their property, it must then make no difference to the victims whether their property is destroyed or whether it is stolen by combatants. Indeed, there is a greater reason to protect the victim from loss of property by mere destruction; for if the victim's property is destroyed, as opposed to merely stolen or looted, the victim suffers even greater

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467 The Prosecution points out that a similar conclusion was reached by Trial Chamber II in the AFRC case: ***AFRC* Trial Judgement**, paras. 750-758. In the AFRC appeal, the Prosecution did not challenge this finding on appeal.

468 **Trial Chamber's Judgement**, para. 166.

harm, since the looting of property holds out hope of recovery or restitution in the future in a way that mere destruction may not do.

6.5 Incidentally, the linguistic meaning of the word "pillage" is ultimately capable of supporting the purposive construction urged above. The *Oxford English Dictionary* contains the following definition of "pillage", among others: "To rob, plunder, *sack* (a person, place, etc): esp. as practiced in war; to rifle." [Emphasis added.][469] For its part, the word "sack" in context has a meaning that encompasses "ravage". For instance, in *The Oxford English Dictionary*, "sacked" is defined as: "That has been given up to sack; plundered, *ravaged*." [Emphasis added.][470] And quite significantly the definitions of "ravage" include the following:

> "The act or practice of ravaging, or the result of this; *destruction, devastation, extensive damage, done by men or beasts*."
> [...]
> "*Extensive depredations*"
> [...]
> "... of the *destructive action* or effects of disease, time, storm, etc."
> [...]
> "To *devastate, lay waste*, despoil, plunder (a country)."
> [...]
> "To commit ravages; to make havoc or *destruction*." [Emphasis added.][471]

Finally, "depredation" is defined, among other things, as follows:

> "The action of making a prey of; plundering, pillaging, ravaging; also, plundered or pillaged condition."
> [...]
> "Consumption or destructive waste of the substance of anything."

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469 ***Oxford English Dictionary*** (second edition, 1989) p 832. Notably also, ***The Oxford Thesaurus*** which contains the following synonyms for the word: "**pillage:** *depredation*, *gut*, loot, overrun, plunder, raid, ransack, rape, *ravage*, rifle, rob, robbery, spoil, strip, *waste*" [emphasis added]: *The Oxford Thesaurus*, Oxford Clarendon Press, 1992, p 869.

470 ***Oxford English Dictionary***, p 333. In *The Shorter Oxford English Dictionary*, "sack" is also simply defined as follows, among other meanings: "Plunder and *destroy* (a captured town, etc.); strip of possessions or goods; despoil, pillage" (emphasis added): ***Shorter Oxford English Dictionary*** (2002) p 2662.

471 ***Oxford English Dictionary***, p 229. Notably also, ***The Oxford Thesaurus*** which contains the following synonyms for the word: "**ravage** *v* **1** lay waste, devastate, ruin, destroy, demolish, raze, wreck, wreak havoc (up)on, damage: *The hurricane ravaged outlying areas but did little damage in the city.* **2** pillage, plunder, despoil, ransack, sack, loot: *The police tried to prevent hooligans from ravaging the shops in the town centre.* ... —*n* **3** Usually, **ravages:** destruction, damage, depredation(s), devastation, wrecking, ruin, demolition: *All about us we saw the ravages of war*" (emphasis added): *The Oxford Thesaurus*, p 378.

[...]
"Destructive operations, ravages (of disease, physical agents)."[472]

6.6 It is thus clear that in the English language, the word "pillage" can bear the meaning of simple destruction without appropriation. The position is the same in the French language. The relevant entries from *Le Nouveau Petit Robert* dictionary for the noun "*pillage*" and the verb "*piller*", from which the noun "pillage" is derived, as well as for the synonym "*dégât*", are contained in Annex B to this Brief. It is submitted that it is thus clear that both in English and in French, the plain meaning of the word "pillage" can include mere destruction of property during war, even when no appropriation is involved.

6.7 Furthermore, both the Australian and Canadian military manuals define pillage as including the destruction of enemy private or public property.[473] The UK *Manual of the Law of Armed Conflict* also discusses the rule against wanton destruction of property under the general rubric of "pillage".[474]

6.8 A similar conclusion is apparent from the judgment of the US Military Tribunal No II (at Nuremberg) in the *Pohl Case*.[475] The Tribunal described in that case the complete demolition and destruction of the Warsaw Ghetto. After an extensive description of events comprising mostly the destruction of a section of Warsaw, the Tribunal said that:

> Thus was accomplished the most complete task of destruction of a modern city since Carthage met its fate many centuries ago .... It was the deliberate and intentional destruction of a large modern city and its entire civilian population. It was wholesale murder, pillage, thievery, and looting ..."[476]

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[472] ***Oxford English Dictionary***, p 487. Notably also, *The Oxford Thesaurus* which contains the following synonyms for the word: "**depredation** *n* plunder, plundering, pillage, pillaging, despoliation, despoiling, ravaging, sacking, laying waste, devastation, destruction; ransacking, robbery, looting, ravages: *The depredation caused by ten years of war is unimaginable*" (emphasis added): *The Oxford Thesaurus*, p 89.

[473] **Australian Defence Force, *Law of Armed Conflicts-Commander's Guide***, paras. 743 and 1224 and Office of the Judge Advocate, The Law of Armed conflict at the Operational and Tactical Level, p. 12-8, quoted in Knut Doermann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2002, pp. 279-280.

[474] UK Ministry of Defence, ***The Manual of the Law of Armed Conflict*** (Oxford University Press, 2004), p. 88.

[475] ***US v Pohl*** (Judgement) *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10*, [Washington: US Government Printing Office, 1952] vol. 5, 193.

[476] *Ibid.*, at p. 986. Available at <http://www.mazal.org/archive/nmt/05/NMT05-T0986.htm>

Here, the Tribunal appears to use the word "pillage" to refer only to the destruction of property, since it uses the separate words "thievery" and "looting" to describe the acts of appropriation of property, and uses no other word that would encompass the "most complete task of destruction" and the "deliberate and intentional destruction of a modern city" which the Tribunal was mostly describing.

6.9 In reaching the opposite conclusion, the Trial Chamber relied on *Black's Law Dictionary* which, it is submitted, is not concerned with legal definitions for the purposes of international humanitarian law. Furthermore, this entry in *Black's Law Dictionary* did not follow its usual method of referring to reliable judicial or statutory authority in the relevant field of the law. It is suggested that it is because of a dearth of authority on point.

6.10 In the 1949 Geneva Conventions and their Additional Protocols, there is no other provision against the destruction of property during ***non-international*** armed conflicts. As to the 1949 Geneva Conventions themselves, the only provision applicable to non-international armed conflicts is article 3 common to those Conventions, which is silent both on the subject of unlawful destruction of property and on the subject of unlawful appropriation of property. (In contrast, the "Grave Breaches" provisions of the Geneva Conventions, which apply in international armed conflicts, expressly prohibit "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly"[477]). Article 4(2)(g) of Additional Protocol II to the Geneva Conventions prohibits "pillage", but contains no other provision expressly prohibiting the destruction of civilian property.[478]

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[477] See article 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (the **First Geneva Convention**); article 51 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 (the Second Convention); and article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (the Fourth Convention). Understandably, this provision is absent from article 130 which codified grave breaches for purposes of the Third Geneva Convention, as that is the Geneva Convention relative to the Treatment of Prisoners of War 1949.

[478] Other than Article 14, which states that: "Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless for that purpose,

6.11 Thus, if the term "pillage" in Article 4(2)(g) is not interpreted to include unlawful destruction of property, there would be no obvious prohibition on such acts in non-international armed conflicts under the Geneva Conventions or Additional Protocols.[479] Yet in both international and non-international armed conflicts, customary international law[480] forbids "[t]he destruction or seizure of the property of an adversary ... unless required by imperative military necessity".[481] The Prosecution submits that it would leave an inexplicable lacuna in Additional Protocol II if it did not contain this prohibition. For the reasons given above, it is submitted that it would be consistent with the plain English (and French) meaning of the word "pillage" to interpret Article 4(2)(g) as including this prohibition.

6.12 It must be pointed out that within the particular framework of the Special Court for Sierra Leone, an effort was indeed made to address the lacuna referred to in the preceding paragraph. But this effort still leaves the lacuna unfilled on the general plain of international law, as regards non-international armed conflicts. This is because the lacuna was merely filled, for purposes of the jurisdiction of the Special Court, by resort to the internal laws of Sierra Leone that prohibited wanton destruction of property. Notably, article 5 of the Statute of the Special Court gives the Court power to prosecute persons who committed certain enumerated crimes under Sierra Leonean law—in particular, offences relating to the wanton destruction of property under the *Malicious Damage Act,* 1861. These include setting fire (a) to dwelling houses (and people in it), (b) to public buildings, and (c) to other buildings. Commenting on the value of article 5, the Secretary General explained that it was meant to fill the lacuna in those "cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law."[482] As a matter of

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objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works."

479 Consultation of the ***ICRC Commentary* on the Geneva Conventions** does not assist in settling the meaning of "pillage" as including or excluding mere destruction without appropriation.

480 International Committee of the Red Cross, ***Customary International Humanitarian Law—Volume I:*** *Rules* (Henckaerts and Doswald-Beck (eds), Cambridge University Press, 2005), pp. 175—177.

481 *Ibid.*, p. 175.

482 The **Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone**, 4 October 2000, UN Doc S/2000/915, 4 October 2000, para 19.

international law, then, prosecuting persons pursuant to the *Malicious Damage Act* 1861 of Sierra Leone (pursuant to powers conferred in article 5 of the Statute) does not resolve the broader question as to whether wanton destruction of property is a conduct reasonably coming within the general prohibitory province of common article 3 to the Geneva Conventions or of Additional Protocol II which regulate non-international armed conflicts.

6.13 Given the constant feature of wanton destruction of property during international and internal armed conflicts, it would be unreasonable to suppose that the drafters of Additional Protocol II had in 1977 intended to omit it from what is to be prohibited during internal armed conflicts. If they had not intended to omit such behaviour from the conduct of non-international armed conflicts, it would then be reasonable to capture such conducts through the construction of any provision which could bear it. The prohibition of "pillage" under article 4(2)(g) of Additional Protocol II is such a provision. The Appeals Chamber is urged to develop international humanitarian law accordingly.

6.14 Indeed, the ICTY has held that the wanton destruction of cities, towns and villages, not justified by military necessity, is a crime within the jurisdiction of the ICTY, whether it occurs in international or non-international conflicts.[483] The ICTY held that although Additional Protocol II does not expressly include a reference to that crime, it is implicit in the general principles of Article 13 of Additional Protocol II.[484]

6.15 The Prosecution submits that Article 3 of the Special Court Statute gives it jurisdiction over all violations of common Article 3 to the Geneva Conventions and Additional Protocol II, so that if this crime of wanton destruction is part of Additional Protocol II, it is included in Article 3 of the Statute. If this crime is included in Article 3 of the Statute, it must fall under one or other of its

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[483] ***Hadžihasanović* Rule 98bis Decision**, paras. 95-107, especially para. 106. This finding was upheld by the ICTY Appeals Chamber: ***Hadžihasanović* Rule 98bis Interlocutory Appeal Decision**, paras. 26-30.

[484] Article 13(1) of **Additional Protocol II** provides that "The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations". Article 13(2) provides that: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited".

paragraphs, and the only paragraph that it is capable of falling under is Article 3(f), which gives the Special Court jurisdiction over "pillage".

6.16 The Prosecution submits that this interpretation is one that is effective to remedy the mischief that the prohibition against pillage is designed to prevent, as argued at the outset of the submissions on this ground of appeal.

6.17 The Prosecution therefore submits that the crime of "pillage" in Article 3(f) of the Statute includes the destruction of property of protected persons not justified by military necessity.

C. Remedy requested

6.18 The Trial Chamber found that the following incidents of destruction of property by burning occurred in incidents, for the crimes committed within which the Accused were found to be individually responsible. Pursuant to Norman's orders, Kamajors under Nallo's command burnt down houses upon their arrival in Bo Town.[485] Fofana was found to be individually responsible under Article 6(3) for crimes committed in this attack.[486] It is notable that he was convicted on Count 5 for the parallel crime of lootings as "pillage" which occurred in this attack.[487] Similarly, Kondewa was found to be individually responsible under Article 6(3) for the unlawful taking of civilian-owned properties in various locations, including Bonthe Town, Mobayeh and the surrounding areas.[488] He was then convicted on Count 5 for lootings in Bonthe.[489] But for this conviction, the Trial Chamber refused to take into account the acts of burning on the contested reasoning that burning did not constitute "pillage".

6.19 The Prosecution therefore requests the Trial Chamber to reverse the Trial Chamber's finding in paragraph 166 of the Trial Chamber's Judgement, and to revise the Trial Chamber's Judgement to add findings that Fofana and Kondewa's

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485 **Trial Chamber Judgement**, paras. 463-465.
486 *Ibid.*, paras. 816-827.
487 *Ibid.*, paras. 838-841.
488 *Ibid.*, paras 895, 903.
489 *Ibid.*, para, 896-898.

convictions on Count 5 include their individual responsibility for the burnings referred to in the previous paragraph.

6.20 On the strength of the foregoing submissions, the Prosecution submits that burnings of houses which were found to have been committed by Kamajors in Kenema[490] would also amount to "pillage", if Ground 3 relating to crimes committed in Kenema is upheld. For the same reasons, the if Ground 4 relating to crimes committed in Tongo, Bo and Koribundo is upheld, the following instances of burnings found by the Trial Chamber should be included as acts of pillage: the burning of nine houses in Tongo[491]; and the burnings committed by Kamajors under Nallo's command during the Koribundo attack between 13 and 15 February 1998.[492] So, too, if Ground 6 relating to Terror is upheld, the burnings found to have occurred in Tongo[493] and in Bonthe District.[494]

7. Prosecution's *Ground 8*: Denial of leave to amend the indictment in order to charge sexual crimes

A. Introduction

7.1 On 9 February 2004, prior to the commencement of the trial in this case, and prior to the date for trial even having been set in this case, the Prosecution filed a motion seeking the leave of the Trial Chamber to amend the Indictment, in order to add four new counts of sexual violence ("**the Indictment Amendment Motion**").[495] The found new counts were:

(1) rape (a crime against humanity punishable under Article 2(g) of the Statute);

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490 See **Trial Chamber's Judgement**, para 598.
491 *Ibid.*, paras 410 and 727.
492 *Ibid.*,, paras 335, 427-429.
493 *Ibid.*, paras 410 and 731.
494 *Ibid.*, para 560.
495 **Indictment Amendment Motion**, SCSL-04-14-PT-005, Registry page nos. 102-218.

(2) sexual slavery and any other form of sexual violence (a crime against humanity punishable under Article 2(g) of the Statute);

(3) other inhumane acts (a crime against humanity punishable under Article 2(i) of the Statute); and

(4) outrages upon personal dignity (a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(e) of the Statute).[496]

7.2 By a decision of 20 May 2004 (the "**Indictment Amendment Decision**"),[497] the Trial Chamber, by majority, dismissed the Indictment Amendment Motion. Judge Boutet dissented ("**Judge Boutet's Dissent**").[498]

7.3 On 4 June 2004, the Prosecution applied for leave to bring an interlocutory appeal against the Indictment Amendment Decision, pursuant to Rule 73(B) (the "**Prosecution Application for Leave to Appeal**").[499] On 2 August 2004, the Trial Chamber, by majority, dismissed that application (the "**Trial Chamber Refusal of Leave to Appeal Decision**").[500] Again, Judge Boutet dissented.[501]

7.4 On 30 August 2004, the Prosecution filed an appeal against the Trial Chamber Refusal of Leave to Appeal Decision (the "**Prosecution Appeal Against Refusal of Leave to Appeal**").[502] The Prosecution argued that the Appeals Chamber could in the circumstances entertain an interlocutory appeal against the Trial Chamber Refusal of Leave to Appeal Decision, on the basis of a general principle that any decision that is erroneous and that has led to an injustice, and which is

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496 The Indictment Amendment Motion also sought to extend the timeframes of, and add locations to, certain of the existing paragraphs of the Indictment (see Indictment Amendment Motion, para. 5(B)). In the Present Ground of Appeal, the Prosecution does not seek to challenge the dismissal of these other aspects of the **Indictment Amendment Motion**, although the Prosecution does ***not*** concede that the Trial Chamber did not err in dismissing these other aspects.

497 **Indictment Amendment Decision** SCSL-04-14-PT-113, Registry page Nos 7001-7040.

498 **Judge Boutet's Dissent** SCSL-04-14-PT-113, Registry page Nos 7024-7040.

499 **Prosecution Application for Leave to Appeal,** SCSL-04-14-PT-122, Registry page nos. 7234-7250.

500 **Trial Chamber Refusal of Leave to Appeal Decision** SCSL-04-14-PT-170, Registry page Nos 8862-8876 (the "").

501 **Judge Boutet's Dissenting Opinion on Interlocutory Appeal**, SCSL-04-14-PT-172, Registry page Nos 8893-8903.

502 **Prosecution Appeal Against Refusal of Leave to Appeal,** SCSL-04-14-T-177, Registry page Nos. 9116-9132

not capable of being remedied by any other means, must be amenable to correction by the Appeals Chamber.[503]

7.5 On 17 January 2005, the Appeals Chamber issued a decision (the "**Appeals Chamber Decision**")[504] finding that it had no jurisdiction to grant leave to the Prosecution to appeal from the Indictment Amendment Decision and no jurisdiction to entertain the appeal without the leave of the Trial Chamber.

7.6 In this Ground of Appeal, the Prosecution now brings this challenge to the Indictment Amendment Decision as part of its post-judgement appeal. The Prosecution contends that the Trial Chamber erred in law, fact and/or procedure in dismissing the Indictment Amendment Motion. In so far as the Trial Chamber erred in law and/or fact, the error(s) invalidated the Trial Chamber's Judgement and/or occasioned a miscarriage of justice, within the meaning of Article 21(1)(b) and/or (c) of the Statute, in that it led to the result that the Trial Chamber's Judgement gave no consideration to the individual responsibility of the Accused for the serious gender crimes with which the Accused would have been charged had the Trial Chamber not so erred.

7.7 Because the Trial Chamber dismissed the Indictment Amendment Motion, no evidence of the alleged gender crimes that the Prosecution sought to add to the Indictment was adduced before the Trial Chamber,[505] and no findings on those alleged gender crimes were made by the Trial Chamber. If the present Ground of Appeal is upheld, in order for any verdict to be reached on the individual responsibility of the Accused for the additional counts of gender crimes, the Appeals Chamber would therefore have to remit the case to the Trial Chamber for further trial proceedings on those counts. The Prosecution accepts that this would not be practicable. In respect of the present Ground of Appeal, the Prosecution therefore does not seek any remedy other than a finding that the Trial Chamber

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503 *Ibid.*, especially at para. 8.

504 **Appeals Chamber Decision,** SCSL-04-14-T-319, Registry page Nos 11429-11445, especially para. 44.

505 See also the Prosecution's Ninth Ground of Appeal below.

erred in dismissing the Indictment Amendment Motion, and that the Trial Chamber should have granted the motion.[506]

B. The errors of the Trial Chamber

7.8 The Prosecution Appeal Against Refusal of Leave to Appeal contained, as an Annex, the Prosecution's submissions on appeal against the Indictment Amendment Decision.[507] That document is annexed to this Appeal Brief, as **Appendix A**, and is referred to below as the "**Prosecution's Main Submissions**". As the Appeals Chamber decided in the Appeals Chamber Decision that it had no jurisdiction to entertain the interlocutory appeal, the submissions in that document were not considered by the Appeals Chamber. The Prosecution now requests the Appeals Chamber to consider those submissions in this post-judgement appeal.

7.9 In addition to the submissions contained in that document, the Prosecution makes the following submissions.

7.10 The Prosecution submits that the Trial Chamber erred in law and/or procedure in finding that the Prosecution had acted without due diligence in the conduct of its investigations of gender crimes,[508] without making any findings of fact on evidence before it on which such a finding could be based. The Trial Chamber said merely that it "would imagine" that if the Prosecution had exercised due diligence, the gender crime counts would have been included in the original indictment.[509] The exercise of a discretion of a Trial Chamber cannot be based on

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[506] The Appeals Chamber of the ICTY has indicated that where it is in the interests of justice to do so, it can find that the Trial Chamber erred in acquitting the accused on the ground that it did, but without either substituting a conviction or ordering a new trial: See ***Aleksovski* Appeal Judgement**, paras 153–154; ***Jelisić* Appeal Judgement**, paras 73–77. The Prosecution submits that it is similarly open to the Appeals Chamber to find that the Trial Chamber erred in refusing to allow the Prosecution to amend the indictment to add further counts, but without ordering further trial proceedings. Furthermore, it has been held that the Appeals Chamber may examine alleged errors which will not affect the verdict but which do, however, raise an issue of general importance for the case-law or functioning of the Tribunal: ***Tadić* Appeal Judgement**, paras. 241, 315; ***Čelebići* Appeal Judgement**, paras. 67-68, 221; ***Krnojelac* Appeal Judgement**, paras. 6-7 (see also Separate Opinion of Judge Shahabuddeen, paras 2-4); but compare ***Blagojević and Jokić* Appeal Judgement**, paras. 317-318.

[507] **Annex to Prosecution Appeal Against Refusal of Leave to Appeal,** SCSL-04-14-T-177, Registry page nos. 9127-9140.

[508] **Indictment Amendment Decision**, paras. 43 and 64.

[509] *Ibid.*, para. 43. See also paragraphs 57-58

mere "imagination". An explanation as to the timing of the filing of the Indictment Amendment Motion was given in the Indictment Amendment Motion itself,[510] in the Prosecution reply to the Defence responses to the Indictment Amendment Motion,[511] and in a written response to questions asked by Judge Thompson at a status conference.[512] The Trial Chamber made no findings of fact that would have contradicted the Prosecution explanation. In the course of an investigation, it cannot be expected that evidence of all different crimes will be found simultaneously. The Prosecution submits that the Trial Chamber erred in law and/or procedure, in merely "imagining" that the Prosecution had not acted with due diligence, and in deciding that the Prosecution had not done so simply because the investigations took longer than the Trial Chamber thought they should have.[513]

7.11 The Trial Chamber said, in the Indictment Amendment Decision, that "it is the traditional role and practice for the prosecution to bring as many counts in an indictment as possible and to amend them where it becomes necessary".[514] The Trial Chamber here seems to suggest that the appropriate course is for the Prosecution to charge an Accused with every possible crime at the outset if it has any sort of inclination to do so, even if it has no indicia of evidence on which to base some of the charges, in order to give the Accused and the Trial Chamber notice of potential charges, and then later, if the evidence does not materialize in subsequent investigations, to move to amend the indictment to drop charges.

7.12 The Prosecution submits that this is erroneous in law. It is submitted that a Prosecutor should only bring charges where it is in possession of "sufficient, credible evidence that can be used and is relevant to what [it] is alleging,"[515] and that the Prosecution should "be in possession of evidence sufficient to reasonably be satisfied that he could get a conviction should he proceed with a count or a new

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510 *Ibid.*, paras. 17-21.
511 **Consolidated Prosecution Reply**, SCSL-04-14-PT-020, Registry page nos. 405-416, paras. 23-25.
512 **Prosecutor's Status Conference Submissions,** SCSL-04-14-PT-029, Registry page nos. 551-558, heading 2.
513 **Indictment Amendment Decision**, paras. 42-43, 57-58.
514 *Ibid.*, para. 34.
515 **Judge Boutet Dissent**, para. 24.

count as the case may be."[516] It is submitted that the Prosecution should not bring charges in an indictment simply because it hopes that evidence may eventually materialize to prove the charges. To the extent that the Trial Chamber considered otherwise, it misdirected itself in law in exercising its discretion as to whether leave should be granted to amend the Indictment.

7.13 In paragraphs 47 to 49 of the Indictment Amendment Decision, the Trial Chamber rejected the Prosecution's explanation for the timing of the Indictment Amendment Motion. As argued in paragraph 13 of the Prosecution's Main Submissions, the earliest that the Prosecution could have sought to amend the Indictment to add the new Counts was in November 2003. The Indictment Amendment Motion was filed in February 2004, three months later, and the end of year judicial recess fell in this period. Paragraph 13 of the Indictment Amendment Motion gave the Prosecution's reasons for this delay, namely that the Prosecution was awaiting a decision on the Prosecution joinder motion, so that it could file a single motion to amend the Indictment rather than filing three separate motions to amend three separate indictments which at the time the Trial Chamber was considering joining. The Indictment Amendment Motion was filed within four days of the Consolidated Indictment being filed.

7.14 The Trial Chamber considered that this explanation was "unacceptable and untenable" as it would require the Accused "to wait indefinitely and for as long as the Prosecution is engaged in this protractedly indefinite expedition whose results may either be uncertain or not forthcoming at all".[517] However, the Prosecution never suggested that the proceedings in the case should be stayed until such time as the Prosecution considered that all of its potential investigations in the case were complete and that all potential charges had been added to the Indictment. The Indictment Amendment Decision was therefore based on an irrelevant consideration. Under the Rules, the Prosecution can move to amend the Indictment at any time, even during the course of the trial (and in this case, when the Prosecution filed the Indictment Amendment Motion, no date had been set for

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[516] *Ibid.*, para. 25.
[517] **Indictment Amendment Decision**, para. 48.

trial). Whenever the Prosecution moves to amend the Indictment, the Trial Chamber must consider the reasons why the amendment of the Indictment is being sought at that time (and in particular, whether the Prosecution has acted with due diligence), and whether there would be prejudice to the Accused in amending the Indictment at that time. In paragraphs 47-53 of the Indictment Amendment Decision, the Trial Chamber appears to take the view that there is a certain "cut-off" point, after which any amendment to the Indictment would violate the right of the Accused to an expeditious trial. To the extent that the Trial Chamber took this view, it misdirected itself in law.

7.15 In the Indictment Amendment Decision, the Trial Chamber expressed concern at the effect that an amendment to the Indictment would have on the timing of the completion of the Special Court's mandate.[518] However, the Trial Chamber gave no detailed consideration to what, if any, delays in the proceedings might be occasioned by the requested amendment. In the Indictment Amendment Motion, the Prosecution submitted that the requested amendment would not cause ***any*** delay in the proceedings (given, apart from anything, that a date for trial had not yet been set).[519] The Trial Chamber considered that there would be delay as (1) the Accused would file further preliminary motions in relation to new charges, and (2) the Defence would need time to investigate the new charges, and might require up to two years to do so.[520] As to the possibility of additional preliminary motions being filed, the Trial Chamber did not have regard to the fact that Rule 72 does not require a stay of proceedings where preliminary motions are brought in relation to new charges,[521] and no basis was given for the suggestion that the Defence might require up to two years to investigate the additional charges. The Trial Chamber appeared to proceed on the basis that because the Special Court is a temporary *ad hoc* institution, it should not allow an amendment to an indictment

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518 *Ibid.*, paras. 53-61.

519 **Indictment Amendment Motion**, para. 24. It added (at para. 25) that even if some delay would result, it would not be unreasonable in the circumstances.

520 *Ibid.*, para. 63.

521 Compare **Indictment Amendment Decision**, para. 74, which assumed (1) that the Defence "would have to" file further preliminary motions, which in fact was merely a possibility; and (2) that any preliminary motions on the new charges would necessarily require a "disruption and postponement" of the start of trial.

if there is any possibility of any delay in the proceedings. To the extent that the Trial Chamber took this view, it misdirected itself in law.

C. Conclusion

7.16 For the reasons given above, the Prosecution requests that this Ground of Appeal be upheld.

8. Prosecution's *Ground 9*: Preclusion of evidence of unlawful conduct of a sexual nature

8.1 As noted in paragraph 7.1 above, **the Indictment Amendment Motion**, by which the Prosecution sought the leave of the Trial Chamber to amend the Indictment, in order to add four new counts of sexual violence, was filed on 9 February 2004, prior to the date for trial even having been set.[522] The Trial Chamber's decision on the Indictment Amendment Motion (the Indictment Amendment Decision), was given on 20 May 2004.

8.2 The trial subsequently commenced on 3 June 2004. On a number of occasions during the course of the prosecution case, the Trial Chamber ruled that the Prosecution could not lead evidence of the commission of crimes of a sexual nature, even though the Prosecution argued that this evidence was relevant to the charges in Count 3 (Inhumane Acts as Crimes against Humanity) and Count 4 (Violence to Life, Health and Physical or Mental Well-Being of Persons, as a War Crime, in particular Cruel Treatment) of the Indictment.[523]

8.3 On 15 February 2005, the Prosecution filed a motion (the "**Admissibility of Evidence Motion**"),[524] in which the Prosecution sought a ruling as to the effect of the Indictment Amendment Decision, and in particular, sought a ruling that the Indictment Amendment Decision should not preclude the addiction of evidence of

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[522] **Indictment Amendment Motion**, SCSL-04-14-PT-005, Registry page nos. 102-218.
[523] Transcript, 2 November 2004, pp. 47-55.
[524] **Admissibility of Evidence Motion**, SCSL-04-14-T-341, Registry page nos. 11990-12049.

the commission of sexual crimes where it was relevant and admissible on the ground that these crimes fell under Count 3 and Count 4 of the Indictment.

8.4 In a decision on this motion rendered on 23 May 2005,[525] with reasons given on 24 May 2005 (the "**Admissibility of Evidence Decision**"),[526] the Trial Chamber by majority, Judge Boutet dissenting, denied the Prosecution motion, and ruled that such evidence was not admissible in relation to Counts 3 and 4. The Prosecution subsequently applied for leave to bring an interlocutory appeal against the Indictment Amendment Decision, pursuant to Rule 73(B), which was denied by the Trial Chamber.[527]

8.5 The main reason given by the majority in the Admissibility of Evidence Decision were that the material facts alleged in the Indictment in support of Counts 3 and 4[528] made no specific factual allegations of sexual violence.[529] The Trial Chamber considered that "evidence [cannot] ... properly be adduced to support Counts 3 and 4 of the Consolidated Indictment without the underlying factual allegations having been specifically pleaded".[530]

8.6 Judge Itoe, who was one of the two majority Judges, added in his separate opinion to the Admissibility of Evidence Decision that "the ***only way*** the Prosecution can be seen to have fully complied with its obligation under Article 17(4)(a) of the Statute to promptly inform the Accused Person of the offences for which he is charged is through an Indictment that has been preferred against him".[531] He added that "Even though Trial Briefs contain a summary of elements of the crimes alleged, they are not, and cannot be characterized as Indictments within the meaning of Rule 47 of Rules for purposes of ensuring the respect of the rights of the Accused under Article 17(4)(a) of the Statute".[532]

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525 **Admissibility of Evidence Decision**.
526 **Reasoned Majority Decision on Evidence**.
527 **Majority Decision on Leave to Appeal Admissibility of Evidence Decision**.
528 Indictment, para. 26.
529 **Admissibility of Evidence Decision**, para. 19(i).
530 *Ibid.*, para. 19(ii).
531 Separate Concurring Opinion of Judge Itoe to the **Reasoned Majority Decision on Evidence**, dated 24 May 2005, paras 26 and 27 (emphasis added).
532 Separate Concurring Opinion of Judge Itoe, para 27(ii). See also the **Admissibility of Evidence Decision,** para 19(v).

8.7 The majority therefore appeared to conclude that it would *ipso facto* prejudice the rights of the accused if the Prosecution could adduce, in support of a count, evidence of crimes that have not been specifically pleaded in the indictment in the material facts alleged in relation to that count, in other words, that notice of the facts underpinning a charge can only be given on the face of the indictment and nowhere else. [533]

8.8 The Prosecution submits that the Trial Chamber erred in law in reaching this conclusion, and that there was therefore a procedural error, in that the Trial Chamber, in exercising its discretion to deny the Admissibility of Evidence Motion, based the exercise of its discretion on wrong legal principles.

8.9 It has been settled that a deficiently pleaded indictment can be deemed cured, and prejudice found to be non-existent, where there has been timely, clear and consistent information provided to the accused detailing the factual basis of the charges against him.[534] Such information could be provided in pre-trial briefs, disclosure, opening statements, or by way of information gained in the course of the trial.[535]

8.10 The Trial Chamber did not dispute that, as a matter of law, the war crime of violence to life, health and physical or mental well-being of persons, in particular cruel treatment (punishable under Article 3(a) of the Statute) can include crimes of a sexual nature.[536] The Prosecution submits that as a matter of law, it can.[537]

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[533] **Admissibility of Evidence Decision**, para. 19(iv) and (v). See also **Trial Chamber's Judgement**, para. 48, in which the Trial Chamber said, referring to paragraph 19(iv) of the Admissibility of Evidence Decision, that: "The Chamber held that it would be prejudicial to the Accused to allow such evidence to be admitted, as acts of sexual violence were not plead in the Indictment under these Counts, and the Accused had therefore not been put on notice that they were facing such charges".

[534] ***Ntagerura* Appeal Judgement**, para 28; ***Ntakirutimana* Appeal Judgement**, para 27; ***Kupreškić* Appeal Judgement**, para 114; and ***Kvočka* Appeal Judgement**, para 43. In citing the case law of the ICTY and ICTR it is important to note that Rule 47 at both Tribunals requires an indictment to contain a "concise statement of facts" where SCSL Rule 47 does not. This would suggest even greater acceptance at the SCSL of providing notice of factual specifics outside of the texts of indictments. Even at the ICTY, it has been held that "There is a distinction between those material facts upon which the Prosecution relies which must be pleaded in an indictment, and the evidence by which those material facts will be proved, which need not be pleaded and is provided by way of pre-trial discovery" (***Blaškić* Appeal Judgement**, para 210; ***Kvočka* Appeal Judgement**, para 43). It has further been held that "where it is attempted to charge rape as an outrage upon personal dignity, the rape is only evidence of the outrage" (***Kunarac* Appeal Judgement**, para 190).

[535] ***Kupreškić* Appeal Judgement**, para 124.

[536] The majority was however of the view that that it is impermissible to allege acts of sexual violence as "other inhumane acts" under Article 2(i) in the light of the separate and distinct residual category

8.11 Therefore, had the Trial Chamber exercised its discretion correctly when deciding the Admissibility of Evidence Motion, it would have enquired whether any defect in the Indictment in failing specifically to allege crimes of a sexual nature in the material facts underpinning Count 4 had subsequently been cured by timely, clear and consistent information provided to the accused. The majority erred in concluding that if such crimes were not expressly pleaded in the Indictment, evidence of such crimes was automatically excluded.

8.12 In the present case, the pre-trial briefs and opening statements, among other things, did clearly and specifically inform the Defence that Counts 3 and 4 encompassed allegations of sexual violence. In the Prosecution Pre-Trial Brief filed on 2 March 2004, over one year ahead of the Trial Chamber's ruling on 23/24 May 2005, sexual violence was specifically averred in the following way:

> The evidence will show that the civilians in Talia village and surrounding villages were subjected to a comprehensive and systematic pattern of violence consequent to the arrival of thousands of Kamajors, who effectively occupied the area for a period up to nine months. The evidence will demonstrate that their daughters and wives were systematically raped and held in sexual slavery...[538].

8.13 In the Prosecution Supplemental Pre-Trial Brief also filed over one year earlier, on 22 April 2004, sexual violence was specifically averred in the following way, with particular regard to the charge of "Violence to life, health and physical or mental well-being of persons" as pleaded in Count 4:

> [As regards Bonthe District, the evidence] will demonstrate, *inter alia*, that: ... *women and girls were subjected by the CDF to sexual assaults, harassment, and non-consensual sex*, which resulted in the

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of sexual offences under Article 2(g): **Admissibility of Evidence Decision**, para. 19(iii). The Prosecution does not concede the correctness of this conclusion, but does not pursue the issue in relation to this Ground of Appeal.

537 In *Akayesu*, for instance, the ICTR reasoned that rape can be an act of genocide. This was founded upon the reasoning that rape amounted to "causing serious bodily or mental harm to members of the group" as provided for under article 2(2)(b) of the ICTR Statute: ***Akayesu* Trial Judgement**, paras 706—707 and 731—734. Similar reasoning has been employed as regards other international crimes involving physical and mental harm, including war crimes. See ***Kunarac* Appeal Judgement**, paras 180—185 and 189; ***Čelebići* Trial Judgement**, paras 475—496, 551-552, 1038—1040; ***Kayishema* Trial Judgement**, para 108; ***Musema* Trial Judgement**, para 156; ***Kordić and Čerkez* Trial Judgement**, paras 260, 265; ***Blaškic* Trial Judgement**, para 182.

538 **Pre-Trial Brief**, para 62.

> widespread proliferation of sexually transmitted diseases, unwanted pregnancies and severe mental suffering;[539] … .
>
> It is the prosecution theory of the case that the planning, instigation, ordering or committing of unlawful *physical violence and mental harm or suffering through sexual assaults* as well as other acts during the attacks in Bonthe District, or the aiding and abetting thereof, or that resulted from the common plan to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone, can be reasonably inferred from, *inter alia*:
>
> a. …;
>
> b. the overall conduct of the CDF, not limited to any one district, which *engaged in the widespread infliction of physical violence and mental harm or suffering* as part of a campaign of terror and collective punishment.[540]

8.14 A review of the pre-trial briefs will also make it clear that the foregoing information was provided with specific reference to Count 4 of the Consolidated Indictment. They were not provided for purposes of the new counts of sexual violence in the proposed amended indictment.

8.15 In the Prosecution opening statement made on 3 June 2004, also about one year before the Admissibility of Evidence Decision was rendered, the Prosecution indicated that it would be leading evidence of sexual crimes.[541] This information was not provided by the Prosecutor in anticipation of leave being granted to add the new Counts of sexual violence, because leave to amend had been denied two weeks earlier, but were made on account of the existing counts in the Consolidated Indictment, including Counts 3 and 4 as they were.[542]

8.16 The Prosecution submits that it was therefore not correct, as found by the Trial Chamber, that "nothing in the records seems to support the Prosecution's assertion that the evidentiary material under reference had been disclosed to the Defence 'in some form' over 12 months ago".[543] To the extent that this finding was a factor taken into account by the Trial Chamber in exercising its discretion

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539 **Supplemental Pre-Trial Brief**, para 91(b). See also para 220(b).

540 ***Prosecution Supplemental Pre-Trial Brief pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief*** dated 22 April 2004, para 92 (emphasis added).

541 See Transcript of 3 June 2004, p 23 (lines 12 to 19, 29 to 37), and p 24 (lines 25 to 27).

542 See Transcript of 3 June 2004, pp 7 to 8.

543 **Admissibility of Evidence Decision**, para. 19(v).

in dismissing the Admissibility of Evidence Motion, the exercise of the discretion was based on erroneous facts. In the Admissibility of Evidence Motion, the Prosecution stated "[t]he admission of this evidence causes no unfairness to the Accused *as the evidence [of sexual violence] has been disclosed to the Defence for over a year.*"[544] This factual averment met with no serious contradiction from the Defence.[545] Furthermore, the Indictment Amendment Motion itself, which was filed on 9 February 2004, would, it is submitted, qualify as "knowledge acquired during trial",[546] capable of putting the Defence on notice that the Prosecution intended to lead evidence of sexual crimes.

8.17 It is therefore submitted that the Trial Chamber committed a procedural error in dismissing the Admissibility of Evidence Motion for the reasons that it did.

8.18 For the reasons given in paragraph 7.7 above, the Prosecution does not seek any remedy in relation to this Ground of Appeal other than a finding that the Trial Chamber erred in dismissing the Admissibility of Evidence Motion for the reasons that it did.

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544 ***Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence*** dated 15 February 2005, para 39. Emphasis added.

545 Notably, the following are the reactions from the Defence in their responses: (a) The Norman Defence: "It is also tantamount to an amendment of the indictment more than half way through the Prosecution's case to allege new crimes without having specified them all, other than by saying 'we gave it to you in discovery'. That simply does not satisfy the requirements of reasonable notice and a fair trial": ***Response of First Accused to Prosecution's "Urgent Prosecution Motion for Ruling on Admissibility of Evidence" and Objection to Other Crimes Evidence***, dated 18 February 2005, para 13. (b) The Defence of Fofana: "This contention is simply untrue. Contrary to the Prosecution's submission, the Defence most certainly did not expect nor anticipate the presentation of evidence outside the scope of the Consolidated Indictment": ***Response of the Second Accused to Urgent Prosecution Motion for Ruling on the Admissibility of Evidence***, dated 25 February 2005, para 21 [Clearly, the Fofana Defence were not denying having received the evidence over a year earlier. Be Their concern was rather that the suggestion was "not true" that they were expecting the evidence to led in the case.] (c) The Kondewa Defence: "With respect, discovery is not the means through which the Accused is informed of the case against him. It is the indictment which serves this function": ***Response of the Third Accused to Prosecution's Urgent Motion for Ruling on the Admissibility of Evidence***, dated 28 February 2005, para 13.

546 ***Kupreškić*** **Appeal Judgement**, para 124.

9. Prosecution's *Ground 10*: Sentencing

A. Introduction

9.1 In the Sentencing Judgement, in respect of the crimes of which the Trial Chamber found Fofana to be guilty, the Trial Chamber imposed a sentence of a total and concurrent term of imprisonment of six (6) years, broken down as follows:

(1) six (6) years for Count 2 (Murder as the War Crime of Violence to Life, Health and Physical or Mental Well-Being of Persons);

(2) six (6) years for Count 4 (Cruel Treatment as the War Crime of Violence to Life, Health and Physical or Mental Well-Being of Persons);

(3) three (3) years for Count 5 (Pillage as a War Crime); and

(4) four (4) years for Count 7 (Collective Punishment as a War Crime).[547]

9.2 In the Sentencing Judgement, in respect of the crimes of which the Trial Chamber found Kondewa to be guilty, the Trial Chamber imposed a sentence of a total and concurrent term of imprisonment of eight (8) years, broken down as follows:

(1) eight (8) years for Count 2 (Murder as the War Crime of Violence to Life, Health and Physical or Mental Well-Being of Persons);

(2) eight (8) years for Count 4 (Cruel Treatment as the War Crime of Violence to Life, Health and Physical or Mental Well-Being of Persons);

(3) five (5) years for Count 5 (Pillage as a War Crime);

(4) six (6) years for Count 7 (Collective Punishment as a War Crime); and

(5) seven (7) years for Count 8 (Enlisting Children under the Age of 15 Years into Armed Forces or Groups or their Use in Active Hostilities, as War Crime).[548]

9.3 In this Ground of Appeal, the Prosecution contends that the Trial Chamber erred in law and in fact, and committed a procedural error (in the sense that there has been a discernible error in the Trial Chamber's sentencing discretion), in imposing the sentences that it did, in the case of both Accused. The errors in the Sentencing Judgement are set out below.

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[547] **Sentencing Judgement**, pp 33—34.

[548] *Ibid.*, p 34.

9.4 Irrespective of any of the Prosecution's other Grounds of Appeal, the Prosecution requests the Appeals Chamber to correct these errors, by revising the Sentencing Judgement of the Trial Chamber and by imposing on each of the Convicted Persons an appropriate higher sentence ***in respect of the crimes of which they were convicted by the Trial Chamber***. If the Prosecution's other Grounds of Appeal are upheld, the new sentences imposed should also reflect the additional criminal responsibility of the Accused resulting from the Appeals Chamber's judgement in respect of those other Grounds of Appeal.

B. Standard of review on appeal in an appeal against sentence

9.5 The standard of review on appeal in an appeal against sentence is well-settled in the case law of the ICTY and ICTR. It has been held that:

> 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.[549]

9.6 A discernible error in the sentence imposed by a Trial Chamber will exist where it is established that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its

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[549] ***Kayishema*** **Appeal Judgement**, para 337. See also ***Vasiljević*** **Appeal Judgement**, para. 9: "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." (Footnotes omitted.) To similar effect, see ***Blaškić*** **Appeal Judgement**, para. 680 (footnotes omitted); ***Kvočka*** **Appeal Judgement**, para. 669.

discretion, or where the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[550]

9.7 The Prosecution acknowledges that in relation to this ground of appeal, it is incumbent upon the Prosecution as appellant to establish the existence of such a "discernible error" in the exercise of the Trial Chamber's sentencing discretion.[551] For the reasons given below, the Prosecution submits that in imposing the sentences in this case, the Trial Chamber erred in law in taking certain matters into account, and that the sentences imposed were "so unreasonable and plainly unjust" that the Trial Chamber failed to exercise its discretion properly.

C. First error of the Trial Chamber: Refusal to consider sentencing practices of Sierra Leonean courts

9.8 The Trial Chamber found that it would be inappropriate to rely on the sentencing practices of Sierra Leonean Courts in determining the punishment to be imposed, on the grounds (1) that the Accused were not indicted or convicted for any of the offences under Article 5 of the Statute (which confers jurisdiction on the Special Court over certain crimes under Sierra Leonean law); and (2) that the Statute of the Special Court does not provide for either capital punishment or imposition of a "life sentence", which are the punishments that the most serious crimes under Sierra Leonean law attract.[552]

9.9 The Prosecution submits that the Trial Chamber thereby erred in law.

9.10 The fact that neither of the Accused were charged or convicted of crimes under Sierra Leonean law is immaterial. Article 19(1) of the Statute states, in general terms, that "the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in ... the national courts of Sierra Leone". It does not state that the Trial Chamber shall only have regard to the practice of the national

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550 See ***Babić* Appeal Judgement on Sentencing**, para. 44; ***Semanza* Appeal Judgement**, paras. 312, 374; ***Galić* Appeal Judgement**, para. 455.

551 See, e.g., ***Kvočka* Appeal Judgement**, para. 669; also ***Kupreškić* Appeal Judgement**, para. 457 ("The burden rests on an [appellant] to demonstrate that the Trial Chamber abused this discretion in failing to take a certain factor or circumstance into account").

552 **Trial Chamber's Judgement**, paras. 42-43.

courts of Sierra Leone in relation to convictions under Article 5. The Statute of the ICTY provides that ICTY Trial Chambers "shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia",[553] even though the ICTY has no jurisdiction at all over crimes under the law of the former Yugoslavia. The Statute of the ICTR provides that ICTR Trial Chambers "shall have recourse to the general practice regarding prison sentences in the courts of Rwanda", even though the ICTR has no jurisdiction at all over crimes under the law of Rwanda.[554] The fact that the convictions in this case were not under Article 5 of the Statute is therefore irrelevant to the appropriateness of having regard to sentencing practices in Sierra Leone.

9.11 The Prosecution submits that the rationale for requiring international tribunals to have regard to the sentencing practices of the national courts of the country where the crimes were committed, and whose citizens were the primary victims of those crimes, is that:

> The punishment must therefore reflect both the calls for justice from the persons who have—directly or indirectly—been victims of the crimes, as well as respond to the call from the international community as a whole to end impunity for massive human rights violations and crimes committed during armed conflicts.[555]

The ICTY has accordingly said that it:

> ... must discern the underlying principles and rationales for punishment that respond to both ***the needs of the society of the former Yugoslavia*** and the international community.[556]

9.12 The Prosecution submits that if a person convicted by an international criminal court of serious violations of international humanitarian law committed on a large scale were to receive a sentence that is significantly lower than the sentence that would have been imposed by a national court in respect of the same conduct charged under national law, this would send the signal to the community that

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553 **ICTY Statute**, Article 24(1).
554 **ICTR Statute**, Article 23(1).
555 ***Blagojević and Jokić*** **Trial Judgement**, para. 814. See also ***Nikolić*** **Sentencing Judgement**, para. 82; and ***Obrenović*** **Sentencing Judgement**, para. 45.
556 ***Blagojević and Jokić*** **Trial Judgement**, para. 816 (emphasis added) and ***Deronjić*** **Trial Judgement**, para. 133.

large scale crimes under international law are considered less serious than ordinary crimes under national law. This would fail to meet the objectives referred to above, and would undermine the seriousness with which violations of international humanitarian law are regarded by the international community. An international criminal court should not impose a sentence that is grossly out of touch with the idea of justice in the domestic jurisdiction concerned.

9.13 The Trial Chamber stated that "Article 19(1) ***authorizes*** the Trial Chamber to consider, where appropriate, the sentencing practices of Sierra Leonean domestic courts".[557] That is incorrect. Article 19(1) of the Statute provides that 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" (emphasis added). The Trial Chamber is therefore ***required*** to have regard to sentencing practices in Sierra Leone where appropriate. While it is true that the Trial Chamber is only required to do so "as appropriate", it would be a complete negation of this requirement if the Trial Chamber could disregard national sentencing practices on the ground that the Special Court cannot impose capital punishment or "life sentences", which are the punishments that the most serious crimes under Sierra Leonean law attract. Given that the Special Court only tries the most serious crimes under international law, and given that it is mandated to try those bearing the greatest responsibility, any reference to national sentencing practices will necessarily be a reference to the sentences imposed by national courts for the most serious offences.

9.14 It is acknowledged that the Trial Chamber could not, by reference to national sentencing practices, impose a death sentence or a life sentence. However, it can, and must, have regard to the severity of the sentences that would be imposed by a national court for similar crimes. The Prosecution therefore submits that the Trial Chamber erred in law in refusing, for erroneous reasons, to give any consideration at all to the Prosecution submission that the offences for which the Accused have been found guilty would attract the death penalty or life imprisonment under Sierra Leonean law.

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[557] **Sentencing Judgement**, para. 42 (emphasis added).

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D. Second error of the Trial Chamber: Treating statements of the Accused at the sentencing hearing as mitigating factors

9.15 Paragraphs 63-65 of the Sentencing Judgement appear under the heading "Remorse". Earlier in the Sentencing Judgement, the Trial Chamber noted that counsel for both Accused had argued that remorse should be taken into account as a mitigating factor in sentencing.[558]

9.16 As the ICTY Appeals Chamber has held, in order to be a factor in mitigation, the remorse expressed by an accused must be ***real and sincere***.[559]

9.17 The Trial Chamber noted that at the sentencing hearing in this case, counsel for Fofana had said that: "Mr Fofana accepts that crimes were committed by the CDF during the conflict in Sierra Leone. .... Mr Fofana deeply regrets all the unnecessary suffering that has occurred in this country".[560] The Trial Chamber did not suggest that this statement was an expression of remorse, let alone a *genuine* expression of remorse, but said that: "Although Fofana by this statement does not expressly acknowledge his personal participation in the crimes for which the Chamber has convicted him, the Chamber finds that he has clearly expressed empathy with the victims of those crimes".[561]

9.18 The Trial Chamber also noted that at the sentencing hearing in this case, Kondewa addressed the Trial Chamber and said: "Sierra Leoneans, those of you who lost your relations within the war, I plead for mercy today, and remorse, and even for yourselves".[562] Kondewa in fact used the word "remorse" on several other occasions in his address to the Trial Chamber.[563] Again, the Trial Chamber did not find this to be an expression of ***genuine remorse***, but said that "although

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558 **Sentencing Judgement**, para. 22 (footnote 34 and accompanying text); para. 40 (footnote 67 and accompanying text).

559 ***Blaškić* Appeal Judgement**, para. 705. See also ***Vasiljević* Appeal Judgement**, para. 177.

560 **Sentencing Judgement**, para. 63.

561 *Ibid.*, para. 64.

562 *Ibid.*, para. 65, referring to sentencing hearing, Transcript, 19 September 2007, p. 91(lines 10-12).

563 **Transcript**, 19 September 2007, p. 91(lines 10-12) ("I want you to know that is not just today that I am showing remorse"); p. 92 (lines 7-9) ("They forced him to show that I will show remorse on this issue and I had remorse in securing the civilians"); p. 93 (lines 10-12) ("When I say I was with pity to civilians, it is not only today I am showing remorse to civilians").

Kondewa did not expressly recognise his own participation in the crimes for which he has been found guilty, the empathy he has shown is real and sincere".[564]

9.19 As authority for the proposition that an expression of "empathy" with the victims of crimes, albeit not an expression of remorse, may be a mitigating factor in sentencing, the Trial Chamber quoted the *Orić* Trial Judgement.[565] The Prosecution submits however that this was only a decision at Trial Chamber level, and notes that the *Orić* Trial Judgement is presently on appeal before the ICTY. Other case law of international criminal tribunals has not generally regarded expressions of "empathy" with victims, especially where made by Defence counsel rather than by the accused, as mitigating factors in sentencing.

9.20 Furthermore, in the passage cited from the *Orić* Trial Judgement, the ICTY Trial Chamber noted that defence counsel had expressed compassion for victims "a few instances" during the course of the trial, that is, *before* the accused was convicted. In the present case, the expressions of "empathy" referred to by the Trial Chamber were made at the sentencing hearing, *after* the Accused had been convicted. Even if expressions of empathy for victims could be given any weight at all, such expressions made *after* conviction, in the context of a sentencing hearing, at a time when the convicted person is seeking to establish mitigating circumstances, cannot reasonably be given the same weight as such an expression made during the trial.

9.21 The Prosecution submits that a Trial Chamber, exercising its sentencing discretion properly, cannot treat "expressions of empathy for victims" made at a sentencing hearing, as opposed to an expression of ***genuine remorse***, as a mitigating factor. At the very least, the Prosecution submits that a Trial Chamber, exercising its sentencing discretion properly, cannot give any significant mitigating weight to expressions of empathy for victims made at a sentencing hearing, in the case of crimes of gravity. The Prosecution further submits that a Trial Chamber, exercising its sentencing discretion properly, could not treat the cursory statements made by Defence counsel for Fofana and by Kondewa at the

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564 **Sentencing Judgement**, para. 65.
565 **Sentencing Judgement**, footnote 108.

sentencing hearing, as ***genuine*** expressions of empathy for victims, let alone as expressions of ***genuine*** remorse.

E. Third error of the Trial Chamber: Treating lack of adequate training as a mitigating factor

9.22 In paragraph 66 of the Sentencing Judgement, the Trial Chamber took into account, as a mitigating factor, that both Accused "were propelled in a relatively short period of time, from civilian life to an effective position of authority in a very brutal and bloody conflict, with no adequate training for the roles which they were to play". The Trial Chamber referred to no evidence to support this finding. At the sentencing hearing, counsel for Fofana, in submitting that this should be taken into account as a mitigating factor, said that "Fofana may not necessarily have been young, but he certainly lacked experience and was thrown into the desperate situation and asked to act",[566] but again cited no evidence in support of this claim.

9.23 As the Trial Chamber noted in paragraph 40 of the Sentencing Judgement, mitigating factors must be established by the Defence on a balance of probabilities. In the absence of reference to any evidence of this alleged mitigating circumstance, and in the absence of any findings of the Trial Chamber in relation to such evidence, this mitigating circumstance cannot have been established on the balance of probabilities.

9.24 The Trial Chamber cited no authorities in this part of the Sentencing Judgement. However, in support of the argument that regard should be had, as a mitigating factor, to the circumstance that Fofana was acting in a difficult situation without adequate training, Defence counsel for Fofana relied on the *Orić* Trial Judgement and the *Hadžihasanović* Trial Judgement.[567] In the *Orić* case, the Trial Chamber took into consideration in mitigation "the enormous burden that was cast upon [the Accused] at the age of 25 while the situation in Srebrenica was desperate", and the fact that he had cast upon him "enormous responsibilities and problems

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[566] **Transcript**, 19 September 2007, p. 75.

[567] Fofana Sentencing Submissions, paras. 30-31; Sentencing Hearing, Transcript, 19 September 2007, pp. 70, 74-75.

that are usually carried by seasoned military commanders".[568] In the *Hadžihasanović* case, the Accused had become commander of a military unit only nine days after it had been set up, and at the very time that it was forced to engage in an unforeseen battle with the opposing armed forces, and his difficulties in exercising command were compounded by a mass arrival of refugees and by a problem of foreign combatants.[569]

9.25 It may be that a Trial Chamber is entitled to take into account, as a mitigating factor, the circumstance that an accused has been very quickly propelled from civilian life to being a military commander, and has been immediately required, without any adequate training, to make numerous quick decisions in the heat of battle while under enemy fire. However, there are no findings of the Trial Chamber to suggest that Fofana or Kondewa were in this situation. The Trial Chamber found that Fofana was ever seen on the battlefield[570] and that Kondewa never went to the war front.[571] It is submitted that the Trial Chamber established no factual basis at all to justify taking lack of training into account as a mitigating factor for either Accused. It cannot be that every person who is convicted with crimes under international law, and who held a position of authority at the time of commission of the crimes, will automatically be entitled to have any lack of formal training taken into account in mitigation. To be a mitigating factor, there must in each individual case be established facts which show that the lack of training affected the ability of the accused to comply with the requirements of international law, and therefore somehow mitigated the moral culpability of the accused. In this case, no such facts were established. Given the heinous nature of the crimes of which Fofana and Kondewa were convicted, and the vulnerable status of the non-combatant victims, it cannot be said that they were incapable of fully appreciating the criminality of their behaviour due to "inadequate training".

9.26 The Trial Chamber therefore erred in law and in the exercise of its sentencing discretion in considering this as a mitigating factor.

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568 ***Orić* Trial Judgement**, para. 757.
569 ***Hadžihasanović* Trial Judgement**, para. 2081.
570 **Trial Chamber's Judgement**, para. 343.
571 **Trial Chamber's Judgement**, para. 345.

F. Fourth error of the Trial Chamber: Treating subsequent conduct of the Accused as a mitigating factor

9.27 At paragraph 67 of the Sentencing Judgement, the Trial Chamber said that it took into account as a mitigating factor "evidence filed by the Fofana Defence regarding Fofana's conduct subsequent to the time frame in which the crimes he committed occurred" and in particular, the Defence submission concerning "Fofana's commitment to and observance of the Lomé Peace agreement".[572]

9.28 The Trial Chamber further said in paragraph 94 that "***both Fofana and Kondewa*** were among those who stepped forward in the efforts to restore democracy to Sierra Leone",[573] and that this, together with other mitigating factors, significantly impacted to influence the reduction of the sentence to be imposed for each count".[574] However, the Trial Chamber did not refer to any evidence of subsequent conduct ***of Kondewa***. As the Trial Chamber noted in paragraph 40 of the Sentencing Judgement, mitigating factors must be established by the Defence on a balance of probabilities. In the absence of reference to any evidence of subsequent conduct of Kondewa, and any findings of the Trial Chamber in relation to such evidence, mitigating subsequent conduct of Kondewa cannot have been established on the balance of probabilities. The Trial Chamber therefore erred in law and in the exercise of its sentencing discretion in considering that any subsequent conduct of Kondewa was a mitigating factor.

9.29 As to the evidence of subsequent conduct of Fofana, this consisted of five witness statements annexed to the Fofana Sentencing Submissions.[575] The Prosecution submits that the information contained in these statements is largely of a general nature, and does not give specific details of the precise conduct of Fofana that would enable an objective assessment to be made of his actual contribution or

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572 Footnote 110 of the **Sentencing Judgement**, which in this paragraph, refers also to *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (AC), Separate Opinion of Judge Robertson, 24 May 2005, para 52. The Prosecution submits that the relevance of this citation to this paragraph of the Sentencing Judgement is unclear.

573 Emphasis added.

574 **Sentencing Judgement**, para. 94.

575 ***Fofana* Sentencing Submissions**, Annexes A to E.

efforts to peace and reconciliation. The Prosecution would not dispute that this evidence indicates that Fofana did involve himself to a degree in activities aimed at peace and reconciliation, but would submit that in the absence of more detailed and specific evidence, only limited weight could be given to this evidence by a reasonable Trial Chamber.

G. Fifth error of the Trial Chamber: Treating lack of prior convictions as a mitigating factor

9.30 In paragraph 68 of the Sentencing Judgement, the Trial Chamber took into account, as a mitigating factor, the fact that neither Fofana nor Kondewa has any previous convictions.

9.31 The Prosecution submits that the Trial Chamber erred in law, or exceeded its sentencing discretion, in treating this as a mitigating factor. The case law of international criminal tribunals indicates that lack of prior convictions should not be considered as a significant mitigating factor,[576] at least in a case of gravity, and that it may if anything aggravate more than mitigate, since for a person of good antecedents to commit such crimes "requires an even greater evil will on his part than for lesser men".[577] It is submitted that it is only in exceptional circumstances that previous good character can be considered as a factor in mitigation.[578] The Prosecution submits that a Trial Chamber, exercising its sentencing discretion properly, could not treat Fofana and Kondewa's lack of prior convictions as a matter of any substantial significance in mitigation.

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576 ***Furundžija* Trial Judgement**, para. 284; ***Jelisić* Trial Judgement**, para. 124, ***Erdemović* Sentencing Judgement**, pp. 13-16.

577 ***Tadić* Sentencing Judgement**, para. 59.

578 ***Galić* Appeal Judgement**, para 51; ***Blagojević and Jokić* Trial Judgement**, para. 853.

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H. Sixth error of the Trial Chamber: Treating the "just cause" of the Accused as a mitigating factor

9.32 In the Sentencing Judgement, the Trial Chamber found that there is no defence of "necessity" in international criminal law, and that "necessity" cannot be taken into account as a mitigating factor in sentencing.[579] The Trial Chamber said that:

> ... validating the defence of Necessity in International Criminal Law would create a justification for what offenders may term and plead as a 'just cause' or a 'just war' even though serious violations of International Humanitarian Law would have been committed. This, we observe, would negate the resolve and determination of the International Community to combat these crimes which have the common characteristics of being heinous, gruesome or degrading of innocent victims or of the civilian population that it intends to protect.[580]

9.33 The Prosecution submits that this is correct.

9.34 However, in contradiction to this finding, the Trial Chamber took into account, as mitigating factors, that "the CDF/Kamajors was a fighting force that was mobilised and was implicated in the conflict in Sierra Leone to support a legitimate cause which ... was to restore the democratically elected Government of President Kabbah",[581] that the Kamajors "were comrades in arms with the regular Sierra Leone Armed Forces as early as from the outbreak of the rebel war",[582] that the crimes were committed "in defending a cause that is palpably just and defendable",[583] that "CDF/Kamajor fighting forces of the Accused Persons, backed and legitimised by the Internationally deployed force, the ECOMOG, defeated and prevailed over the rebellion of the AFRC that ousted the legitimate Government",[584] and that this "contributed immensely to re-establishing the rule

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[579] **Sentencing Judgement**, paras. 69-81. At para. 74 of the Sentencing Judgement, the Trial Chamber said that "necessity" "cannot be sustained as a defence in this case and that by a parity of reasoning, cannot be considered either for purposes of mitigating the sentences because the Chamber opines that it either stands as a defence, or fails on all other grounds or circumstances".

[580] **Sentencing Judgement**, para. 79.

[581] *Ibid.*, para. 83.

[582] *Ibid.*, para. 84.

[583] *Ibid.*, para. 86.

[584] *Ibid.*, para. 87.

of law in this Country where criminality, anarchy and lawlessness ... had become the order of the day".[585]

9.35 The effect of this section of the Sentencing Judgement is to hold that it is a mitigating factor in sentencing that the convicted person was fighting on the "right" side in the conflict. The Prosecution submits that this holding is inconsistent with the most fundamental tenets of international humanitarian law, and inconsistent with the Trial Chamber's conclusion, based on the same fundamental tenets, that "necessity", and the alleged principle of "Salus Civis Suprema Lex Est", are neither defences nor matters to be taken into account in mitigation.

9.36 Under international law, immediately upon the outbreak of hostilities in any armed conflict, rules of international humanitarian law automatically spring into operation in full scope—with equal force to both sides of the conflict, regardless of who commenced the conflict and why they fight.[586] In paragraphs 2.51 and 2.52 above, reference has been made to the fundamental distinction between *ius ad bellum* and *jus in bello*, and the principle that international humanitarian law is intended to protect war victims and their fundamental rights, no matter to which party they belong to. This principle of parity of burden is reaffirmed in Additional Protocol I to the Geneva Conventions in the following terms:

> Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in *all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts* ...[587]

9.37 This principle applies also in non-international armed conflicts.[588] Article 13 of Additional Protocol II provides:

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585 **Sentencing Judgement**., para. 87.

586 See C Greenwood, "**Historical Development and Legal Basis**" in D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995), pp 1, 7-8.

587 **Protocol Additional to the Geneva Conventions** of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, preamble (emphasis added).

588 See ***Čelebići* Appeal Judgement**, 20 February 2001, para 172. See also ***Tadić* Jurisdictional Appeal Decision**, paras 96—98.

> The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, *the following rules shall be observed in all circumstances.*
>
> 2. *The civilian population as such, as well as individual civilians, shall not be the object of attack.* Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
>
> 3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities. [Emphasis added.]

9.38 As the International Law Commission has observed:

> The requirement of humane treatment based on the principle of respect for the human personality extends to internal armed conflicts by virtue of common article 3 of the Geneva Conventions of 1949 as well as Additional Protocol II thereto of 1977. According to the commentary to the first Geneva Convention of 1949, this common provision "makes it absolutely clear that the object of the Convention is a purely humanitarian one ... and merely ensures respect for the few essential rules of humanity which all civilized nations consider as *valid everywhere and under all circumstances and as being above and outside war itself.*[589]

9.39 The dictate of international humanitarian law is therefore simply stated as follows: regardless of the reasons for war or the justness of the cause of each side to the conflict, the rules of international humanitarian law must be respected by all sides to the conflict. This dictate is also reflected, for instance, in the fact that in international criminal law, there is no defence of "*tu quoque*": even if one side to the conflict engages in serious violations of international criminal law, this does not justify the other side in committing similar crimes in response.[590] To accept a defence, or mitigation of culpability, on the ground that the perpetrator of a crime

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589 United Nations, **Report of the International Law Commission on the work of its forty-seventh session, 2 May—21 July 1995**, Official Records of the General Assembly, Fiftieth session, Supplement No 10, Doc No A/50/10, p 72 in *Yearbook of the International Law Commission* (1995) vol II(2) (emphasis added).

590 ***Limaj* Trial Judgement**, para. 193; ***Kupreškić* Evidence Decision,** (noting that international humanitarian law "does not lay down synallagmatic obligations, i.e., obligations based on reciprocity, but obligations *erga omnes* (or, in the case of treaty obligations, obligations *erga omnes contractantes*) which are designed to safeguard fundamental human values and therefore must be complied with by each party regardless of the conduct of the other party or parties"); ***Čelebići* Rule 98 Decision**, para. 17.

was fighting for the "just" side in an armed conflict "would almost certainly lead to a total disregard for humanitarian law".[591]

9.40 The Accused in this case were not charged with, or convicted of, having committed any crime merely by virtue of being part of the CDF, or merely by virtue of having fought on behalf of the Kabbah Government. They were convicted of specific crimes for which they, personally, were found to be individually responsible. Crimes under international law cannot be mitigated by a belief that the accused felt their cause was just. Perpetrators of very serious violations of international humanitarian law may feel that their cause is just. In various conflicts that have occurred over time in different countries, persons fighting on behalf of a government against a rebel movement may have felt that their cause was just on the ground that they were seeking to uphold the established constitutional order, while those opposed to the government may have felt that their cause was just because they were fighting to topple a corrupt or oppressive government which did not protect and serve its population. International humanitarian law as a matter of fundamental principle does not enquire into or consider the justness or otherwise of each side's cause. Both sides in the conflict are equally subject to the dictates of international humanitarian law, no matter how just their cause, and the justness of a cause can be neither a defence nor a mitigating factor.

9.41 The Prosecution submits that the Trial Chamber therefore erred in law and in the exercising of its sentencing discretion, in finding this to be a mitigating factor in this case.

I. Seventh error of the Trial Chamber: Treating the motive of "civic duty" as a mitigating factor

9.42 The Trial Chamber said, at paragraph 94 of the Sentencing Judgement, that "there is nothing in the evidence which demonstrates that either Fofana or Kondewa

[591] See C Greenwood, **'Historical Development and Legal Basis'** in D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995), p. 8.

joined the conflict in Sierra Leone for selfish reasons" and that "they acted from a sense of civic duty rather than for personal aggrandisement or gain".

9.43 The Prosecution submits that this finding of the Trial Chamber is based on the consideration that Fofana and Kondewa were fighting on the "right" side of the conflict,[592] and that the Trial Chamber erred in law, and in the exercise of its sentencing discretion, in taking this into account as a mitigating factor, for the same reasons as those given in Section H above.

9.44 The Prosecution submits that most perpetrators of crimes under international law, regardless of which side they are fighting on, act in the belief that their cause is the just cause, and that they are making personal sacrifices in the interests of fighting for that cause. If international criminal law cannot make judgements about which was the "right" side or the "wrong" side in an armed conflict, this cannot be regarded as a mitigating factor in sentencing.

9.45 In cases where an accused acts for base personal motives in committing a crime (such as to satisfy sadistic or sexual urges, or for personal gain or profit), this may be an ***aggravating*** factor in sentencing[593]. However, the absence of such base personal motives cannot be regarded as a ***mitigating*** factor[594]. The Prosecution submits that the Trial Chamber erred in law, and erred in the exercise of its sentencing discretion, as treating this as a mitigating factor.

J. Eighth error of the Trial Chamber: Treating the purposes of reconciliation as a mitigating factor

9.46 At paragraph 95 of the Sentencing Judgement, the Trial Chamber said:

> It is our view that a manifestly repressive sentence, rather than providing the deterrent objective which it is meant to achieve, will be counterproductive to the Sierra Leonean society in that it will neither

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592 It is submitted that this is apparent from the fact that paragraph 94 of the Sentencing Judgement is in the same section of the Sentencing Judgement (Section 3.6) as the findings that form the subject of Section H of this Prosecution Ground of Appeal.

593 ***Simba* Appeal Judgement** para. 320 (zeal or sadism may be an aggravating factor).

594 Compare ***Simba* Appeal Judgement**, para 318. See also at paras. 327-330, in which the Appeals Chamber found that the Trial Chamber had not, as alleged by the Prosecution, erred in taking into account as a mitigating factor the possibility that the Appellant acted out of patriotism and government allegiance rather than extremism or ethnic hatred. The Appeals Chamber found that the Trial Chamber had not in fact taken this into account as a mitigating factor, without elaborating on whether it would have erred if it had taken it into account.

> be consonant with nor will it be in the overall interests and ultimate aims and objectives of justice, peace, and reconciliation that this Court is mandated by UN Security Council Resolution 1315, to achieve.[595]

9.47 The preamble of United Nations Security Council Resolution 1315 (2000), which led to the establishment of the Special Court, 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, if anything, undermine reconciliation.

9.48 The Prosecution submits that the Special Court's purpose of providing "a credible system of justice and accountability" with a view to contributing "to the process of national reconciliation and to the restoration and maintenance of peace" cannot be achieved if the sentences imposed by the Special Court are not consistent with what the community would accept as a punishment fitting the crimes in question.

9.49 As the ICTY Appeals Chamber has said:

> ... while national reconciliation and the restoration and maintenance of peace are important goals of sentencing, they are not the only goals". As the Trial Chamber rightly stressed, the purposes of punishment are clearly set out in the jurisprudence of the International Tribunal. In particular, the Appeals Chamber recalls the importance of the principle of retribution in the International Tribunal's sentencing process. The Appeals Chamber concurs with the Trial Chamber that the principle of retribution imposed on a convicted person "amounts to an expression of condemnation by the international community at the horrific nature of the crimes committed, and must therefore be proportionate to his specific conduct". The Appeals Chamber further recalls that, as the Trial Chamber observed, principles of deterrence are also relevant to sentencing considerations.[596]

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[595] Footnote omitted.

[596] ***Bralo* Appeal Judgement**, para. 82.

9.50 United Nations Security Council Resolution 955 (1994), which established the ICTR, similarly stated that the establishment of the ICTR would "contribute to the process of national reconciliation and to the restoration and maintenance of peace".[597] However, it also stated the Security Council's determination "to put an end to such crimes and take effective measures to bring to justice the persons responsible for them",[598] and affirmed the Security Council's belief that the establishment of the ICTR "will contribute to ensuring that such violations are halted and effectively redressed".

9.51 Other case law of the international tribunals indicates that to the extent to which considerations of reconciliation and restoration of peace may be relevant to sentencing, these objectives are to be served by imposing sentences which "dissuade for good those who will be tempted in the future to perpetrate such atrocities by showing them that the international community is no longer willing to tolerate serious violations of international humanitarian law and human rights", and that therefore the most important factors in sentencing are deterrence and retribution.[599] A central purpose of sentencing for serious violations of international humanitarian law is the need to "[express] the outrage of the international community at these crimes",[600] which requires that "a sentence ... should make plain the condemnation of the international community of the

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597 **United Nations Security Council Resolution 955 (1994)**, preambular paragraph 7.

598 *Ibid.*, preambular paragraph 6.

599 See, for instance, ***Furundžija* Trial Judgement**, para. 288: "It is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity. It is not only right that *punitur quia peccatur* (the individual must be punished because he broke the law) but also *punitur ne peccatur* (he must be punished so that he and others will no longer break the law). The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence". ***Kayishema* Trial Judgement**, paras. 1-2: "In determining the sentences, this Chamber is mindful that the Security Council, pursuant to Article 39 and Chapter VII of the United Nations Charter, established the Tribunal to ensure the effective redress of violations of international humanitarian law in Rwanda in 1994. The objective was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and promote national reconciliation and the restoration of peace. ... This Chamber must impose sentences on convicted persons for retribution, deterrence, rehabilitation, and to protect society. As to deterrence, this Chamber seeks to dissuade for good those who will be tempted in the future to perpetrate such atrocities by showing them that the international community is no longer willing to tolerate serious violations of international humanitarian law and human rights." (Footnotes omitted.) See also ***Tadić* 11 November 1999 Sentencing Judgement**, paras. 7-9; ***Serushago* Sentence**, para. 19; ***Jelisić* Trial Judgement**, para. 116, 133.

600 ***Aleksovski* Appeal Judgement**, para 185.

behaviour in question and show "that the international community was not ready to tolerate serious violations of international humanitarian law and human rights".[601] Considerations of reconciliation and the restoration and maintenance of peace are reflected in the requirement that "The punishment must ... reflect both the calls for justice from the persons who have—directly or indirectly—been victims of the crimes, as well as respond to the call from the international community as a whole to end impunity for massive human rights violations and crimes committed during armed conflicts".[602]

9.52 The Prosecution submits that to the extent to which reconciliation is a relevant purpose of sentencing, this is already reflected in the established case law on the law and principles to be applied by international criminal courts and tribunals when sentencing convicted persons. The Prosecution submits that in suggesting that the sentence that would otherwise be imposed in accordance with that law and those principles should be reduced, in the interests of reconciliation, the Trial Chamber erred in law, and/or erred in the exercise of its sentencing discretion.

K. Ninth error of the Trial Chamber: Deciding that all sentences would be concurrent without adequate consideration

9.53 While recognizing that it had the discretion to impose a single, global sentence on an accused convicted of more than one crime, the Trial Chamber in this case decided to impose separate sentences in respect of each of the Counts for which each of the Accused was convicted.[603] The Prosecution acknowledges that the Trial Chamber has this discretion.

9.54 Where the Trial Chamber imposes separate sentences for each of the Counts on which an accused has been convicted, the Trial Chamber is required to indicate whether multiple sentences shall be served consecutively or concurrently.[604] The question whether sentences are to be served consecutively or concurrently is thus

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601 ***Aleksovski* Appeal Judgement,** para 185.

602 ***Blagojević and Jokić* Trial Judgement**, para 814. See also ***Nikolić* Sentencing Judgement**, para 82; and ***Obrenović* Sentencing Judgement**, 10 December 2003, para 45.

603 **Sentencing Judgement**, para. 97 and Disposition.

604 Rule 101(C) of the Rules.

a matter within the discretion of the Trial Chamber. A proper exercise of that discretion must require the Trial Chamber to have appropriate regard to all relevant considerations. Whether the Trial Chamber imposes a single, global sentence, or multiple consecutive or concurrent sentences, the governing criterion is that the final or aggregate sentence should reflect the totality of the culpable conduct (**the "totality" principle**), 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. This can be achieved through either the imposition of one sentence in respect of all offences, or several sentences ordered to run concurrently, consecutively or both.[605]

9.55 As a general principle, a person who is convicted of many crimes should, in practice, serve a longer sentence than a person in like circumstances who commits only one of those crimes.[606] It is submitted that if a single crime merited a sentence of say, 20 years' imprisonment, then a person who commits ten such crimes should not be sentenced to ten terms of 20 years' imprisonment to be served concurrently, as in practice this would mean that the person would serve the same sentence that he or she would have served if only one of those crimes had been committed. On the other hand, to order that the ten sentences be served consecutively, so that the convicted person would be sentenced to 200 years' imprisonment, might well be considered to be excessive.[607] It is submitted that the reason why international criminal tribunals now tend to impose single, global sentences in cases where an accused is convicted of multiple crimes is that this gives the Trial Chamber complete flexibility in determining an actual sentence which it, in its discretion, considers appropriate to the overall criminal culpability of the convicted person.

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605 ***Čelebići* Appeal Judgement**, paras 429-430.

606 *Ibid*, para. 770.

607 Compare, for instance, ***Furundžija* Trial Judgement**, para. 293, referring to article 48 of the Penal Code applied in Bosnia and Herzegovina, which provided that if the accused has committed several criminal offences by one act or several offences by several acts, the court shall first assess the punishment for each criminal offence and then proceed with the determination of the principal punishment. In the case of imprisonment, the court shall impose one punishment consisting of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments.

9.56 However, even where Trial Chambers have imposed separate sentences in respect of each crime, they have still sought to ensure that the overall sentence is consistent with the totality principle. For instance, in the *Imanishimwe* case, the accused, in addition to being sentenced to two sentences of 15 years imprisonment for genocide and extermination, was sentenced to 10 years imprisonment for murder as a crime against humanity, 3 years for imprisonment as a crime against humanity, 10 years for torture as a crime against humanity, and 12 years for cruel treatment as a violation of Common Article 3.[608] The sentences for murder, imprisonment, torture and cruel treatment were ordered to be served concurrently, but consecutively with the two 15 year sentences for genocide and extermination, resulting in a total sentence of 27 years imprisonment. Thus, the overall sentence was longer than the longest of any of the individual sentences, but shorter than if all sentences had been ordered to be served consecutively.

9.57 Similarly, in the *Semanza* case, the accused was sentenced to the following terms of imprisonment for counts of crimes against humanity: 7 years for rape, 10 years for torture, and two sentences of 10 years and 8 years for two counts of murder.[609] These sentences were ordered to be served concurrently, but consecutively with two 15 year sentences for genocide and extermination, resulting in a total sentence of 25 years imprisonment. On appeal, the conviction for genocide was increased to 25 years, making the total overall sentence 35 years. Again, in the *Semanza* case, the overall sentence to be served by the convicted person was longer that the longest of the individual sentences imposed, but shorter than if all sentences had been ordered to be served consecutively.[610]

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608 ***Ntagerura* Judgement and Sentence**, paras 822-827. The sentence in this case was reduced on appeal because the Appeals Chamber reversed some of the convictions entered by the Trial Chamber. However, the Appeals Chamber did not disturb the Trial Chamber's analysis of the way it imposed the sentence for the convictions as they stood at the original sentencing stage.

609 ***Semanza* Trial Judgement**, paras 586-288.

610 See also the *Akayesu* case, in which the accused was sentenced to a term of life imprisonment for convictions of genocide and extermination, to three terms of 15 years for three counts of murder, 10 years for torture, 15 years for rape and 10 years for other inhumane acts. It is noted that these sentences were ordered to be served concurrently, leading to a single sentence of life imprisonment, but in this case it made no difference in practice, given that the overall sentence was life imprisonment. ***Akayesu* Sentence**, p. 8. The Appeals Chamber found no errors in the Trial Chamber's analysis: ***Akayesu* Appeal Judgement**, para. 417.

9.58 In the present case, the Trial Chamber deliberately chose to impose separate sentences for each of the crimes for which Fofana and Kondewa were convicted because the Trial Chamber considered "that this better reflects the culpability of the Accused for each offence for which they were convicted, given that distinct crimes were committed by each Accused in discrete geographical areas".[611] Notwithstanding this express decision of the Trial Chamber, the Trial Chamber then simply ordered all of the sentences to be served concurrently, leading to the result that Fofana received the same overall sentence that he would have received if he had been convicted on Count 4 only, and had not also been convicted on Counts 5 and 7. In other words, the sentence simply fails to reflect Fofana's additional criminal culpability on Counts 5 and 7. Similarly, Kondewa received the same overall sentence that he would have received if he had been convicted on Count 2 only, and had not also been convicted on Counts 4, 5, 7 and 8. In other words, the sentence simply fails to reflect Kondewa's additional criminal culpability on Counts 4, 5, 7 and 8.

9.59 In certain other cases, international criminal tribunals have imposed separate sentences in respect of different counts and ordered them all to be served concurrently,[612] although in at least one case this decision was overtaken by events following appeal.[613]

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611 **Trial Chamber's Judgement**, para. 97.

612 For example, ***Furundžija* Trial Judgement**, Disposition (but see *ibid*, paras. 292-296, expressly giving reasons for this). This sentence was affirmed on appeal: ***Furundžija* Appeal Judgement**, Disposition. In the ***Tadić* 14 July 1997 Sentencing Judgement,** para. 75, the Trial Chamber imposed separate sentences and simply ordered each of the sentences to be served concurrently. Following appeal proceedings, the matter of sentencing was referred back to the Trial Chamber, which again imposed separate sentences and ordered that all sentences be served concurrently: ***Tadić* 11 November 1999 Sentencing Judgement**, para. 32(G). In an appeal against this second sentencing judgement, the Appeals Chamber again ordered the separate sentences to be served concurrently: Tadic 26 January 2000 Judgement in Sentencing Appeals, para. 76(6).

613 In the ***Čelebići* Trial Judgement**, para. 1286, all sentences were ordered to be served concurrently. In respect of the three (out of four) accused in that case who were convicted, the matter of sentencing was referred back to the Trial Chamber by the Appeals Chamber following successful Prosecution and Defence appeals (***Čelebići* Appeal Judgement**, Disposition). In the subsequent sentencing proceedings before the Trial Chamber, the Trial Chamber imposed a ***single and global sentence*** in the case of each accused (***Čelebići* 9 October 2001 Sentencing Judgement**, para. 43). Subsequent defence appeals against the new sentences imposed by the Trial Chamber was dismissed (***Čelebići* 8 April 2003 Judgement on Sentence Appeal**, para. 61).

9.60 In the *Čelebići* Appeal Judgement, the Trial Chamber had imposed on one of the Accused, Zdravko Mucić, separate sentences of 7 years for each of the Counts on which he had been convicted, and then ordered all of these sentences to be served concurrently. The Prosecution argued on appeal that Trial Chamber erred in failing to exercise properly its discretion to determine whether the multiple sentences imposed on Mucić should be served consecutively or concurrently.[614] The Appeals Chamber decided that it did not need to consider this argument as it found that the sentence imposed by the Trial Chamber was in any event inadequate and referred the matter of sentencing back to the Trial Chamber.[615] However, the Appeals Chamber did affirm the legal principle that whether separate sentences or a single global sentence are imposed, the Trial Chamber's sentencing discretion "must be exercised by reference to the fundamental consideration ... that the sentence to be served by an accused must reflect the totality of the accused's criminal conduct" and affirmed the principle that "a person who is convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes".[616]

9.61 In the present case, the Trial Chamber, in the Sentencing Judgement, simply ordered all sentences to be served concurrently, without giving any reasons for this decision, and without making any reference anywhere in the Sentencing Judgement to the principle that the overall sentence to be served by an accused must reflect the totality of the accused's criminal conduct. The Prosecution submits that the Trial Chamber thereby erred in law, and/or erred in the exercise of its sentencing discretion, in ordering that all sentences be served concurrently, without giving any proper consideration to whether the sentences should be ordered to be served concurrently, consecutively, or a combination of both, and without giving any consideration to the "totality" principle.

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614 ***Čelebići* Appeal Judgement**, para. 772.
615 *Ibid.*, paras. 772, 851, and see second to last footnote above.
616 *Ibid.*, para. 771; and see also paras. 429-430.

L. Tenth (and overall) error of the Trial Chamber: Manifest inadequacy of the sentence

9.62 The Prosecution submits that the primary, and overall, error in the Sentencing Judgement is that it imposes sentences which are, in the circumstances, so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[617]

9.63 The gravity of the crimes of which the Accused were convicted is dealt with in the Sentencing Judgement in paragraphs 45-51 (in the case of Fofana) and paragraphs 52-58 (in the case of Kondewa). It is unnecessary to repeat all of what is said in those paragraphs.

9.64 In the case of **Fofana**, the Trial Chamber found that the crimes of his subordinates of which he was convicted under Article 6(3) "were of a very serious nature, and were committed against innocent civilians",[618] and referred to the brutality of the offences committed by Fofana's subordinates, including mutilations and killings.[619] The Trial Chamber recalled for instance "the gruesome murder of two women in Koribondo who had sticks inserted and forced into their genitals until they came out of their mouths".[620] The Trial Chamber further noted "that many of the offences for which Fofana was convicted under Article 6(1) were committed on a large scale and with a significant degree of brutality",[621] including large-scale killings.[622] The Trial Chamber further found that the crimes were particularly serious as they were committed against unarmed and innocent civilians,[623] including young children and women,[624] and that the crimes had a significant physical and psychological impact on the victims of such crimes, on the relatives of the victims, and on those in the broader community.[625]

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617 See para. 11.6 above.
618 **Sentencing Judgement**, para. 46.
619 *Ibid.*, para. 46.
620 *Ibid.*, para. 46.
621 *Ibid.*, para. 47.
622 *Ibid.*, para. 47.
623 *Ibid.*, para. 47.
624 *Ibid.*, para. 48.
625 *Ibid.*, para. 49.

9.65 The Trial Chamber took into consideration that Fofana's convictions under Article 6(1) of the Statute were for aiding and abetting, and that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation.[626] However, the Trial Chamber took into account as an aggravating factor in relation to all convictions that "given his role as a former Chiefdom Speaker, a community elder and the CDF National Director of War, Fofana breached a position of trust in committing the offences".[627] In relation specifically to his convictions under Article 6(3), the Trial Chamber found that Fofana's responsibility is ***greater than that of the actual perpetrators of the crimes***, in that "Fofana's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to believe that they could commit further crimes with impunity".[628]

9.66 In the case of **Kondewa**, the Trial Chamber similarly found that the crimes committed by his subordinates were of a serious nature,[629] and that he was convicted under Article 6(1) for the same crimes as Fofana in the Tongo area.[630] The Trial Chamber again found that the victims of these crimes included women and children, and that the crimes had a significant physical and psychological impact on the victims of such crimes, on the relatives of the victims, and on those in the broader community.[631] The Trial Chamber further noted that while Kondewa was held liable on the basis of aiding and abetting under Article 6(1) and as a superior under Article 6(3), he was also held liable for the direct perpetration of some acts, including the shooting of a town commander and for committing the offence of the enlistment of child soldiers.[632] For the same reasons as in the case of Fofana, the Trial Chamber found, in relation to Kondewa's liability under Article 6(3), that the gravity of the offence committed

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626 **Sentencing Judgement**., para. 50.
627 *Ibid.*, para. 59.
628 *Ibid.*, para. 51.
629 *Ibid.*, para. 53.
630 *Ibid.*, para. 53.
631 *Ibid.*, paras. 54-56.
632 *Ibid.*, para. 57.

by Kondewa is ***greater than that of the actual perpetrators of the crimes***.[633] The Trial Chamber further found in Kondewa's case that it was an aggravating factor that he abused a position of trust, given his position of seniority in the CDF and his unique and prominent position in the community.[634]

9.67 The Prosecution submits that no reasonable trier of fact, properly applying the relevant sentencing principles, could have imposed sentences of six and eight years respectively, for crimes of this gravity.

9.68 As the Trial Chamber noted, Kondewa personally killed a town commander in Talia/Base Zero.[635] Even in national law, murder is the most grave of crimes, warranting the highest sentence. The commission of murder as a war crime cannot, on any view, be appropriately punished by a sentence of 8 years, in the absence of the most exceptionally extreme mitigating factors.[636]

9.69 The Trial Chamber further found, in relation to the crimes for which both Accused were responsible under Article 6(3), that the responsibility of both Accused was ***greater than that of the actual perpetrators of the crimes***. Again, the Prosecution submits that it is inconceivable that the direct perpetrators of these crimes on such a scale and of such gravity could be appropriately punished by sentences of six or eight years. If the responsibility of both Accused was even greater than that of the direct perpetrators, it is again inconceivable that they could be appropriately punished by sentences of six or eight years, in the absence of the most exceptionally extreme mitigating factors.

9.70 In relation to the crimes for which both Accused were responsible under Article 6(1), the Prosecution accepts that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation. However, the Prosecution submits that no reasonable trier of

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633 **Sentencing Judgement**., para. 58.

634 *Ibid.*, paras. 61-62.

635 **Trial Chamber's Judgement**, para. 623; **Sentencing Judgement**, para. 57.

636 Compare the ***Erdemović*** **Sentencing Judgement**, in which the Accused was sentenced to 5 years imprisonment for multiple killings in the Srebrenica massacre, but where the Accused had pleaded guilty, and was a very young and junior combatant who was acting under duress, had genuinely expressed remorse, had provided excellent cooperation to the Office of the Prosecutor, and had only committed the crimes under duress, in that there was a real risk that the accused would himself have been killed had he disobeyed the order to commit the killings.

fact, properly applying the relevant sentencing principles, could have concluded that responsibility for aiding and abetting crimes of this gravity could be appropriately punished by sentences of six and eight years respectively, bearing in mind that both Accused also bore additional responsibility under Article 6(3), and that Kondewa was also liable for the direct perpetration of some acts.[637]

9.71 The Trial Chamber said that the mitigating factors that it found "significantly impacted to influence the reduction of the sentence to be imposed for each count".[638] The Trial Chamber thereby acknowledged that the sentence would, but for those mitigating factors, have been much higher. For the reasons given in Sections C to K above, the Prosecution submits that the Trial Chamber was not entitled to treat as mitigating factors the matters that it did so consider. Alternatively, to the extent that the Trial Chamber was entitled to treat any of those matters as mitigating factors, the Prosecution submits that no reasonable trier of fact, properly applying the relevant sentencing principles, could have given such matters such weight as to reduce sentences of such gravity to such low terms of six and eight years.

9.72 The Prosecution submits that overall, in the words of the ICTY Appeals Chamber in the *Galić* Appeal Judgement, the sentences imposed in this case were simply "taken from the wrong shelf", and fell outside the range of sentences available to the Trial Chamber in the circumstances of this case.[639]

M. Conclusion

9.73 For the reasons given above, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's Sentencing Judgement, and to revise the Sentencing Judgement by imposing on Fofana and Kondewa higher sentences that would be appropriate and just in all of the circumstances of their individual cases. The

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637 The Prosecution notes that in the *Blagojević and Jokić* case, Dragan Jokić was sentenced to nine years' imprisonment for aiding and abetting the massacre of civilians at Srebrenica. However, his acts of aiding and abetting consisted only of ordering earth-moving equipment of the engineering brigade of an army unit to be sent to several massacre sites, where it was subsequently used for the digging of mass graves. He was found to have no criminal responsibility under any other modes of liability. See ***Blagojević and Jokić* Trial Judgement**; ***Blagojević and Jokić* Appeal Judgement**.

638 **Sentencing Judgement**, para. 94.

639 ***Galić* Appeal Judgement**, para. 455.

Prosecution submits that in the case of each of the Accused, an appropriate sentence would be 30 years' imprisonment.

Filed in Freetown,
11 December 2007
For the Prosecution,

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Deputy Prosecutor

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Senior Appeals Counsel

APPENDIX A

SCSL-2004-14-177: Prosecution Appeal against Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal

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SCSL-2004-14-T
C9116 - 9140

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Emmanuel Ayoola, Presiding
Judge A. Raja N. Fernando
Judge George Gelaga King
Judge Geoffrey Robertson, QC
Judge Renate Winter

Registrar: Mr Robin Vincent

Date filed: 30 August 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

CASE NO. SCSL – 2004 – 14 – T

PROSECUTION APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 2 AUGUST 2004 REFUSING LEAVE TO FILE AN INTERLOCUTORY APPEAL

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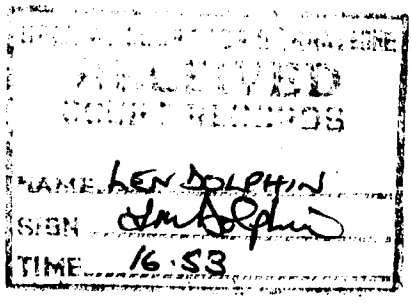

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA

CASE NO. SCSL – 2004 – 14 – T

PROSECUTION APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 2 AUGUST 2004 REFUSING LEAVE TO FILE AN INTERLOCUTORY APPEAL

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1. The Prosecution applies herewith to the Appeals Chamber to appeal against the Trial Chamber's decision of 2 August 2003 (the **"Impugned Decision"**),[1] in which the Trial Chamber refused a Prosecution request under Rule 73(B) for leave to file an interlocutory appeal.

I. BACKGROUND

2. On 9 February 2004, the Prosecution filed a request before the Trial Chamber to amend the Indictment in these proceedings (the **"Prosecution Amendment Request"**).[2] In this request, the Prosecution sought to include additional charges based on acts of sexual violence committed against women, to extend the timeframes and locations of certain existing charges, and to make certain consequential amendments to the Indictment. The amendments were requested as the result of additional evidence uncovered by the Prosecution in the course of its ongoing investigations.

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[1] *Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, 2 August 2004, Registry Pages (**"RP"**) 8862-8867.

[2] "Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", filed by the Prosecution on 9 February 2004, RP 102-218.

3. The Prosecution Amendment Request was refused by the Trial Chamber, in a decision dated 20 May 2004 (the "**Trial Chamber Amendment Decision**").[3] That decision was given by majority, with Judge Boutet dissenting.

4. On 4 June 2004, the Prosecution applied to the Trial Chamber pursuant to Rule 73(B) of the Rules of Procedure and Evidence (the "**Rules**") for leave to file an interlocutory appeal against the Trial Chamber Amendment Decision (the "**Prosecution Leave to Appeal Request**").[4] The Accused filed a response to that request, to which the Prosecution filed a reply (the "**Prosecution Leave to Appeal Reply**").[5]

5. The Prosecution Leave to Appeal Request was refused by the Trial Chamber in a decision of 2 August 2004 (the "**Impugned Decision**" or "**Majority Opinion**").[6] That decision was also given by majority, with Judge Boutet dissenting.[7] The Prosecution now applies herewith to the Appeals Chamber to appeal against the Impugned Decision.

II. ARGUMENT

(1) The jurisdiction of the Appeals Chamber to entertain this appeal

6. There is no provision in the Rules which expressly permits a party to appeal to the Appeals Chamber against a decision of the Trial Chamber under Rule 73(B) refusing leave to file an interlocutory appeal. However, it is clear from the case law of the ICTY and ICTR that the Appeals Chamber has the power to hear appeals in certain circumstances, even where no appeal is expressly provided for in the Statute or Rules. For instance, in the *Tadic* case, a defence counsel had been found guilty of contempt of the ICTY by the Appeals Chamber ruling in the first instance. Although the Rules at that time made no provision for an appeal against such a first-instance decision of the Appeals Chamber, an appeal was in fact entertained by a differently constituted Appeals Chamber.[8] In the *Brdanin and Talic* case, a

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[3] *Decision on Prosecution Request for Leave to Amend the Indictment*, dated 20 May 2004, RP 7001-7040.

[4] "Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", 4 June 2004, RP 7234-7250.

[5] "Prosecution Reply to the Defence Joint Response to Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on Request for Leave to Amend the Indictment", filed by the Prosecution on 18 June 2004, RP 7479-7533.

[6] See footnote 1 above.

[7] *Dissenting Opinion of Judge Pierre Boutet on Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, dated 5 August 2004, RP 8893-8903, ("**Judge Boutet's Dissenting Opinion**").

[8] *Prosecutor v. Tadic, Appeal Judgement on Allegations of Contempt by Prior Counsel*, Case No. IT-94-1-A-AR77, Appeals Chamber, 27 February 2001. Only one of the five members of the Appeals Chamber in this decision (Judge Wald) was of the view that no appeal could be heard in the circumstances in the absence of any authorisation in the Statute or Rules. (Subsequent to this decision, the Rules of the ICTY were amended to provide expressly that where a person is found to be in contempt of the Tribunal by the Appeals Chamber, the person concerned can appeal to a differently constituted Appeals Chamber: see present Rule 77(K) of the ICTY Rules.)

Trial Chamber of the ICTY rejected a motion filed by a witness who sought to have a subpoena set aside on the ground that he enjoyed a testimonial privilege as a journalist. The Appeals Chamber permitted the journalist to appeal against that decision, and ultimately allowed the appeal, notwithstanding the lack of any legislative provision for appeals by witnesses against orders addressed to them.[9] In the *Milosevic* case, the Appeals Chamber entertained an interlocutory appeal brought by *amici curiae*, even though it acknowledged that "Not being a party to the proceedings, the *amici* are not entitled to use Rule 73 [of the Rules of the ICTY] to bring an interlocutory appeal."[10]

7. Indeed, the Appeals Chamber of the ICTY has gone even further. It has also expressly held that the Appeals Chamber has an inherent power to reconsider any of its own decisions, whether an interlocutory decision, or even a final judgement. This power can be exercised where the Appeals Chamber, in its discretion, is persuaded that the judgement or decision sought to be reconsidered has led to an injustice.[11] The Appeals Chamber of the ICTY has said that this power is an aspect of its inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by the Statute is not frustrated and that its basic judicial functions are safeguarded. This power of the Appeals Chamber to reconsider its own decisions has been held to be necessary to address the prospect of any injustice resulting from the fact that the ICTY has only one level of appeal which is not a *de novo* hearing.[12]

8. The Prosecution does not suggest that the Appeals Chamber has a general power to hear any appeal from any decision of a Trial Chamber at any time and in any circumstances, regardless of whether or not the Statute or Rules provide for it. Indeed, the Appeals Chamber of the ICTY and ICTR has on various occasions rejected appeals that had no basis in the Statute or Rules of those Tribunals.[13] However, the Prosecution submits that the case law of

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[9] *Prosecutor* v. *Brdanin and Talic, Decision on Interlocutory Appeal,* Case No. IT-99-36-AR73.9, Appeals Chamber, 11 December 2002.

[10] *Prosecutor v. Milosevic, Decision on the Interlocutory Appeal by the* Amici Curiae *Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case*, Case No. IT-02-54-AR73.6, Appeals Chamber, 20 January 2004, paras. 4-5.

[11] *Prosecutor v. Delalic et al. (Celebici case), Judgement on Sentence Appeal*, Case No. IT-96-21-A*bis*, Appeals Chamber, 8 April 2003, para. 49; and also the *Separate Opinion of Judge Shahabuddeen*, paras. 10-15 (but see the *Separate Opinion of Judges Meron and Pocar*, who considered that it was unnecessary to decide this question). In relation to the International Criminal Court ("**ICC**"), it has also been said that other remedies of "reconsideration" or "review" could be fashioned in the exercise of the Appeals Chamber's inherent jurisdiction: William A. Schabas, *An Introduction to the International Criminal Court* (2001), p.135.

[12] *Celebici Sentencing Appeal Judgement*, paras. 50-52.

[13] See *Dragan Opacic, Decision on Application for Leave to Appeal*, Case No. IT-95-7-Misc.1, Bench of the Appeals Chamber, 3 June 1997 (in which a Bench of the Appeals Chamber refused to grant leave to appeal to a witness); *Prosecutor* v. *Bagosora and 28 Others, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagosora and 28 Others,* Case No. ICTR 98-37-A, Appeals Chamber, 8 June 1998 (in which the Appeals Chamber refused to permit an appeal by the Prosecution against the refusal of a judge to confirm an indictment presented by the Prosecutor for confirmation).

the International Tribunals referred to above reflects a general principle that any decision (whether of the Trial Chamber or of the Appeals Chamber), that is erroneous and that has led to an injustice, and which is not capable of being remedied by any other means, must be amenable to correction by the Appeals Chamber. It would simply be inconsistent with the judicial nature of international criminal courts and tribunals for an injustice caused by a decision of the court or tribunal itself to be incapable of being remedied in any way. Where there is no other possibility of correcting such an injustice, the Appeals Chamber must have an inherent power to intervene.

9. The need for the Appeals Chamber to exercise this inherent power will arise only very rarely at an interlocutory stage. Normally, interlocutory decisions of a Trial Chamber are capable of effective remedy (if necessary) in a post-judgement appeal. In exceptional circumstances, if an interlocutory appeal is necessary to avoid irreparable prejudice, a Trial Chamber can grant leave to appeal under Rule 73(B). In cases where the Trial Chamber, in the valid exercise of its discretion, refuses to grant leave to appeal under Rule 73(B), there is unlikely to be any basis for the Appeals Chamber to exercise its inherent power: even if the applicant for leave to appeal disagrees with the Trial Chamber's decision to refuse leave to appeal, that decision cannot be said to have caused an injustice if it is a proper exercise of the Trial Chamber's judicial discretion.

10. However, in the present case, there are reasons why the Appeals Chamber should exercise its inherent power to hear an appeal against the Impugned Decision.

    (1) The Prosecution position is that the Impugned Decision erred in the interpretation and application of the test in Rule 73(B) for determining whether to grant leave to bring an interlocutory appeal. Thus, the denial of leave to appeal was not a proper exercise of the Trial Chamber's discretion under that provision.

    (2) The effect of the alleged errors in the Impugned Decision cannot be cured by a post-judgement appeal. The Prosecution Amendment Request seeks to have additional charges against the Accused tried as part of the present trial proceedings. If the Appeals Chamber were to decide in a post-judgement appeal that the Trial Chamber should have granted leave to appeal, and that the Prosecution should have been given leave to amend the Indictment, it would by that stage obviously be impossible to include the additional charges in the present trial proceedings, which by then will have been completed.

    (3) There is no other avenue available to the Prosecution in practice to deal with the adverse effects of the Impugned Decision. The reality is that if the Prosecution is denied the possibility of filing an interlocutory appeal, and thereby denied the possibility of amending the Indictment to deal with the additional charges in the

present trial proceedings, it is highly unlikely that the Accused will be tried at all in respect of the additional charges. Moreover, the judgement in the present case will not reflect the full alleged criminal culpability of the Accused. The prejudice to the Prosecution is thus irreparable.[14]

(4) The issues at stake (in particular, the issue whether it is consistent with the objectives of the Special Court to charge gender based crimes as if they were general violence offences, and the issue of whether it is consistent with the Accused's fair trial rights to amend the Indictment) are of particular importance.

(5) If the Impugned Decision contains the errors that the Prosecution alleges, it has thus caused an injustice. Justice requires not only a fair trial for the accused, but also for the Prosecution (which acts in the interests of the international community, including the victims of crimes).[15] For the Prosecution to be erroneously deprived of an interlocutory appeal causes injustice where its practical effect is to erroneously deprive the Prosecution of the possibility of bringing important charges against the Accused, despite the existence of evidence justifying these charges.

11. It is also highly desirable that the Appeals Chamber hear this appeal, in order to give guidance on the correct interpretation and application of Rule 73(B), which is an issue of general importance to the functioning of the Special Court. The discharge of the Special Court's mandate would be hindered if, at the end of a long and expensive trial, the verdict were overturned (possibly necessitating a whole new trial) as a result of an error by the Trial Chamber that might easily have been corrected by the Appeals Chamber at an interlocutory stage. Rule 73(B) promotes the effective functioning of the Special Court, not only by filtering out unnecessary interlocutory appeals, but also by ensuring that interlocutory appeals can be brought where there are proper reasons for so doing. In the existing case law of the Trial Chamber of the Special Court,[16] there is disagreement about the correct legal test to be applied under Rule 73(B) (given Judge Boutet's dissent in the Impugned Decision, in which he expressly considered that the Trial Chamber's statement of the law in an earlier

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[14] See, in this respect, Prosecution Leave to Appeal Request, paras. 7-9; Prosecution Leave to Appeal Reply, paras. 5-7; Judge Boutet's Dissenting Opinion, at paras. 19-20.

[15] As Judge Boutet's Dissenting Opinion states (at para. 18), "Victims ... have the right to have the crimes that are committed against them prosecuted with all due respect to the Rule of Law".

[16] The other decisions of the Trial Chamber on Rule 73(B) are (1) *Prosecutor v. Sesay et al., Decision on Prosecution Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder*, Case No. SCSL-2004-15-PT, Trial Chamber, 13 February 2004 (the "***Joinder Decision***"); (2) *Prosecutor v. Sesay et al., Decision on Prosecution Application for Leave to File an Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases*, Case No. SCSL-2004-15-PT, Trial Chamber, 1 June 2004 (the "***Common Evidence Decision***"); and (3) *Prosecutor v. Sesay et al., Decision on Application for Leave to Appeal—Gbao—Decision on Application to Withdraw Counsel*, Case No. SCSL-2004-15-T, Trial Chamber, 4 August 2004 (the "***Withdrawal of Counsel Decision***").

decision was wrong[17]). Furthermore, the decisions of the Trial Chamber on the application of Rule 73(B) do not seem to be entirely consistent.[18] Guidance cannot be found in the case law of the ICTY and ICTR, since the wording of the equivalent provisions in the Rules of the ICTY and ICTR is different. The need for an authoritative pronouncement by the Appeals Chamber on the interpretation and application of Rule 73(B) is therefore pressing.

(2) The errors in the Impugned Decision

12. Rule 73(B) confers a discretion on the Trial Chamber whether or not to grant leave to appeal. For the Appeals Chamber to intervene in the exercise of a discretion by a Trial Chamber, it must be established that 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."[19]

13. In the Impugned Decision, the Majority Opinion has misdirected itself as to the applicable principle and/or law in the exercise of its discretion under Rule 73(B).

14. First, in deciding whether to grant leave to file an interlocutory appeal, the Majority Opinion based its decision on its view of the merits of one of the main issues in the proposed appeal. This was the issue of whether the Prosecution had acted diligently in investigating the case and had been timely in making its request to amend the Indictment. The Prosecution Amendment Request had strenuously argued that the Prosecution had acted with due diligence and timeliness.[20] The Trial Chamber Amendment Decision disagreed, and cited a lack of diligence by the Prosecution as a principal reason for refusing the request to amend the Indictment.[21] A key issue in the proposed appeal was thus whether the Trial Chamber

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17 Judge Boutet's Dissenting Opinion, paras. 4-5.

18 See paragraphs 18 and 19, and footnote 26, below.

19 *Prosecutor v. Milosevic, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder*, Case No. IT-99-37-AR73, Appeals Chamber, 18 April 2002, para. 5 "***Milosevic Joinder Appeal Decision***"). See also *Prosecutor v. Milosevic, Decision on the Interlocutory Appeal by the* Amici Curiae *Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case*, Case No. IT-02-54-AR73.6, Appeals Chamber, 20 January 2004, para. 7; *Prosecutor v. Bizimungu, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment*, Case No. ICTR-99-50-AR50, Appeals Chamber, 12 February 2004, para. 11; *Prosecutor v. Karemera, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File Amended Indictment*, Case No. ICTR-98-44-AR73, Appeals Chamber, 19 December 2003, para. 9.

20 Prosecution Amendment Request, paras. 17-21; "Consolidated Reply to Defence Response to Prosecution Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", filed by the Prosecution on 24 February 2004, RP 405-416, paras. 21-31.

21 Trial Chamber Amendment Decision, especially paras. 54-58, 77-79.

Amendment Decision erred in finding that the Prosecution had not acted with diligence.[22] In determining whether to grant leave to appeal, the Majority Opinion held that the Prosecution's lack of diligence estopped the Prosecution from arguing that there was "irreparable prejudice" for the purposes of Rule 73(B). In making this finding, the Majority Opinion merely quotes (and thereby assumes the correctness of) various paragraphs of the Impugned Decision that the Prosecution seeks to challenge on appeal.[23] The Majority Opinion thereby effectively decides one of the main issues in the proposed appeal, and uses its decision on that issue as a reason for denying leave to appeal.

15. This is a manifest error in the application of Rule 73(B). An application for leave to appeal is only ever brought under Rule 73(B) in circumstances where the Trial Chamber has made an adverse ruling against the party making the application, and the fact that the Trial Chamber disagrees with the applicant on the merits of the decision sought to be appealed must therefore be irrelevant to whether leave to appeal should be granted. In a Rule 73(B) application, the Trial Chamber can only be concerned with whether the criteria of Rule 73(B) itself are satisfied, and not with the merits of the decision sought to be appealed.[24]

16. Secondly, the Majority Opinion erroneously proceeds from a preconception that Rule 73(B) is a "restrictive provision"[25] providing a "very limited" exception[26] that must be applied with "stringency,"[27] and that a "high threshold"[28] must be met to justify an interlocutory appeal. As noted in paragraph 11 above, Rule 73(B) serves two purposes: (1) to ensure that inappropriate interlocutory appeals are not brought; and (2) to ensure that appropriate interlocutory appeals can be brought. The Majority Opinion, like earlier decisions of the Trial Chamber, erroneously emphasises only the first of these two purposes, that is, the purpose of ensuring that "criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals."[29] The Prosecution agrees that under Rule 73(B), interlocutory appeals are intended to be the exception rather than the norm. However, in determining an application under Rule 73(B), the relevant inquiry is always whether it is appropriate to make an exception to the general rule, having regard to the criteria in Rule

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22 Prosecution Leave to Appeal Request, paras. 12-24.

23 Impugned Decision, para. 37.

24 This is clearly recognized in Judge Boutet's Dissenting Opinion, at paras. 2 and 25-26.

25 Impugned Decision, para. 23. See also *Joinder Decision*, para. 11; *Common Evidence Decision*, para. 21; *Withdrawal of Counsel Decision*, para. 37.

26 Impugned Decision, para. 23. See also *Joinder Decision*, para. 11, *Common Evidence Decision*, para. 21; *Withdrawal of Counsel Decision*, para. 37. The *Joinder Decision*, at para. 9, perhaps inconsistently used the expression "extremely limited exception".

27 Impugned Decision, para. 25.

28 Impugned Decision, para. 21. See also *Joinder Decision*, para. 10; *Common Evidence Decision*, para. 21; *Withdrawal of Counsel Decision*, para. 36.

29 Impugned Decision, para. 24. See also *Common Evidence Decision*, para. 21; *Withdrawal of Counsel Decision*, para. 38.

73(B) and the circumstances of the case. The expression "exceptional circumstances" means no more than circumstances that justify making an exception to the general rule.[30] Where there is an intention that an exception will be applied very stringently, other expressions are normally used such as "wholly exceptional circumstances"[31] or "very exceptional circumstances"[32] or "most exceptional circumstances."[33]

17. Thirdly, the Majority Opinion, like earlier decisions of the Trial Chamber, erroneously treats "exceptional circumstances" and "irreparable prejudice" as two distinct requirements of Rule 73(B), that must both be separately satisfied.[34] Thus, in the present case, the Majority Opinion considered that because "exceptional circumstances" had not been established, the Trial Chamber was not obliged judicially to consider the issue of "irreparable prejudice".[35] This approach is incorrect as a matter of law. It is submitted that the Trial Chamber is always required to look at all of the circumstances of the case as a whole, in order to determine whether the requirements of Rule 73(B) as a whole are met. As Judge Boutet's Dissenting Opinion indicates,[36] the existence of irreparable prejudice may of itself constitute exceptional circumstances. A Trial Chamber should not be able to reject an application under Rule 73(B) on the ground of lack of "exceptional circumstances," without even addressing its mind to the grave and irreparable prejudice that a party would suffer if the decision sought to be appealed was wrong and remained uncorrected.

18. The Majority Opinion also failed to give sufficient weight to relevant considerations. It gave no consideration to the issue of irreparable prejudice (apart from stating that the Prosecution was estopped from raising this point, which, for the reasons given above, is erroneous). Nor did the Majority Opinion give sufficient weight to the fact that the proposed appeal involved difficult and uncertain issues (as evidenced by the fact that Judge Boutet dissented in the Impugned Decision), on which the guidance of the Appeals Chamber was desirable.[37] In this respect, the Impugned Decision seems inconsistent with the Trial Chamber's *Withdrawal of*

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30 See, e.g., *Prosecutor v. Delalic et al. (Celebici), Decision on Motion for Provisional Release Filed by the Accused Esad Landzo*, Case No. IT-96-21-T, Trial Chamber, 16 January 1997, para. 33:"The Trial Chamber accordingly considers that an 'exceptional circumstance' to a general rule is a condition or situation enabling a modification to, or indeed exclusion of, the application of the general rule."

31 See *Prosecutor v. Tadic, Decision on Motion for Review*, Case No. IT-94-1-R, Appeals Chamber, 30 July 2002, paras. 26-27.

32 *Kanyabashi v. Prosecutor, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I; Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia*, Case No. ICTR-96-15-A, Appeals Chamber, 3 June 1999, para. 13.

33 See *Prosecutor v. Barayagwiza, Decision*, Case No. ICTR-97-19-A, Appeals Chamber, 3 November 1999, footnote 170.

34 Impugned Decision, para. 21. See also *Joinder Decision*, para. 10, *Common Evidence Decision*, para. 21; *Withdrawal of Counsel Decision*, para. 36.

35 Impugned Decision, para. 34. The same approach was taken in *Joinder Decision*, para. 15 (first sentence); *Common Evidence Decision*, para. 24.

36 Judge Boutet's Dissenting Opinion, para. 20.

37 See Impugned Decision, paras. 26-27.

Counsel Decision, in which it held that the desirability of guidance from the Appeals Chamber can be an "exceptional circumstance" for the purposes of Rule 73(B).[38] Furthermore, even if a dissenting opinion is not necessarily of itself an exceptional circumstance, it is on any view a factor to be considered together with other circumstances.[39] The Trial Chamber failed to give due weight to the circumstances as a whole.[40]

19. Similarly, even if the high profile nature of gender based crimes was not the "sole determinant or overriding variable," and even if the obligation of the Prosecution to prosecute to the full extent of the law was not the "paramount consideration,"[41] these were certainly factors to which the Trial Chamber should have given due weight in considering the circumstances as a whole. The Majority Decision may be inconsistent with the *Withdrawal of Counsel Decision*, which suggests (at paras. 53-57) that importance of the issues at stake may be an exceptional circumstance.

20. In its discussion of exceptional circumstances, the Majority Opinion says (at para. 32) that the Prosecution's argument "that no delay would be occasioned" by an interlocutory appeal was "highly speculative." However, the Prosecution did not suggest that the fact that no delay would be caused was an "exceptional circumstance". Rather, this was a factor to be taken into account in the exercise of the Trial Chamber's discretion under Rule 73(B). The Prosecution did not say that there would definitely be no delay, but merely that there "need not" be a delay.[42] Even if it could not be known for certain that an interlocutory appeal would cause no delay, there is no particular reason for thinking that an interlocutory appeal would necessarily cause any particularly significant delay, and this was a relevant factor to which the Trial Chamber should have given due weight.

(3) The remedy requested by the Prosecution

21. For the reasons given above, in the Impugned Decision the majority erred in the exercise of the Trial Chamber's discretion under Rule 73(B). Accordingly, the Appeals Chamber can substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber.[43] For the reasons given above, and for the reasons given in the Prosecution Leave to Appeal Request and the Prosecution Leave to Appeal Reply, and for the reasons given in Judge Boutet's Dissenting Opinion, the Appeals Chamber is requested to reverse the Impugned Decision of the Trial Chamber, and to exercise its discretion to hold that the

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38 *Withdrawal of Counsel Decision*, paras. 53-57.
39 See Judge Boutet's Dissenting Opinion, para. 16.
40 See Judge Boutet's Dissenting Opinion, para. 16, indicating that the cumulative effect of all the circumstances should also be considered.
41 Impugned Decision, para. 29.
42 Prosecution Leave to Appeal Request, para. 10.
43 *Milosevic Joinder Appeal Decision*, footnote 19 above, para. 4.

Appeals Chamber will entertain an interlocutory appeal against the Trial Chamber Amendment Decision.

22. In the event that the Appeals Chamber so decides, the Prosecution's submissions on appeal against the Trial Chamber Amendment Decision are set out in the Annex to the present filing. The Prosecution acknowledges that the submissions in the Annex only fall to be considered by the Appeals Chamber if the Appeals Chamber first decides to allow the appeal against the Impugned Decision. The inclusion of the Annex to this filing in no way seeks to presume the outcome of the Appeals Chamber's consideration of the submissions above. Rather, the submissions in the Annex are included at this stage in order to avoid unnecessary delay in the event that the Appeals Chamber allows the appeal against the Impugned Decision.

CONCLUSION

23. For the reasons given above, the Prosecution requests the Appeals Chamber:

(1) To find that it has the power to entertain an appeal against the Impugned Decision, and to exercise that power;

(2) To reverse the Impugned Decision, and to hold that the Appeals Chamber will entertain an interlocutory appeal against the Trial Chamber Amendment Decision;

(3) To proceed to deal with the interlocutory appeal against the Trial Chamber Amendment Decision, and in particular:

(i) to order that the submissions in the Annex to this filing shall be the Prosecution submissions in the appeal against the Trial Chamber Amendment Decision; and

(ii) to fix a date for the filing of Defence responses to those submissions.

Freetown, 30 August 2004.

For the Prosecution,

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Christopher Staker

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

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

Registrar: Mr Robin Vincent

Date filed: 4 August 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA

CASE NO. SCSL – 2004 – 14 – T

ANNEX TO THE PROSECUTION APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 2 AUGUST 2004 REFUSING LEAVE TO FILE AN INTERLOCUTORY APPEAL

PROSECUTION SUBMISSIONS ON APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 20 MAY 2004

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA

CASE NO. SCSL – 2004 – 14 – T

ANNEX TO THE
PROSECUTION APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 2 AUGUST 2004 REFUSING LEAVE TO FILE AN INTERLOCUTORY APPEAL

PROSECUTION SUBMISSIONS ON APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 20 MAY 2004

I. INTRODUCTION

1. The Prosecution presents these submissions on appeal against the Trial Chamber's *Decision on Prosecution Request for Leave to Amend the Indictment*, dated 20 May 2004 (the "**Decision**"), in the event that the Appeals Chamber entertains this appeal.

2. The Decision (by majority) rejected a request by the Prosecution pursuant to Rule 50(A) and Rule 73(A) of the Rules of Procedure and Evidence (the "**Rules**") to amend the Indictment in this case (the "**Prosecution Amendment Request**").[1] For the reasons given below, the Prosecution submits that in the Decision the majority erred in the exercise of the Trial Chamber's discretion.[2]

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[1] "Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", filed by the Prosecution on 9 February 2004, Registry Pages ("**RP**") 102-218.

[2] For the standard of review in an appeal against an exercise of a discretion by the Trial Chamber, see *Prosecutor v. Milosevic, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder*, Case No. IT-99-37-AR73, Appeals Chamber, 18 April 2002 (the "***Milosevic Joinder Appeal Decision***"), para. 5. See also *Prosecutor v. Milosevic, Decision on the Interlocutory Appeal by the* Amici Curiae *Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case*, Case No. IT-02-54-AR73.6, Appeals Chamber, 20 January 2004, para. 7.

II. ARGUMENT

(1) General submissions

3. The Prosecution's reasons for seeking an amendment to the Indictment are set out in the Prosecution Amendment Request.[3] The amendments were requested as the result of additional evidence uncovered by the Prosecution in the course of its ongoing investigations. The considerations underlying the request include:

   (1) **The obligation of the Prosecutor to prosecute to the full extent of the law.** This obligation has been recognised in the case law of the ICTY and ICTR.[4] The obligation does not require the Prosecution to prosecute every person for every crime of which the Prosecution has evidence. However, it does require the Prosecution to exercise its prosecutorial discretion in accordance with the mandate of the Special Court to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law."[5] It would be inconsistent with this mandate for the Prosecution only to prosecute low-level perpetrators, or only to prosecute high-level perpetrators for the most minor of their crimes. If the Prosecution has additional evidence of a particularly serious crime committed by one of its Accused, that crime should be prosecuted (including by way of an amendment to an existing indictment, if necessary) unless other legitimate interests militate against this.

   (2) **The seriousness with which the international community regards gender based crimes in armed conflict and the inadequacy of prosecuting such crimes as ordinary crimes of violence.** The seriousness of such crimes is reflected, for instance,

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[3] And see also the "Consolidated Reply to Defence Response to Prosecution Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", 24 February 2004, RP 405-416 (the "**Prosecution Amendment Reply**").

[4] See *Prosecutor v. Naletilic and Martinovic, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment*, Case No. IT-98-34-PT, Trial Chamber, 14 February 2001 ("The jurisprudence of the ICTY and the ICTR on the exercise of the discretion contained in Rule 50 thus demonstrates that a decision to accept an amendment will normally be forthcoming unless prejudice can be shown to the accused. This recognises the duty of the Prosecutor to prosecute the accused to the full extent of the law"); *Prosecutor v. Kajelijeli, Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File and Amended Indictment*, Case No. ICTR-98-44A-T, Trial Chamber, 25 January 2001 ("As to the propriety of the timing of the Prosecutor's Motion, the Chamber concurs with the jurisprudence of the Tribunal in *Prosecutor v. Musema*, ICTR-96-13-T (6 May 1999) (Decision on the Prosecutor's Request for Leave to Amend the Indictment), which held, at par. 17 that, '[...] Rule 50 of the Rules does not explicitly prescribe a time limit within which the Prosecutor may file to amend the Indictment, leaving it open to the Trial Chamber to consider the motion in light of the circumstances of each individual case. A key consideration would be whether or not, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial. In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber.'"). See also *Prosecutor v. Bizimungu et al., Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to Amend Indictment*, Case No. ICTR-99-50-AR50, Appeals Chamber, 12 February 2004, para. 13.

[5] Statute of the Special Court, Article 1(1).

in Security Council resolution 1325 of 31 October 2000,[6] and the work of the United Nations High Commissioner for Human Rights.[7] As one commentator on the ICC Statute explains, it was critical to women's human rights advocates to enumerate rape and other sexual crimes as a separate category of war crimes in its own right, since "Fitting rape within other categories of crimes such as 'inhuman or degrading treatment' as was often the case in past judicial decisions ... trivializes the extreme physical and psychological harm caused by rape."[8] Thus, where the Prosecution has evidence of gender based crimes, it is important that they be prosecuted as such.

4. It is acknowledged that in deciding the Prosecution Amendment Request, the Trial Chamber had to weigh these considerations against other important considerations, in particular the overall interests of justice and the Accused's right to an expeditious trial.[9]

5. The Trial Chamber's main reason for rejecting the Prosecution Amendment Request was that it considered that the Prosecution has not acted diligently in obtaining the evidence in question and in seeking the amendment to the Indictment. Indeed, it is evident from the reasons of the majority that the majority regarded this as the overriding consideration in its decision to reject the Prosecution request.[10] The majority went so far as to suggest that it

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[6] In which the Security Council, amongst other matters: "9. *Calls upon* all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, ...10. *Calls on* all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict; 11. *Emphasizes* the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard *stresses* the need to exclude these crimes, where feasible from amnesty provisions".

[7] See, e.g., Report of the United Nations High Commissioner for Human Rights, *Systematic rape, sexual slavery and slavery-like practices, during armed conflicts* (UN Doc. E/CN.4/Sub.2/2004/35), 8 June 2004: "44. Despite legal achievements at the international level, exemplified by the latest judgements from ICTY and ICTR, the work of SCSL and the provisions of the Rome Statute of the International Criminal Court, acknowledging that rape and sexual enslavement, committed as part of a widespread or systematic attack directed against any civilian population, constitute crimes against humanity, and that perpetrators should be held accountable and punished for such crimes, sexual gender-based violence, systematic rape and various forms of enslavement are still widespread during armed conflicts. 45. Armed conflicts exacerbate violence against women and illustrate its linkage to a system of patriarchal domination, based on gender inequality and on the subordination of women by men. Recent reports from the United Nations human rights mechanisms reveal that in armed conflict women and girls face widespread sexual gender-based violations in the form of, but not limited to, rape, sexual violence, sexual slavery and forced marriage. ... 46. As a landmark document, Security Council resolution 1325 (2000) on women, peace and security retains a vital role in the efforts to strengthen the protection of the human rights of women and girls during and after armed conflicts and in acknowledging that sexual violence against women during armed conflicts has a major negative impact on international peace and security."

[8] Michael Cottier, commentary on Article 8(2)(b)(xxii) of the ICC Statute in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), pp. 248-249.

[9] See Prosecution Amendment Request, para. 9.

[10] See especially Decision, paras. 54-64. And see in particular para. 78. In para. 78, the majority of the Trial Chamber indicates that it is a "valid argument" that the request to amend the indictment was timely as the trial had not yet commenced. However, it added that this argument "collapsed" because of the "Prosecution inattention to appreciate the particularity of the cases ... and to have acted more diligently, and indeed, expeditiously".

would "occasion a palpable miscarriage of justice" to allow the amendment to the Indictment when the Prosecution had not exercised due diligence,[11] and indeed, went even further still, to suggest that this would be an abuse of process.[12]

6. For the reasons given in section (2) below, the Trial Chamber erred in fact when it determined that the Prosecutor had not acted with due diligence in investigating this case, and that it had not acted in a timely manner in seeking the amendment to the Indictment. It follows that the Decision is based on an error of fact, and that there is no justification for the Trial Chamber's conclusion that a lack of diligence by the Prosecution would make it unjust or an abuse of process for the Indictment to be amended. Having based the Decision on this erroneous consideration, the majority failed to give appropriate weight to the various relevant considerations.

(2) The errors in the Trial Chamber's Decision

7. The Trial Chamber erred when it considered that the investigations had begun 2 years ago.[13] The Trial Chamber based its view on the Defence submissions, which were made in February 2004.[14] Had this been true, investigations would have commenced on February 2002, five months before the funds to create the Court were secured, and six months prior to the arrival of the Prosecutor and the Head of Investigations in Sierra Leone. In fact, since the Head of Investigations arrived in Sierra Leone in August 2002, and since he was engaged in selecting and hiring investigators until October 2002, full investigations in a coordinated fashion did not begin until November 2002.

8. The Trial Chamber erred when it considered that the Prosecution had in its possession evidence relating to gender based crimes as early as June 2003.[15] Only *indications* of gender based crimes were available to it in June 2003, and only in October 2003 did it obtain solid evidence capable of confirmation.[16] Not only was this previously submitted by the Prosecution on several occasions, but it was also stressed by Judge Boutet in his Dissenting Opinion on the Decision.[17] It is emphasized by the Prosecution that what is meant by "solid evidence capable of confirmation" is evidence that is sufficient to prove the crimes alleged. It was a proper exercise of the Prosecution's discretion to wait for such evidence, and not to bring charges based only on preliminary information which could not constitute prima facie

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11 Decision, para. 85.

12 Decision, paras. 80-86.

13 Decision, paras. 43, 57, 63, 64.

14 Norman Response to the Prosecution Amendment Request, para. 33, Kondewa Response to the Prosecution Amendment Request, top of page 4. The Prosecution denied this allegation in Prosecution Amendment Reply, para. 23.

15 Decision, para. 44.

16 Prosecution Amendment Reply, para. 15; Prosecutor's Written Answers, paragraph 2. The basis of such evidence was statements taken in September 2003, analysis of which was completed in October 2003.

17 Decision, Judge Boutet's Dissenting Opinion, paras. 6, 35, 37.

evidence. This is in conformity with the view expressed in Judge Boutet's Dissenting Opinion.[18] Hence, the time period which should have been examined by the Trial Chamber was the period from the date on which such evidence was available, i.e. late October 2003, until the date the Prosecution Amendment Request was filed, i.e. beginning of February 2004.

9. The Trial Chamber erred in assuming that the Prosecution had acted without due diligence in the conduct of its investigations of gender based crimes.[19] The Prosecution submits that obtaining evidence on gender based crimes necessitates much more time than collecting evidence concerning other crimes. This is acknowledged in Judge Boutet's Dissenting Opinion on the Decision.[20] The Prosecution submits that even more time is required when gathering evidence against CDF members, as victims of CDF members are subject to greater risks to their personal security and reputation, in light of the popular support the CDF receives in some areas of Sierra Leone (where it is regarded as the force which protected the nation from the rebels), and also in light of the fact that CDF members committed gender based crimes against their own supporters, who still live in the same communities as their perpetrators. The specific security risk related to the CDF case was acknowledged in the Trial Chamber's own decision of 8 June 2004, in which it granted protective measures to such witnesses.[21]

10. The Trial Chamber erred in deeming "neither credible nor convincing" the Prosecution's submission that evidence relating to gender based crimes was only recently discovered.[22] The Trial Chamber based its view on the (mistaken) facts that the investigations had begun two years ago, and that evidence concerning gender based crimes was indeed found against the six Accused individuals in the other two cases before the Special Court, i.e. the RUF and AFRC cases, prior to their initial appearance before the Trial Chamber. The Prosecution submits that the Trial Chamber failed to understand that evidence of gender based crimes against CDF members was much harder to obtain than evidence against RUF and AFRC members, as explained above. Furthermore, the fact that gender based crimes were indeed charged in the RUF and AFRC cases before the initial appearance of the accused in those cases demonstrates that it was the policy of the Prosecution to charge such crimes where it has evidence of them. This supports the conclusion that had the Prosecution possessed such evidence against the CDF members prior to their initial appearance, they would have been charged with gender based crimes in the original Indictment.

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18 Decision, Judge Boutet's Dissenting Opinion, paras. 24, 25.

19 Decision, paras. 43 and 64.

20 Decision, Judge Boutet's Dissenting Opinion, paras. 26-33.

21 *Prosecutor v. Norman, Fofana and Kondewa, Decision on Prosecution Motion for Modification of Protective Measure for Witnesses*, Case No. SCSL-2004-14-PT, Trial Chamber, 8 June 2004.

22 Decision, para. 57.

11. The Trial Chamber erred in failing to consider the nature of the charges as a justification for the passage of time between the Prosecution's obtaining the initial indication that gender based crimes occurred, and the date in which this indication crystallized into real evidence. The Prosecution submits that in order to obtain evidence from victims and perpetrators of gender base crimes much more time is required than that needed to obtain evidence relating to other crimes. Most domestic jurisdictions treat sexual violence crimes differently to other crime in accordance with the understanding that their investigation and prosecution requires more time. Under international criminal law, this is even more so, taking into account cultural differences which necessitate even greater sensitivity and caution when investigating and prosecuting such crimes. It is therefore submitted that had the Trial Chamber taken into account that the investigation of gender based crimes, especially when they involve CDF members, as explained above, requires much time and caution, the Trial Chamber would not have concluded that the right of the Accused to be tried without undue delay was breached, and nor would it have concluded that granting the request would amount to an abuses of process. The Prosecution had indications of gender based crimes in June 2003, that it only took four months to secure solid evidence based on that information. This timeframe was reasonable under the circumstances. As stated in paragraphs 19 and 20 of the Prosecution Amendment Request, the Prosecution submits that it exercised due diligence in conducting its investigation, and that it carefully considered whether and at what point to file the request to amend the Indictment.

12. The Trial Chamber misdirected itself as to the principle to be applied, when it held that "the rules relating to the detection and prosecution of these [gender based] offences are the same as those governing the other war crimes and international humanitarian offences".[23] The Prosecution emphasizes, as was acknowledged by Judge Boutet in his Dissenting Opinion on the Decision, that the detection of evidence relating to gender crimes requires much more time and vigilance than the detection of other crimes. Furthermore, since it requires special efforts to build the trust of victims in the judicial process and in the protective measures provided to secure them during the proceedings, investigating and prosecuting gender based crimes usually takes longer than prosecuting other crimes. Hence, even after the witnesses reveal their accounts to the Prosecution, arriving at the stage where they are willing to testify publicly takes much longer than in the case of general, non-gender based, crimes.

13. The Trial Chamber also erred in deeming "unacceptable and untenable" the fact that time has passed between the date on which solid evidence was available to the Prosecution, and the date on which the Prosecution Amendment Request was filed.[24] It, moreover, erroneously criticized the Prosecution's action in "withholding the application to amend because it was

[23] Decision, para. 83.
[24] Decision, paras. 47 and 48.

waiting for the outcome of the joinder motion".[25] The Prosecution submits that since evidence was available in October 2003 and witness cooperation was secured thereafter, a request to amend the Indictment could not have been prepared and filed until November 2003 at the earliest. However, at that time, there were nine separate cases pending before the Special Court, and the Prosecution also wished to seek to have amendments made to the indictments in certain of the other cases. If the Prosecution had at that time filed motions for any amendments it wished to make in all of those cases, it would have flooded the Trial Chamber with nine separate motions to amend indictments. The Prosecution decided instead to await the then imminently expected decision on the joinder motion, which was filed in October 2003. Underscoring this action was the principle of judicial economy, since it meant that instead of being faced with nine separate requests, the Trial Chamber would be faced with possibly only two (and eventually three). In any event, given the Court recess during December 2003, the earliest the Trial Chamber could have deliberated on the matter had the Prosecution filed the request to amend in November 2003, would have been in January 2004. Since the joinder decision was not given until 28 January 2004, and the Consolidated Indictment was filed on 5 February 2004, waiting to file the Prosecution Amendment Request on 9 February 2004 was in accordance with good faith and due diligence on the part of the Prosecution, as was the immediate subsequent disclosure.

14. The Trial Chamber erred in holding that "the accused would have, if the Prosecution were reasonably diligent, been informed properly and in detail, of 'the nature and cause of the charges against them.'" The Prosecution submits that the Trial Chamber erred in interpreting the right of the Accused to be informed promptly of the charges against them, as enshrined in Article 9 of the ICCPR and in Article 17(a) of the Statute. These articles refer to the charges contained in the Indictment at the time of arrest and not charges that could be brought subsequently.[26] As the Accused were informed of the existing charges against them at the time of their arrest, their right to be informed promptly of the charges was not violated. Further, the evidence supporting the charges requested to be added to the Indictment was promptly disclosed in February 2004, shortly after the Prosecution Amendment Request was filed and much earlier than required under Rule 50(B)(ii). Based on the circumstances of the case the Prosecution Amendment Request was filed within a reasonable time.

15. The Trial Chamber mistakenly concluded that "the prosecution was in breach of the ingredient of timeliness as statutorily required by the Statute and so would any order emanating from us granting this motion to amend their indictment."[27] The ICTY Appeals

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25 Decision, paras. 47 and 48.

26 *Prosecutor v. Kovacevic, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998*, Trial Chamber, 2 July 1998 ("*Kovacevic*, 2 July 1998") para. 36.

27 Decision, para. 64.

Chamber in *Kovacevic* held that "the timeliness of the Prosecutor's request for leave to amend the Indictment must ... be measured within the framework of the overall requirement of the fairness of the proceedings."[28] Furthermore, this very same Trial Chamber, has previously permitted the amendment of indictments, stating that "this application to amend, for the reasons that the offences sought to be added were disclosed to the accused and the Defence promptly, fulfils the criterion of timeliness having been filed even before the trial proceedings take off although we know that some applications for amendments could, and have in fact been accepted, at the depth of the trial for considerations based on the overall interest of justice."[29] The Prosecution reasserts that the Prosecution Amendment Request in the present case was also timely, as the amendments were sought before a trial date was set, and the evidence was properly disclosed to the Accused. The lapse of time between the availability of evidence in October 2003 (witness cooperation confirmed in November) and the filing of the Request in February 2004, was clearly reasonable under the circumstances. Furthermore, the possibility of postponing the trials should not be the paramount consideration in the decision as to whether or not to grant the Prosecution Amendment Request. The nature of the charges requested to be added, and the effect the amendment would have on the integrity of the proceedings as a whole, are equally relevant. In any case, this time lapse should not, in and of itself, form the basis of the denial of the Prosecution Amendment Request. The Court should determine whether the timing of the Prosecution Amendment Request was such as to deny the Accused the opportunity to prepare their case. The ICTR Appeals Chamber in *Karemera*, noting that the requested amendments had been sought at the pre-trial stage, held that although the trial had already commenced and 8 prosecution witnesses had already testified, the request to amend the Indictment was not filed so late as to prejudice the accused by depriving them of a fair opportunity to prepare their case.[30] Furthermore, the ICTR in *Akayesu* permitted the amendment of the Indictment to include charges of gender based crimes, over five months after the trial had commenced.[31] Hence, the Prosecution Amendment Request was filed within a reasonable time and at a stage when no prejudice would be caused to the Accused.

16. The Trial Chamber erred in considering that granting the Prosecution's Request would breach the right of the Accused to be tried without undue delay.[32] In contradiction to the

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28 *Kovacevic*, 2 July 1998, para. 31.

29 *Prosecutor v. Sesay, Kallon and Gbao, Decision on Prosecution Request for Leave to Amend the Indictment*, Case No. SCSL-2004-15-PT, Trial Chamber, 6 May 2004, para. 52; *Prosecutor v. Brima, Kamara and Kanu, Decision on Prosecution Request for Leave to Amend the Indictment*, Case No. SCSL-2004-16-PT, Trial Chamber, 6 May 2004, para. 53.

30 *Prosecutor v. Karemera, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to file an Amended Indictment*, Case No. ICTR-98-44-AR73, Appeals Chamber, 19 December 2003 ("*Karemera*, 19 Dec. 2003"), para. 29.

31 *Akayesu*, 2 Sept. 1998, para. 417.

32 Decision, para. 63.

majority view, and in conformity with Judge Boutet's Dissenting Opinion, the Prosecution submits that amending the Indictment would not cause undue delay under the circumstances of the present case. Firstly, the newly added charges could be dealt with later in the Trial. Furthermore, it is a well established practice of the international criminal tribunals that investigations are carried out after the commencement of trial and throughout. These investigations often reveal new evidence which is sought to be introduced through motions made in the course of the trial, and at times even warrant the amendment of the Indictment. In addition, the possibility of motions challenging amendments to the Indictment cannot be a basis to deny the Request, especially considering that Rule 72 of the Rules does not require a stay of proceedings and provides that objections based on lack of jurisdiction or on the form of an amendment indictment shall be raised by a party in one motion only. Such challenges are all part of the fair trial process and the possibility of objections being raised should not bar the amendment of the Indictment. In any event, in this case, such motions need not delay the trial as they relate only to the new charges of gender based crimes and not the entire Indictment. It is further emphasised that in accordance with international jurisprudence, a delay which is substantial would be undue only if it occurred due to improper tactical advantage sought by the Prosecution.[33] In this case, the Prosecution stresses that no such tactical advantage is sought by seeking to amend the Indictment at this stage of the proceedings.

17. The Trial Chamber erred in failing to give sufficient weight to the interests of justice in amending the indictment to fully reflect the totality of the criminal acts allegedly committed by the Accused individuals, and gave undue weight to the impact of such amendment on the expeditious nature of the proceedings against the Accused. Furthermore, in its examination of the delay that may be caused to the proceedings by amending the Indictment, the Trial Chamber mistakenly concluded that this would be undue delay. The Prosecution submits that even if some delay would result, it is justifiable in light of the countervailing considerations. As was held by the ICTY Appeals Chamber in *Karemera*, "the Trial Chamber must consider all of the circumstances bearing on a Request to amend the indictment. Interference with the orderly scheduling of trial, however, is one such circumstance." In addition, the ICTY Appeals Chamber held that "'postponement of the trial date and a prolongation of the pretrial detention of the Accused' are 'some, but not all' of the considerations relevant to determining whether a proposed amendment would violate the right of the accused to a trial 'without undue delay', which in turn bears on the broader question whether the amendment is justified under Rule 50 of the Rules."[34]

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33 *Kovacevic*, 2 July 1998, para. 32.

34 *Prosecutor v. Bizimungu, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment*, Case No. ICTR-99-50-AR50,

18. The Trial Chamber failed to consider the fact that the evidence concerning gender based crimes was disclosed to the Defence in February 2004; that the witnesses providing this evidence are on the witness list submitted to the Court on 26 April 2004; and, that the current Indictment includes general violence counts, which could encompass sexual violence.

(3) The remedy requested by the Prosecution

19. For the reasons given above, in the Impugned Decision the Trial Chamber erred in the exercise of its discretion under Rule 73(B). Accordingly, the Appeals Chamber can substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber.[35] For the reasons given in the Prosecution Amendment Request and Prosecution Amendment Reply, the Appeals Chamber should exercise the discretion by granting the Prosecution Request.

CONCLUSION

20. For the reasons given above, the Prosecution requests the Appeals Chamber to reverse the Decision and to grant the Prosecution Amendment Request.

Freetown, 30 August 2004.

For the Prosecution,

per Luc Côté

James C. Johnson

for Christopher Staker

Adwoa Wiafe

[35] *Milosevic Joinder Appeal Decision*, footnote 2 above, para. 4.

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PROSECUTION INDEX OF AUTHORITIES

Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 2 August 2004.

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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

Trial Chamber's Judgement	*Prosecutor v. Fofana and Kondewa,* SCSL-14-785, "Judgement", Trial Chamber, 3 August 2007 (see also Annex C "**Separate Concurring and Partially Dissenting Opinion of Justice Thompson**", Registry Pages 21399-21436) and ("**Separate and Partially Dissenting Opinion Only on Count 8 of Hon. Justice Benjamin Mutanga Itoe**"
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ANNEX

COPIES OF AUTHORITIES

(Filed pursuant to Practice Direction on Filing Documents)

2. National Cases

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SUPREME COURT OF CANADA

CITATION: Mugesera *v.* Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40

DATE: 20050628
DOCKET: 30025

BETWEEN:

Minister of Citizenship and Immigration
Appellant
v.
Léon Mugesera, Gemma Uwamariya, Irenée Rutema, Yves Rusi, Carmen Nono, Mireille Urumuri and Marie-Grâce Hoho
Respondents
- and -
League for Human Rights of B'nai Brith Canada, PAGE RWANDA, Canadian Centre for International Justice, Canadian Jewish Congress, University of Toronto, Faculty of Law – International Human Rights Clinic, and Human Rights Watch
Interveners

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 180) McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

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Mugesera *v.* Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40

Minister of Citizenship and Immigration *Appellant*

v.

Léon Mugesera, Gemma Uwamariya, Irenée Rutema, Yves Rusi, Carmen Nono, Mireille Urumuri and Marie-Grâce Hoho *Respondents*

and

League for Human Rights of B'nai Brith Canada, PAGE RWANDA, Canadian Centre for International Justice, Canadian Jewish Congress, University of Toronto, Faculty of Law — International Human Rights Clinic, and Human Rights Watch *Interveners*

Indexed as: Mugesera *v.* Canada (Minister of Citizenship and Immigration)

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2004: December 8; 2005: June 28.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

on appeal from the federal court of appeal

customary international law, the jurisprudence of the ICTY and the ICTR is again very relevant.

1. *What Is a Widespread or Systematic Attack?*

153 An "attack" may be "a course of conduct involving the commission of acts of violence": *Prosecutor v. Kunarac, Kovac and Vukovic*, Case Nos. IT-96-23-T & IT-96-23/1-T (ICTY, Trial Chamber II), 22 February 2001, at para. 415. It may also be a course of conduct that is not characterized by the commission of acts of violence if it involves the imposition of a system such as apartheid, or the exertion on the population of pressure to act in a particular manner that is orchestrated on a massive scale or in a systematic manner: *Akayesu*, Trial Chamber, at para. 581. It is fair to say, however, that in most instances, an attack will involve the commission of acts of violence. This definition aptly conveys the idea that the existence of an attack does not presuppose armed conflict (though it does not preclude armed conflict).

154 A *widespread* attack "may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims" — it need not be carried out pursuant to a specific strategy, policy or plan: *Akayesu*, Trial Chamber, at para. 580; and *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T (Trial Chamber II), 21 May 1999, at para. 123. It may consist of a number of acts or of one act of great magnitude: Mettraux, at p. 260.

155 A *systematic* attack is one that is "thoroughly organised and follow[s] a regular pattern on the basis of a common policy involving substantial public or private

resources" and is "carried out pursuant to a . . . policy or plan", although the policy need not be an official state policy and the number of victims affected is not determinative: *Akayesu*, Trial Chamber, at para. 580; and *Kayishema*, at para. 123. As noted by the ICTY's Trial Chamber in *Kunarac*, at para. 429: "The adjective 'systematic' signifies the organised nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes — that is the non-accidental repetition of similar criminal conduct on a regular basis — are a common expression of such systematic occurrence."

156 An attack need be only widespread *or* systematic to come within the scope of s. 7(3.76), not both: *Tadic*, Trial Chamber, at para. 648; *Kayishema*, at para. 123. The widespread or systematic nature of the attack will ultimately be determined by examining the means, methods, resources and results of the attack upon a civilian population: *Kunarac*, at para. 430. Only the attack needs to be widespread or systematic, not the act of the accused. The IAD, relying on *Sivakumar*, appears to have confused these notions, and to the extent that it did, it erred in law. Even a single act may constitute a crime against humanity as long as the attack it forms a part of is widespread or systematic and is directed against a civilian population: *Prosecutor v. Mrksic, Radic and Sljivancanin*, 108 ILR 53 (ICTY, Trial Chamber I 1996), at para. 30.

157 A contentious issue raised by the "widespread or systematic attack" requirement is whether the attack must be carried out pursuant to a government policy or plan. Some scholars suggest that limiting crimes against humanity to attacks which implement a government policy is necessary due to the nature and scale of such

crimes: see, e.g., Bassiouni, at pp. 243-46. Others point out that the existence of a government policy has never been required and suggest that crimes against humanity take on their international character simply by virtue of the existence of a widespread and systematic attack: see, e.g., Mettraux, at pp. 270-82.

158 The Appeals Chamber of the ICTY held in *Prosecutor v. Kunarac, Kovac and Vukovic* that there was no additional requirement for a state or other policy behind the attack: Case Nos. IT-96-23-A & IT-96-23/1-A, 12 June 2002, at para. 98. The Appeals Chamber acknowledged that the existence of such a policy might be useful in establishing that the attack was directed against a civilian population or that it was widespread or systematic (particularly the latter). However, the existence of a policy or plan would ultimately be useful only for evidentiary purposes and it does not constitute a separate element of the offence (para. 98). It seems that there is currently no requirement in customary international law that a policy underlie the attack, though we do not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement (see, e.g., art. 7(2)(*a*) of the *Rome Statute of the International Criminal Court*, A/CONF. 183/9, 17 July 1998).

159 Considering all these factors, was a widespread or systematic attack taking place when Mr. Mugesera gave his speech? With respect to whether the attack was widespread, Mr. Duquette found that, between October 1, 1990 and November 22, 1992, almost 2,000 Tutsi were massacred in Rwanda (para. 336). Mr. Duquette also found as a fact that in October 1990 approximately 8,000 people, 90 percent of them Tutsi, were falsely arrested on suspicion of complicity with the RPF (para. 26). The massacres occurred in various parts of the country and the number of victims grew to

the thousands. This suggests a large-scale action directed against a multiplicity of victims.

160 In any event, it is unnecessary to decide whether the attack was widespread because the facts as found by Mr. Duquette support the conclusion that it was, at the very least, systematic. Mr. Duquette found as a fact that the Rwandan government staged a military attack on Kigali which served to justify the arrest of and continued violence against Tutsi and against political opponents (para. 255). According to Mr. Duquette, a pattern of massacres, sometimes participated in and overtly encouraged by MRND officials and the military, began in 1990 and was still under way when Mr. Mugesera gave his speech (para. 50). As discussed above, a pattern of victimizing behaviour, particularly one which is sanctioned or carried out by the government or the military, will often be sufficient to establish that the attack took place pursuant to a policy or plan and was therefore systematic. There was an unmistakable policy of attacks, persecution and violence against Tutsi and moderate Hutu in Rwanda at the time of Mr. Mugesera's speech. Mr. Mugesera's act of persecution therefore took place in the context of a systematic attack.

2. *What Does It Mean for the Attack to Be "Directed Against Any Civilian Population"?*

161 The mere existence of a systematic attack is not sufficient, however, to establish a crime against humanity. The attack must also be directed against a civilian population. This means that the civilian population must be "the primary object of the attack", and not merely a collateral victim of it: *Kunarac*, Trial Chamber, at para. 421.

The term "population" suggests that the attack is directed against a relatively large group of people who share distinctive features which identify them as targets of the attack: Mettraux, at p. 255.

162 A prototypical example of a civilian population would be a particular national, ethnic or religious group. Thus, for instance, the target populations in the former Yugoslavia were identifiable on ethnic and religious grounds. It is notable that the fact that non-civilians also form part of the group will not change the character of the population as long as it remains largely civilian in nature: *Prosecutor v. Blaskic*, 122 ILR 1 (ICTY, Trial Chamber I 2000), at para. 211.

163 The Tutsi and moderate Hutu, two groups that were ethnically and politically identifiable, were a civilian population as this term is understood in customary international law. Mr. Duquette's findings of fact leave no doubt that the ongoing systematic attack was directed against them. For these reasons, we agree that at the time of Mr. Mugesera's speech, a systematic attack directed against a civilian population was taking place in Rwanda.

3. *What Does It Mean for an Act to Occur "as Part of" a Systematic Attack?*

164 As we have seen, the existence of a widespread or systematic attack helps to ensure that purely personal crimes do not fall within the scope of provisions regarding crimes against humanity. However, because personal crimes are committed in all places and at all times, the mere existence of a widespread or systematic attack will

not be sufficient to exclude them. To ensure their exclusion, a link must be demonstrated between the act and the attack which compels international scrutiny. For this reason, we must explore what it means for an act to occur "as part of" a widespread or systematic attack and determine whether Mr. Mugesera's speech was indeed "a part of" the systematic attack occurring in Rwanda in the early 1990s.

165 The requirement for a link between the act and the attack may be expressed in many ways. For instance, "in the context of" or "forming a part of" are common wordings. These phrases require that the accused's acts "be objectively part of the attack in that, by their nature or consequences, they are liable to have the effect of furthering the attack": Mettraux, at p. 251. In *Tadic*, the Appeals Chamber of the ICTY found that the acts of the accused must "comprise part of a pattern" of widespread or systematic abuse of civilian populations or must objectively further the attack (para. 248).

166 To say that an act must be part of a pattern of abuse or must objectively further the attack does not mean that no personal motive for the underlying act can exist. The presence of a personal motive does not change the nature of the question, which remains an objective one: is the act part of a pattern of abuse or does it further the attack?

167 Also, and this is particularly relevant given the findings of Décary J.A. for the FCA in this case, the proscribed act need not be undertaken as a particular element of a strategy of attack. In essence, the act must further the attack or clearly fit the pattern of the attack, but it need not comprise an essential or officially sanctioned part

of it. Thus, in *Kunarac*, where the three accused took advantage of a widespread and systematic attack to rape and sexually torture Muslim women and girls, the nexus requirement was made out: Trial Chamber, at para. 592. The accused knew of the attack, their acts furthered the attack directed against the Muslim population of Foca and they contributed to a pattern of attack against that population.

168 These legal principles make it clear that Décary J.A. erred in law when he suggested that a crime against humanity could not be made out because Mr. Mugesera's speech was not part of a "strategy" (para. 58). However, we must still consider whether Mr. Mugesera's speech objectively furthered the attack or fit into its pattern.

169 Mr. Duquette found as a fact that Mr. Mugesera's speech had targeted Tutsi and moderate Hutu (para. 335). Tutsi and moderate Hutu were the targets of the systematic attack taking place in Rwanda at the time. A persecutory speech which encourages hatred and violence against a targeted group furthers an attack against that group. Also relevant is geographical proximity. Mr. Duquette found that many of the massacres perpetrated in Rwanda between 1990 and 1993 had occurred in and around Gisenyi prefecture, where the speech was given (paras. 26 and 50). He also noted that local MRND officials had participated in and encouraged the targeting of Tutsi and moderate Hutu. Mr. Mugesera's speech therefore not only objectively furthered the attack, but also fit into a pattern of abuse prevailing at that time. We therefore conclude that Mr. Mugesera's speech was "a part of" a systematic attack directed against a civilian population that was occurring in Rwanda at the time.

170 In sum, we have seen that the criminal act requirement for crimes against humanity in ss. 7(3.76) and 7(3.77) is made up of three essential elements: (1) a proscribed act is carried out; (2) the act occurs as part of a widespread or systematic attack; and (3) the attack is directed against any civilian population. The first element means that all the elements of an enumerated act — both physical and moral — must be made out. The second and third elements require that the act take place in a particular context: a widespread or systematic attack directed against any civilian population. Each of these elements has been made out in Mr. Mugesera's case.

171 However, as noted above, making out the criminal act of a crime against humanity will not necessarily imply that there are reasonable grounds to believe that Mr. Mugesera has committed a crime against humanity. Mr. Mugesera must also have had a guilty mind. As a result, we must now go on to consider the mental element of s. 7(3.76) of the *Criminal Code*.

(b) *The Guilty Mind for Crimes Against Humanity*

172 We have seen that an individual accused of crimes against humanity must possess the required guilty state of mind in respect of the underlying proscribed act. We have also underlined that, contrary to what was said in *Finta*, discriminatory intent need not be made out in respect of all crimes against humanity, but only in respect of those which take the form of persecution. This leaves a final question: in addition to the mental element required for the underlying act, what is the mental element required to make out a crime against humanity under s. 7(3.76) of the *Criminal Code*?

3. Books, Articles and Commentaries

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SECOND EDITION

Prepared by

J. A. SIMPSON *and* E. S. C. WEINER

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ii. 145 If you mean *Couplings*, I liked it... I happen to like inchy films.

Hence 'raunchily *adv.*, in a raunchy manner; **raunchiness.**

1972 *Time* 17 Apr. 66/3 They are a raunchily genteel exercise. 1975 *New Yorker* 20 Jan. 62/3 A shaggy-dog tale of raunchiness Tolstoyan in scale, if not in tone, is related with single-minded, uninterruptible passion by one of the couple guests. 1977 D. O'Sullivan in D. Marcus *Best Irish Short Stories* II. 96 No..customs and excise officer ever shaked from his intimations of mortality as raunchily as Lily Brontë from the stool. 1980 *Observer* 13 Jan. 36/2 The language is nearly devoid of metaphor, but doesn't lack a beguiling raunchiness.

rauncour, obs. f. RANCOUR.

raundom, -don(e, -doun, obs. ff. RANDOM.

raundsom, obs. f. RANSOM.

raung(e, obs. ff. RANGE.

raunger, -ier, obs. ff. RANGER.

rauning, *a.* [var. RAWLIN; but in Cornwall possaries explained as 'ravening, ravenous', as f. *raun*, 'to devour greedily'.] (See quot.)

1880 *E. Cornwall Gloss.* s.v., That voracious fish, *Trachinus Carbonarius*, is called the rauning pollack.

raunke, obs. f. RANK *a.*

raunp-, obs. f. RAMP *v.*

raunpick, dial. var. RAMPICK *a.*

raunpike, var. RAMPIKE.

rauns, obs. f. RANCE *sb.*[1]

raunsake, obs. f. RANSACK *v.*

raunscun', -som(e, -soun, etc., obs. ff. RANSOM *sb.*

raunsede, -sene: see RANSOM *v.*

rauntree, -try: see ROWAN-TREE.

rauon, obs. f. RAVEN *sb.*[1]

raupo, ('raʊpɔː, 'raʊpəʊ). Also 9 ra-poo. [Maori.] A New Zealand bulrush (*Typha muelleri*) used for building native houses, thatching roofs, etc. Also *attrib.*, and *ellipt.*, a hut built of raupo.

1832 A. Earle *9 Months' Resid. N. Zealand* 99 Another party was collecting rushes (which grow plentifully in the neighbourhood, and are called Ra-poo). 1835 W. Yate *Acc. New Zealand* 205 To engage the natives to build raupo, that is, rush-houses. 1851 V. Lush *Jrnl.* 25 Apr. (1971) 75 Reached the Lusks' *raupo* about 9. 1860 Donaldson *Bush Lays* 5 Entangled in a foul morass A raupo swamp. 1863 'Pakeha Maori' *Old N.Z.* vi. 79 My house was a good commodious *rapo* building. 1881 *Chequered Career* 104 My canteen was built of raupo, a reed something like the bulrush, that grows in the swamps. 1897 [see korupe]. 1905 W. Baucke *Where White Man Treads* 145 Here and there a patch of stunted rapo standing listless in its sour and stagnant ooze. 1920 J. Inander *Story N.Z. River* xxvi. 317 There was suddenly a mostly movement in the rapoo and the reeds. 1933 *Bulletin* (Sydney) 9 Aug. 21/2 The pollen and roots of the raupo were..regularly eaten. 1944 *Coast to Coast 1943* 96 They [fleas] came from the dust under the raupo mats. 1960 *Guardian* 9 Dec. 6/3 It was five months on voyage and a tent of raupo (rush) hut at the end of it. 1975 *Turangi* (N.Z.) *Citizen* 2 Apr. 1/1 Prior to the railrace being established the area had been raupo swamp.

rauque (rɔːk), *a. rare.* [a. F. *rauque*, ad. L. *raucus*: cf. RAUC, RAUK.] Hoarse, harsh.

1848 Lytton *K. Arthur* IX. lxxxvi, The deaf'ning, strident, rauque, Homeric roar. 1859 R. F. Burton in *Jrnl. Anthrop. Soc.* XXIX. 214 The rauque bellow of the hippopotamus is heard on its banks.

raurekau (raʊ'reɪkaʊ). Also raureka. [Maori.] A small evergreen tree, *Coprosma australis*, belonging to the family Rubiaceæ, native to New Zealand, and bearing small white flowers and red berries. Also *attrib.*

1905 W. Baucke *Where White Man Treads* 254 Pork..fermented with stacks of eels enclosed in wrappings of raurekau' leaves. 1928 Cockayne & Turner *Trees N.Z.* 36 Raurekau. A low, bushy tree..or tall shrub, with dark-coloured bark. 1949 *Landfall* III. 31 He stumbled through a jungle of raureka and gorse. 1963 Poole & Adams *Trees & Shrubs N.Z.* 173 Raurekau. Small tree reaching 7m... flowers in fascicles.

rauriki ('raʊriki, 'rariki). Also rariki. [Maori.] = PUHA.

1944 *Mod. Jun. Dict.* (Whitcombe & Tombs) 331 Rauriki, Sowthistle..The Maori word for sowthistle. 1949 E. de Launy *Huntsman in his Career* II. 122 Weeds grew in profusion, rariki and nettle. 1958 A. Wall *Queen's English* 48 Sowthistle..is actually edible and much used by the Maoris as *rauriki*, corruptly 'raddiky'. 1966 *N.Z. Encycl.* II. 145/2 The juice of rauriki..., a latex, was also used.

rauschpfeife ('raʊʃpfaɪfə). *Mus.* Pl. -n. [Ger., = reed-pipe.] 1. (See quot. 1964.)

1876 Stainer & Barrett *Dict. Mus. Terms* 374/2 *Rauschpfeif* [sic]..a stop in old organs of two ranks of pipes. Schlick in 1511. It seems to have consisted originally of reed pipes with conical resonators; it became transformed in the course of the c. to a 2-rank stop of flue pipes. Since the mid-17th c. the stop was treated as a mixture, often 3-rank. .. In the 18th c. it was enlarged further... The original meaning of the word had long been forgotten: to Praetorius already it was a 'rustling' pipe (from [G.] *rauschen*, to rustle). 1976 D. Munrow *Instruments Middle Ages & Renaissance* vii. 60/1 The 'manual', the main part of the instrument [*sc.* a Renaissance organ], with eleven registers, was composed of reeds and flue stops, including a *Zink*, *Regall*, and *Rauspfeiffen*.

2. A reed-cap shawm of the Renaissance period.

1939 A. Carse *Mus. Wind Instruments* xi. 128 Two instruments of the shawm type figure in one of Burgkmair's famous series of woodcuts 'Kayser Maximilians I Triumph' (c. 1516) and are there named *rauschpfeiffen*. 1964 S. Marcuse *Mus. Instruments* 436/1 *Rauschpfeife* (? MHGer. *Rusch*, rush), 1. family of Ger. Renaissance reed-cap shawms, with wide conical bore..., terminating in a bell, the double reed concealed in a wooden cap. 1968 *Observer* 19 May 40 David Munrow..has a collection of more than 100 historic woodwind instruments with engaging names like.. the rauschpfeife. 1976 D. Munrow *Instruments Middle Ages & Renaissance* vi. 50/4 *Rauschpfeifen* and *schreierpfeifen*.. are reed-cap shawms... Of the two, rauschpfeifen seem to have been more common. 1978 *Early Music* Apr. 253/1 No rauschpfeifen..are preserved, and yet no one denies they existed.

raut, dial. var. ROWT *v.*

rauth, var. *raught*, obs. pa. t. REACH.

rauthe, obs. f. RUTH.

Rauwiloid ('raʊwɪlɔɪd). *Pharm.* [f. RAUW(OLFIA + *-iloid.*] A proprietary name for a hypotensive preparation containing a number of alkaloids extracted from *Rauvolfia serpentina* (RAUWOLFIA).

1953 *Trade Marks Jrnl.* 15 July 616/2 *Rauwiloid*... Medicinal tablets for the treatment of hypertension. Riker Laboratories Inc... City of Los Angeles. 1953 *Official Gaz.* (U.S. Patent Office) 13 Oct. 295/1 *Rauwiloid*... Claims use since Oct. 28, 1952. 1954 *Jrnl. Amer. Med. Assoc.* 17 July 1027/1 The treatment of hypertension of varying degrees of severity with alseroxylon (Rauwiloid). 1956 [see RAUDIXIN]. 1967 H. Beckman *Dilemmas in Drug Therapy* 175/1 Usual doses of the Rauwolfia preparations employed in treating hypertension are..alseroxylon (Rauwiloid), 2–4 mg. daily; ..rauwolfia (Raudixin, Rauserpa, Rauval), 200–400 mg. daily in divided doses.

rauwolfia (raʊ'wɒlfɪə, -vɒlfɪə). Also rauvolfia and with capital initial. [mod.L. (P. C. Plumier *Nova Plantarum Americanarum Genera* (1703) 19), f. the name of Leonhard *Rauwolf* (d. 1596), German physician, botanist, and traveller + -IA[1].] 1. A tropical shrub or small tree of the genus so called, belonging to the family Apocynaceæ and bearing clusters of small white flowers and red or black berries; *esp.* a shrub of one of the several species cultivated for the medicinal drugs obtained from their roots.

1752 P. Miller *Gardeners Dict.* (ed. 6) s.v. *Rauvolfia*, Four-leaved Rauvolfia, with narrow Leaves. 1823 *Curtis's Bot. Mag.* L. 2440 (*heading*) Three-leaved Rauwolfia. 1902 L. H. Bailey *Cycl. Amer. Hort.* IV. 1503/2 The Rauwolfia flourishes with great luxuriance in the shade of other shrubs. 1955 *Sci. Amer.* Oct. 81/1 Reserpine is an alkaloid extract from the snakeroot plant (named Rauwolfia for a 16th-century German physician). 1962 N. Maxwell *Witch-Doctor's Apprentice* i. 1 Many types of rauwolfia were employed by jungle shamans centuries before our medical men thought of tranquillizers. 1976 *Hortus Third* (L. H. Bailey Hortorium) 942/1 Rauvolfias are cultivated as ornamentals and for curiosity. 1976 W. A. R. Thompson *Herbs that Heal* ix. 148 This unleashed the flood-gates of the pharmaceutical industry, whose scouts started scouring the earth for rauwolfia.

2. *Pharm.* Also **rauwolfia serpentina.** The dried roots of *Rauvolfia serpentina* or related species, or an extract therefrom, containing a number of alkaloids (notably reserpine) and used medicinally, esp. to treat hypertension.

[1949 *Brit. Heart Jrnl.* XI. 350/2 This overwhelming body of support in favour of regarding *R. Serpentina* as the remedy of choice. *Ibid.* 354/1 The hypotensive action of *R. Serpentina*.] 1952 *Ann. Internal Med.* XXXVII. 1149 In our clinic we have relied chiefly upon various combinations of hydrazinophthalazine, Rauwolfia and veratrum, principally because these drugs appear to be the safest..of any medicinal regimen we have tried. 1954 *Brit. Pharmaceutical Codex* 649 Rauwolfia has a depressant action on the central nervous system. 1957 H. W. Youngken in R. E. Woodson et al. *Rauwolfia* ii. 32 The drug Rauwolfia or Rauwolfia Serpentina consists of the dried root of *Rauwolfia serpentina*. .. The commercial sources of the drug..have been India, Pakistan, Ceylon, Burma, and Siam. 1966 *New Scientist* 27 Jan. 236/2 Physicians and pharmacists..are inclined to think that only a few vegetable drugs such as..digitalis, penicillin and rauwolfia are important in the present day *materia medica*. 1977 Lewis & Elvin-Lewis *Med. Bot.* vii. 187/1 *Rauvolfia* acts synergistically with other hypotensive drugs, and in the more severe cases of hypertension it is used in combination with *Veratrum viride* or protoveratrines A and B.

3. *attrib.*, as *rauwolfia alkaloid, berry.*

1942 *Biol. Abstr.* XVII. 117/2 The various effects suggest that the *Rauwolfia* alkaloids probably act on the vasomotor system and also directly on plain muscles of the blood bradycardia. 1932 *Discovery* July 231/1 Three kinds of starlings come with the great blue pigeons to the Rauwolfia berries.

rav (rɒv). Also rov. [Yiddish.] A rabbi; freq. prefixed to personal names.

1892 I. Zangwill *Childr. Ghetto* I. i. xiv. 314 'Ah, you will become a Ravi'.. 'What's that about a Ravi?.. Does he want me to become a Rabbi?' 1893 —— *Ghetto Tragedies* 4 The great Rav Rotchinsky from Brody was to deliver a sermon. 1962 'E. McBain' *Empty Hours* iii. 115 'I know who killed the *rov*.'.. 'She says she knows who killed the rabbi.' 1967 C. Potok *Chosen* xiv. 238 From one to three we would have the actual Talmud session itself, the shiur, with Rav Gershenson. 1973 *Jewish Chron.* 19 Jan. 34/2 The daughters and family of the late Mrs B——. C——...wish to thank the Rav, rabbonim..and friends for their visits..and numerous letters of sympathy.

ravage ('rævɪdʒ), *sb.* [a. F. *ravage* (14th c.), f. *ravir* to RAVISH: see -AGE.]

†1. A flood, inundation. *Obs. rare*[−0].

1611 Cotgr., *Ragats d'eau*, a great floud, inundation, rauage of waters.

2. The act or practice of ravaging, or the result of this; destruction, devastation, extensive damage, done by men or beasts.

1611 Cotgr., *Ravage*, rauage, hauocke, spoyle. 1656 in Blount *Glossogr.* 1684 *Scanderbeg Redivivus* vi. 154 They slew near one Hundred-Thousand; and having finisht their Ravage, took Bialogrod. 1692 Ray *Creation* I. (1692) 111 To secure their Eggs and Young from the ravage of Apes and Monkeys. 1751 Johnson *Rambler* No. 185 ¶3 What would so soon destroy all the order of society, and deform life with violence and ravage, as a permission to every one to judge his own cause. 1821 Shelley *Adonais* xlviii, 'Tis nought That ages, empires, and religions there Lie buried in the ravage they have wrought. 1872 Tennyson *Gareth & Lynette* 429 Many another suppliant crying came With noise of ravage wrought by beast and man.

b. *pl.* Extensive depredations. †Also *sg.* with *a.*

1697 Luttrell *Brief Rel.* (1857) IV. 294, 60,000 Tartars are approaching to make a ravage in Poland. 1772 Goldsm. *Hist. Eng.* II. 78 Unable to perceive any signs of an enemy, except from the ravages they had made. 1844 H. H. Wilson *Brit. India* III. 171 They..after a short interval, returned and renewed their ravages. 1853 J. H. Newman *Hist. Sk.* (1873) II. I. i. 34 Six centuries have been unable to repair the ravages of four years.

c. *transf.*, esp. of the destructive action or effects of disease, time, storm, etc.

1704 F. Fuller *Med. Gymn.* (1711) 78 To what must we attribute the Ravage this Disease makes? 1745 J. Mason *Self-Knowl.* (1853) I. xiv. 99 The Torment of the Mind, under such an Insurrection and merciless Ravage of the Passions. 1786 Burns *Author's Farewell* ii, The Autumn mourns her rip'ning corn By early Winter's ravage torn. 1801 *Lusignan* IV. 229 The ravage time and affliction had made on those features. 1868 Tennyson *Lucret.* 176 Seeing with how great ease Nature can smile..At random ravage. *pl.* 1777 Sheridan *Sch. Scand.* II. ii, If Mrs. Evergreen does take some pains to repair the ravages of time. 1838 Thirlwall *Greece* xxi. III. 169 The ravages of the pestilence continued..for two years. 1873 Max Müller *Sc. Rel.* 118 On rolls of papyrus which seem to defy the ravages of time.

3. *concr.* Plunder, spoil. *rare*[−1].

1809 Malkin *Gil Blas* VI. i. ¶2 Three hundred pistoles, the lawful ravage of their pockets.

ravage ('rævɪdʒ), *v.* [ad. F. *ravager*, f. *ravage*: see prec.]

1. *trans.* To devastate, lay waste, despoil, plunder (a country). Also *transf.* or *fig.*

1611 Cotgr., *Ravager*, to rauage, forray, spoyle, prey vpon. *a*1704 T. Brown *Satire Antients* Wks. 1730 I. 24 The barbarians who ravag'd Greece and Italy. 1758 Johnson *Idler* No. 8 ¶6 The Isle of Rhodes..was ravaged by a dragon. *Ibid.* No. 14 ¶4 Life is continually ravaged by invaders. 1838–43 Arnold *Hist. Rome* II. xxxvii. 481 Æmilius began to ravage their territory with fire and sword. 1848 Thackeray *Van. Fair* xx, That sweet face so sadly ravaged by grief and despair.

2. *intr.* To commit ravages; to make havoc or destruction. Also *fig.*

1627 F. E. *Hist. Edw. II* (1680) 47 His wand'ring eyes now ravage through the confines of his great Court. 1659 Hammond *On Ps.* civ. 20, 21 Paraphr., Beasts of prey, which ..are inabled to ravage, and feed. 1769 Goldsm. *Hist. Rome* (1786) II. 497 A dreadful enemy ravaging in the midst of their country. 1840 Dickens *Barn. Rudge* iv, The locksmith who had..been ravaging among the eatables. 1874 Green *Short Hist.* ii. §7. 95 When the Danes were ravaging along Loire as they ravaged along Thames.

ravaged ('rævɪdʒd), *ppl. a.* [f. prec. + -ED[1].] Despoiled, devastated.

1728–46 Thomson *Spring* 14 The shatter'd forest, and the ravag'd vale. 1799 Kirwan *Geol. Ess.* 74 The more southern, ravaged or torn up continents. 1811 Scott *Don Roderick* I. ii, Each voice..That rings Mondego's ravaged shores around. 1821 Shelley *Hellas* 907 The weight which Crime..Leaves in his flight from ravaged heart to heart.

†**'ravagement.** *Obs. rare.* [a. F. *ravagement*: see RAVAGE *v.* and -MENT.] Ravage.

1723 *Briton* No. 20 (1724) 87 Success attended their Inroads and Ravagements. 1766 Entick *London* IV. 286 Houses within the ravagement of the flames.

ravager ('rævɪdʒə(r)). [f. RAVAGE *v.* + -ER[1].] One who or that which ravages.

1611 Cotgr., *Ravageur*, a rauager, spoyler, forrayer. 1726

2. Lowering in estimation; disparagement.
1790 Bp. T. Burgess *Serm. Divin. Christ*, Note iii, Dangerous..to form comparisons..where the preference of one tends to the depreciation of the other. 1831 Lamb *Elia, Ellistoniana*, Resentment of depreciations done to his more lofty intellectual pretensions. 1872 Geo. Eliot *Middlem.* lxxxvi, She never said a word in depreciation of Dorothea.

depreciative (dɪ'pri:ʃɪətɪv), *a.* [f. L. *dēpretiāt-* (see DEPRECIATE *v.*) + -IVE.] Characterized by depreciating; given to depreciation; depreciatory.
1836 in Smart, and in mod. Dicts.

depreciator (dɪ'pri:ʃɪeɪtə(r)). [a. L. *dēpretiātor* (*dēprec-*) (Tertull.), agent-n. f. *dēpretiāre* to DEPRECIATE.] One who depreciates.
1799 V. Knox *Consid. Lord's Supper* (R.), The depreciators of the Eucharist. 1868 Freeman *Norm. Conq.* (ed. 3) II. ix. 387 Depreciators of Harold. 1875 Jevons *Money* vii. 66 Kings have been the most notorious false coiners and depreciators of the currency.

depreciatory (dɪ'pri:ʃɪətərɪ), *a.* [f. L. type **dēpretiātōri-us*, f. *dēpretiātor*: see prec. and -ORY.] Tending to depreciate; of disparaging tendency.
1805 W. Taylor in *Ann. Rev.* III. 57 This account..is too depretiatory. 1875 Jowett *Plate* (ed. 2) V. 59, I have a word to say..which may seem to be depreciatory of legislators.

†**de'predable,** *a. Obs.* [f. stem of L. *dēprædāre* or F. *dépréder* (see DEPREDATE) + -BLE.] Liable to be preyed upon or consumed.
1640 G. Watts tr. *Bacon's Adv. Learn.* IV. ii. 201 The juyce and succulencies of the body, are made less depredable, if either they be made more indurate, or more dewy, and oyly. 1656 Blount *Glossogr.*, *Depredable*, that may be robbed or spoiled.

†**de'predar.** *Sc. Obs.* [agent-n. f. a vb. **deprede*, a. F. *dépréder*, ad. L. *dēprædāre* to DEPREDATE; perh. directly repr. a F. **déprédeur*.] = DEPREDATOR; ravager.
1535 Stewart *Cron. Scot.* II. 304 Tua vncristin kingis..Depredaris alss of halie kirk also.

depredate ('dɛprɪdeɪt), *v.* [f. ppl. stem of L. *dēprædāre* to pillage, ravage, f. DE- I. 3 + *prædāre* (*-ārī*) to make booty or prey of, f. *præda* booty, prey. Cf. F. *dépréder*.]
†1. *trans.* To prey upon, to make a prey of; to plunder, pillage. *Obs.* (or *nonce-wd*)
1651 N. Bacon *Disc. Govt. Eng.* II. vi. (1739) 30 That corrupt custom or practice of depredating those possessions given to a holy use. 1654 H. L'Estrange *Chas. I* (1655) 126 Such things as had been depredated and scrambled away from the Crown in his Fathers minority. 1677 Hale *Prim. Orig. Man.* IV. viii. 369 Animals..which are more obnoxious to be preyed upon and depredated. [1886 *Pall Mall G.* 2 Oct. 4/1 These animals [tigers and leopards] are common in Corea, and depredate the inhabitants in winter.]
†b. *fig.* To consume by waste. *Obs.*
1626 Bacon *Sylva* §299 It [Exercise] maketh the Substance of the Body more solid and Compact; and so less apt to be Consumed and Depredated by the Spirits. 1662 H. Stubbe *Ind. Nectar* iii. 65 They do depredate, and dissolve, by way of colliquation, the flesh.
2. *intr.* To make depredations. (*affected.*)
1797 Mrs. A. M. Bennett *Beggar Girl* (1813) I. 250 If none are allowed to depredate on the fortunes of others. 1799–1805 S. Turner *Anglo-Sax.* (1836) I. IV. iii. 283 Ragnar Lodbrog depredated with success on various parts of Europe. 1888 *Boston* (Mass) *Jrnl.* 20 Oct. 2 4 Wolves..invade farm yards and depredate upon chickens and calves.

depredation (dɛprɪ'deɪʃən). [a. F. *déprédation*, in 15th c. *depredacion* (Hatzf.), ad. L. *dēprædātiōn-em* plundering, n. of action from *dēprædāre*: see prec.]
1. The action of making a prey of; plundering, pillaging, ravaging; also, †plundered or pillaged condition (*obs.*).
1483 Caxton *Gold. Leg.* 343/2 Somme..seyng his depredacion entryd in to his hows by nyght and robbed hym. 1494 Fabyan *Chron.* VII. 354 By y^e^ depredacion & brennynge of our manours. 1618 Jas. I in *Fortesc. Papers* (Camden) 58 Touching his [Raleigh's] actes of hostilitie, depredation, abuse..of our Commission. 1783 Johnson *Lett. to Mrs. Thrale* 1 July, Till the neighbourhood should have lost its habits of depredation. 1832 Ht. Martineau *Ireland* vi. 92 When he heard of the acts of malice and depredation.
b. *Sc. Law.* (See quot.)
1861 W. Bell *Dict. Law Scot.* 278 *Depredation* or *Hership*, is the offence of driving away numbers of cattle or other bestial, by the masterful force of armed persons..The punishment is capital.
c. An act of spoliation and robbery; *pl.* ravages.
1495 *Act 11 Hen. VII*, c. 9 Preamb., Robberies, felonyes, depredacions, riottes and other greate trespaces. 1611 Speed *Theat. Gt. Brit.* xxviii. (1614) 55/1 In the depredations of the Danes. 1688 in Somers *Tracts* II. 383 For redressing the depredations and robberies by the Highland Clans. 1798 Ferriar *Illustr. Sterne* vi. 169 Sterne truly resembled Shakespeare's Biron, in the extent of his depredations from other writers. 1867 Lady Herbert *Cradle L.* vii. 202 Subject..to continual depredations at the hands of the Bedouins.
1626 Bacon *Sylva* §91 The Speedy Depredation of Air upon Watery Moisture, and Version of the same into Air, appeareth in..the sudden discharge..of a little Cloud of Breath, or Vapour, from Glass. 1650 tr. *Bacon's Life & Death* Pref. 3 The one touching the Consumption, or Depredation, of the Body of Man; The other, touching the Reparation, and Renovation of the same. 1651 Biggs *New Disp.* ¶ 124 The deprædation of the strength, and very substance of our bodies.
b. *pl.* Destructive operations, ravages (of disease, physical agents).
1663 Cowley *Death Mrs. K. Philips* 4 Cruel Disease!..the fairest Sex..thy Depredations most do vex. 1750 Johnson *Rambler* No. 74 ¶2 Peevishness..may be considered as the canker of life, that creeps on with hourly depredations. 1875 Lyell *Princ. Geol.* II. II. xxvii. 51 [They] perished..by the depredations of the lava.
Hence **depre'dationist**, one who practises or approves of depredations.
1828 Bentham *Wks.* (1843) X. 581 The enemies of the people may be divided into two classes; the depredationists..and the oppressionists.

depredator ('dɛprɪdeɪtə(r)). [a. L. *dēprædātor*, agent-n. from *dēprædāre* (see DEPREDATE); perh. immed. ad. F. *déprédateur* (14th c. in Hatzf., not in Cotgr. 1611, in Dict. Acad. 1798).] One who, or that which, preys upon or makes depredations; a ravager, plunderer, pillager.
1626 Bacon *Sylva* §492 They be both great Depredatours of the Earth. 1646 J. Hall *Horæ Vac.* 143 Hawking..is..a generous exercise, as well for variety of deprædators as preys. 1799–1805 S. Turner *Anglo-Sax.* (1836) I. III. i. 154 They had been but petty and partial depredators. 1814 Scott *Wav.* xv, The depredators were twelve Highlanders. 1851 *Beck's Florist* 100 If you should be annoyed by a small black insect..use every means to encourage the plants..by brushing the depredators from the points of the shoots.

depredatory (dɪ'prɛdətərɪ, 'dɛprɪdeɪtərɪ), *a.* [f. L. type **dēprædātōri-us*, f. *dēprædātor*: see prec. and -ORY.] Characterized by depredation; plundering, laying waste.
1651 tr. *Bacon's Life & Death* 38 That the Spirits and Aire in their actions may be the less depredatory. 1771 Macpherson *Introd. Hist. Gt. Brit.* 29 The irruption of the Cimbri was not merely depredatory. 1799–1805 S. Turner *Anglo-Sax.* (1836) I. III. i. 149 More fortunate than their depredatory countrymen who had preceded them.

†**de'predicate,** *v. Obs. rare.* [f. DE- I. 3 + PREDICATE *v.*] To proclaim aloud; call out; celebrate.
1550 Veron *Godly Sayings* (1846) 148 Do not nowe the enemyes of the truth..as they are syttyng on theyr ale benches, depredycate and saye: Where is extortyon, bryberye and pyllynge nowe a dayes most used? 1659 Hammond *On Ps.* Annot. 1 The Hebrew..which in Piel signifies to praise, or celebrate, or deprædicate. 1674 Hickman *Quinquart. Hist.* (ed. 2) 237, I wish..that he had not depredicated the invincible constancy of Mr. Barret, as he doth.

†**deprehend** (dɛprɪ'hɛnd), *v. Obs.* [ad. L. *dēprehend-ĕre* to take or snatch away, seize, catch, detect, etc., f. DE- I. 2 + *prehend-ĕre* to lay hold of, seize.]
1. *trans.* To seize, capture; to arrest, apprehend.
1532 More *Confut. Barnes* VIII. Wks. 758/1 He would..cause them to be deprehended and taken. *a* 1572 Knox *Hist. Ref.* Wks. 1846 I. 6 About the year of God 1431, was deprehended in the Universitie of Sanctandrose, one named Paull Craw, a Bohame..accused of heresye. *a* 1639 Spottiswood *Hist. Ch. Scot.* VI. (1677) 390 With him were deprehended divers missive Letters..signed by the Earl. 1657 S. Purchas *Pol. Flying Ins.* I. v. 11 Least they should be deprehended for theeves. 1834 Hogg *Mora Campbell* 638 Two wives at once to deprehend him.
2. To catch or detect (a person) in the commission of some evil or secret deed; to take by surprise.
1529 More *Comf. agst. Trib.* I. Wks. 1148/1 [Achan] myghte wel see that he was deprehended and taken agaynst hys wyl. 1543 Grafton *Contn. Harding* 583 Yf he were deprehended in lyke cryme. 1574 Whitgift *Def. Aunsw.* ii. Wks. 1851 I. 272 Touching the woman deprehended in adultery. 1622 Donne *Serm.* i. 6 When Moses came down from God, and deprehended the people in that Idolatry to the Calfe. 1677 Cary *Chronol.* II. II. III. iii. 228 Being deprehended a Confederate with Sô, King of Ægypt..this stirred up the King of Assyria against him.
b. To convict or prove guilty (*of*).
1598 Grenewey *Tacitus' Ann.* III. xi. (1622) 80 Noting the countenance, and the feare of euerie one of such, which should be deprehended of this shamefull lauishing.
3. To detect or discover (anything concealed or liable to escape notice).
1523 in Burnet *Hist. Ref.* II. 105 The more the said Breve cometh unto light..the more falsities may be deprehended therein. 1607 Topsell *Four-f. Beasts* (1658) 430 The fraud ..is easily deprehended, for both the odour and the colour are different from the true amber. 1626 Bacon *Sylva* §98 The Motions of the Minute Parts of Bodies..are Invisible, and incurre not to the Eye; but yet they are to be deprehended by Experience. *a* 1683 Whichcote *Serm.* (1698) 22 If it [our Religion] had been a Cheat and an imposture it would have been deprehended in length of Time.
b. With *subord. cl.*
1531 Elyot *Gov.* I. xiv, In the bokes of Tulli, men may R. Vaughan *Coinage* 30 Easily deprehend if there be mixture of allay amongst it.
Hence †**depre'hended** *ppl. a.*, caught in the act.
1655 Jer. Taylor *Unum Necess.* ix. § 1 (R.) Of the thief on the cross and the deprehended adultress. 1660 —— *Duct. Dubit.* III. i. rule 1 § 12.

†**depre'hendible,** *a. Obs.* [f. L. *dēprehendĕre* + -BLE.] Capable of being detected.
1660 H. More *Myst. Godliness* VII. ii. 288 The foolery of it [is] still more palpably deprehendible.

†**depre'hensible,** *a. Obs.* [f. L. *dēprehens-*, ppl. stem of *dēprehend-ĕre* + -BLE.] = prec.
1653 H. More *Antid. Ath.* III. iii. (1712) 94 His presence was palpably deprehensible by many freaks and pranks that he played. 1660 N. Ingelo *Bentivolio & Urania* II. (1682) 61 Operations which are Regular and deprehensible by Reason.
Hence †**depre'hensibleness;** †**depre'hensibly** *adv.*
1664 H. More *Myst. Iniq.* I. II. viii. ¶ 13 Which if they doe very grossely and deprehensibly here. 1727 Bailey vol. II, *Deprehensibleness*, capableness of being caught or understood.

†**depre'hension.** *Obs.* [ad. L. *dēprehensiōn-em*, n. of action from *dēprehendĕre* to DEPREHEND.] The action of catching or taking in the act; detection; arrest.
1527 Knight in J. S. Brewer *Reign Hen. VIII*, xxviii. (1884) II. 199 That it be not in any wise known that the said..deprehension should come by the King. 1612–5 Bp. Hall *Contempl., N.T.* IV. xv, To be taken in the very act was no part of her sin..yet her deprehension is made an aggravation of her shame. 1630 Sanderson *Serm.* II. 269 The next step is for deprehension, or conviction. 1649 Jer. Taylor *Gt. Exemp.* xvi. ¶ 9 We must conceal our actions from the surprises and deprehensions of Suspition.

†**de'prensible,** *a. Obs.* [f. L. *dēprend-ĕre*, *dēprens-* shortened form of *dēprehendĕre*, etc.] = DEPREHENSIBLE; capable of being detected.
1648 Sir W. Petty *Advice to Hartlib* 15 Such [qualities] as are not discernible by sense, or deprensible by Certaine Experiments.

†**de'prension.** *Obs.* [cf. prec.] = DEPREHENSION.
1654 Gayton *Pleas. Notes* IV. vi.–vii. 214 Shame and deprension is a better friend.

depresh (dɪ'prɛʃ). Now *Obs.* or *rare.* Colloq. abbrev. of DEPRESSION, esp. in sense 5.
1933 *Bulletin* (Sydney) 2 Aug. 10/4 There's no surer test of the depresh down-and-out. 1933 M. Lowry *Ultramarine* ii. 70 Forgetting depresh. of departing semester. 1942 Berrey & Van den Bark *Amer. Thes. Slang* §3/7 The depresh, the 1929–32 depression. *Ibid.* §543/4 Big bad wolf, the Big Trouble, depresh, Old Man Depression, economic depression.

depress (dɪ'prɛs), *v.* Also 4 depres(e, deprece, 5–7 depresse, (6 dyprease). [a. OF. *dépresser* (Godef.), ad. L. type **dēpressāre* (It. *depressare*), freq. of *dēprimĕre* to press down. (Cf. *pressāre* freq. of *premĕre* in L. use.) In Eng. taken as the repr. of L. *dēprimĕre*, ppl. stem *dēpress-*.]
†1. *trans.* To put down by force, or crush in a contest or struggle; to overcome, subjugate, vanquish. *Obs.*
c 1325 *E.E. Allit. P.* A. 777 And þou con alle þo dere out-dryf, And fro þat maryag al oper depres. *c* 1340 *Gaw. & Gr. Knt.* 6 Ennias þe apel and his highe kinde, þat siþen depreced prouinces. 1432–50 tr. *Higden* (Rolls) I. 145 The dogges..be so greete and feerse that thei depresse bulles and peresche lyones. 1529 Frith *Pistle to Chr. Rdr.* (1829) 464 Her seed shal depress & also break thy head. 1671 Milton *Samson* 1698 So virtue..Depressed and overthrown, as seem'd..Revives, reflourishes. 1675 tr. *Machiavelli's Prince* iii. (Rtldg. 1883) 20 The kingdom of the Macedonians was depress'd and Antiochus driven out.
†b. To press hard; to ply closely with questions, entreaties, etc. *Obs. rare.*
c 1340 *Gaw. & Gr. Knt.* 1770 þat prince [= princess] of pris depressed hym so pikke..þat nede hym bi-houed Oper lach þer hir luf, oper to-day refuse.
2. To press down (in space). Often more widely: To force, bring, move, or put into a lower position by any physical action; to lower.
1526 *Pilgr. Perf.* (W. de W. 1531) 134 b, As the belowes, the more they depresse the flame, the more the fyre encreaseth. 1646 Sir T. Browne *Pseud. Ep.* II. ii. 61 Needles which stood before..parallel unto the Horizon, being vigorously excited, incline and bend downeward, depressing the North extreame below the Horizon. 1665 Hooke *Microgr.* 17 The globular figure..will be deprest into the Elliptico-spherical. 1692 in *Capt. Smith's Seaman's Gram.* II. iii. 92 A Gunner's Quadrant to level, elevate, or depress his Gun. 1752 Chambers *Cycl., Depression of the Pole*, So many degrees as you..travel from the pole towards the equator; so many you are said to depress the pole, because it becomes..so much lower or nearer the horizon. 1774 J. Bryant *Mythol.* I. 321 The Palm was supposed to rise under a weight; and to thrive in proportion to its being depressed. 1822 Imison *Sc. & Art* I. 184 Alternately raising and depressing the piston. 1855 Bain *Senses & Int.* II. II § 13 The sensation of a weight depressing the hand. 1880 Gunther *Fishes* 41 The spines can be erected or depressed at the will of the fish.
3. *fig.* To lower in station, fortune, or

1. *trans.* To give over (a city, town, etc.) to plunder by the soldiery of a victorious army; to strip (a person or place) of possessions or goods; to plunder, despoil.

a 1547 SURREY *Ecclesiastes* v. Wks. 1815 I. 76 The plenteous houses sackt; the owners end with shame Their sparkled goods. *a* 1548 HALL *Chron., Hen. V* 45 The toune was sacked to the greate gayne of the Englishemen. 1563 WINJET *Vincent. Lirin.* To Marie Q. Scottis, Wks. (S.T.S.) II. 5 That al the enimeis thairof.. suld nocht mak thame be force and plane violente to sact it, or onywayis subdew it. 1567 *Satir. Poems Reform.* v. 52 Spair not to gif thame all ane syse, Quhome ze beleif the King did sact. 1574 tr. *Marlorat's Apocalips* 44 He wil be sacked of all his goods or be throwen into prison. 1634 HEYWOOD *Maidenh. Lost* I. Wks. 1874 I. 111 We sack't the Citty after nine Moneths siege. 1807 J. BARLOW *Columb.* III. 13 They sack the temples, the gay fields deface. 1840 DICKENS *Barn. Rudge* lxxi, People.. are flying from the town which is sacked from end to end. 1855 MACAULAY *Hist. Eng.* xix. IV. 295 From Bow to Hyde Park.. there was no parish in which some quiet dwelling had not been sacked by burglars. 1879 GREEN *Read. Eng. Hist.* xvii. 83 The monastery was sacked by the Danes.

b. said of an inanimate agent.

1571 *Satir. Poems Reform.* xxv. 119 Gif fyre may pair buildings sacke, Or bullat beat paim downe. 1817 SHELLEY *Rev. Islam* VII. xxxviii, When I woke, the flood Whose banded waves that crystal cave had sacked Was ebbing round me.

†2. To take as plunder or spoil. *Obs. rare*$^{-1}$.

1590 tr. *P. Ubaldino's Disc. conc. Span. Invas.* 21 The Englishmen departed,.. hauing sacked 22000. duckets of gold,.. and 14. coffers of mooueables.

fig. 1590 GREENE *Never too late* II. Wks. (Grosart) VIII. 155 Thou seekest not only to sacke mine honour, but to suck my bloud.

sack, obs. form of SAC^{1}.

sackable ('sækəb(ə)l), *a.* [f. SACK *v.* 5 a + -ABLE.] For which one may be sacked; justifying the sack. So **sacka'bility**, liability to be sacked.

1975 *Financial Times* 13 Jan. 25/6 Mr. Carew thinks that to-day's average British executive has had sackability built into him from childhood. 1975 *Daily Tel.* 3 Oct. 6/5, I admit I may have been impetuous in writing what I did about the school, but every word is truth. I don't consider publication of the truth to be a sackable offence.

sackage ('sækɪdʒ), *sb.* Now *rare.* Also 6–7 **saccage**. [a. F. *saccage*, according to Hatz.-Darm. a verbal noun f. *saccager*: see SACKAGE *v.*]

1. The action, or an act, of sacking (a city, etc.).

1577–87 HOLINSHED *Chron.* III. 1097/1 For the defense and safegard of this citie from spoile and saccage. 1583 BABINGTON *Commandm.* (1590) 226 In sackages of Cities. 1601 HOLLAND *Pliny* I. xv. xviii. 443 Howbeit Cato survived not the rasing and saccage of Carthage, for he died the yeare immediatly following this resolution. 1654 tr. *Martini's Conq. China* 190 The sackage endured from the 24. of November till the 5. of December. 1755 T. H. CROKER *Orl. Fur.* XXXIII. xli, Ravenna is in sackage laid. 1808 SOUTHEY *Chron. Cid* 386 Some among us, says he, in this city, count from the sackage of the Jews. 1875 TENNYSON *Q. Mary* II. ii, To guard and keep you whole and safe from all The spoil and sackage aim'd at by these rebels.

†2. Booty, plunder. *Obs. rare*$^{-1}$.

1609 HOLLAND *Amm. Marcell.* XXIV. viii. 251 When the saccage therefore was divided and dealt,.. himselfe tooke for his share a dumbe boy.

†**sackage, 'saccage**, *v. Obs.* [a. F. *sãccager*, prob. ad. It. *sa cheggiare*, f. *sacco* SACK *sb.*^{2}] *trans.* To put to sack; to plunder.

1585 T. WASHINGTON tr. *Nicholay's Voy.* I. vii. 5 b, Their intent was to.. haue good means to saccage vs. *Ibid.* xii. 13 b, The houses.. hauing been twise saccaged [orig. *deux fois saccagees*] and spoyled by the Spaniardes. 1628 *Priv. Mem. Sir K. Digby* (1828) 28 Before they went out of it they saccaged the town. 1662 J. BARGRAVE *Pope Alex. VII* (1867) 94 They.. set upon the barch [? *read* bank] where the money was, and sackaged all. 1687 A. LOVELL tr. *Thevenot's Trav.* I. 6 It.. having been.. saccaged and ruined by a Roman Army.

Hence †'**saccaging** *vbl. sb.*, †'**saccagement**.

1585 T. WASHINGTON tr. *Nicholay's Voy.* II. xiii. 48 b, The saccaging.. continued 3. daies. *Ibid.* IV. XXXVI. 160 The ruine, saccagement, & desolation of their countrey. 1654 tr. *Martini's Conq. China* 90 After the saccaging and burning of so many Provinces.

'sackalever (sæko'li:və). Also **sacoleva**. [ad. It. *saccaleva*. Cf. F. *sacolève*.] A small lateen-rigged sailing vessel used in the Levant.

1819 T. HOPE *Anastasius* (1820) I. xii. 223 Meaning myself to go by land as far as Gallipoli, where the sacoleva was to ballast. 1878 TRELAWNY *Shelley* (1887) 83 A Turkish sackalever.

sackbut ('sækbʌt). Forms: 6–7 **sagbut**, **-bot**, 6 **sagbout**, **saggebut**, 7 **sagbutt**, 6–7 **shagbot(e**, (6 **shakbott**, **shagbush**, 7 **-but**), 6 **sackbot**, 7 **-butt**, **sacke-but**, 7 **sacbutt**, 8–9 **sacbut**, 7– **sackbut**. [a. F. *saquebute*, earlier *saqueboute*, *-botte*, etc.; not found as the name of a musical instrument earlier than the latter half of the 15th c., but presumably identical with ONF. *saqueboute*, explained in the 14th c. as a lance furnished with an iron hook for pulling men off their horses' ('un grau de fer pour les garchons *saquier* jus de leurs quevaulz'). In the modern Norman dialect draw (which accounts for all the senses of the compound); the etymology of the second element is obscure; some scholars connect it with *bouter* to push.

The Sp. *sacabuche* (cf. the 16th c. Eng. form *shagbushe*), sackbut, also tube used as a pump, and the Pg. *sacabucha*, *-buxa*, with the same meanings, appear to be corrupt adoptions of the Fr. word. The Pg. word is identical in form with a word meaning a hook for drawing the wad from a gun, regularly f. *saca-r* to draw + *bucha*, *buxa*, wad. Possibly the Fr. word may, when adopted into Pg., have undergone assimilation to the native word and then passed in the altered form into Sp.; but evidence is wanting.]

1. a. A musical instrument of the Renaissance; a bass trumpet with a slide like that of a trombone for altering the pitch. Recently revived in the performances of some early music.

The word is to many readers known only from its occurrence in Dan. iii, where it is a mistranslation of Aramaic *sabbᵉkā*, which the LXX and Vulgate render (doubtless correctly) by Gr. σαμβύκη, L. *sambūca*, the name of a stringed instrument (see SAMBUCA^{1}). Coverdale 1535 (for what reason is not clear) renders the word by *shawmes*, thus taking it to denote a wind instrument; the Geneva translators, accepting this view, seem to have chosen the rendering 'sackbut' on account of its resemblance in sound to the Aramaic word. In this they have been followed by the 'Authorized' (1611) and 'Revised' (1885) Versions.

1533 ELYOT *Cast. Helthe* (1539) 51 The entrayles.. be exercised by blowyng, eyther by constraint, or playeng on shaulmes, or sackbottes. 1536 WRIOTHESLEY *Chron.* (Camden) I. 44 And shalmes, sagbuttes, and dromeslawes playing also in barges going before him. 1560 BIBLE (Genev.) *Dan.* iii. 5 The cornet, trumpet, harpe, sackebut, psalteries, dulcimer, and all instruments of musicke. 1577–87 HOLINSHED *Chron.* III. 930/2 In which barge were shalmes, shagbushes, and diverse other instruments. 1638 BURTON *Anat. Mel.* II. ii. III. (ed. 5) 249 As he that playes upon a Sagbut by pulling it up and downe alters his tones and tunes. 1674 PLAYFORD *Skill Mus.* Pref. 3 The sound of a Sackbut or Trumpet, should skip from Concord to Concord. 1675 SHADWELL *Psyche* I. Wks. 1720 II. 16 Voices, Flagellets, Violins, Cornets, Sackbuts, Hautboys; all joyn in Chorus. 1797 SOUTHEY *Tri. Woman* 108 And shrill were heard the flute, The cornet, sackbut, dulcimer, and lute. 1808 SCOTT *Marm.* IV. XXXI, And sackbut deep, and psaltery. 1862 LONGF. *Wayside Inn* Prel. 213 In vision or in trance He heard the solemn sackbut play. 1972 *Register of Early Music* Autumn 19 (*heading*) People who have expressed an interest in:—Cornetts, Serpents, Sackbuts and Early Brass. 1973 *Early Music* I. 48 (Advt.), Brass Instruments... Sackbuts, Renaissance and Baroque trumpets by Meinel & Lauber. 1978 *Early Music Gaz.* Jan. p. 11/3 *Cornett and Sackbut* is a new magazine for all players of early lip-reed instruments.

†b. A player on the sackbut. *Obs.*

1539 *Rutland MSS.* (1905) IV. 293 To Doctre Lee's shawmes and shagboshes that playt before my Lorde of Solfolke, iijs. iiijd. 1540 in *Vicary's Anat.* (1888) App. xii. 241 Item, for Pilligrine, sagbut, wages, xls. 1647 HAWARD *Crown Rev.* 25 Six Sackbuts: Fee *le peice*, 24. 6. 8.

¶ 2. *Roman Antiq.* Used to render L. *sambuca*: see SAMBUCA^{1} 2. *rare*$^{-1}$.

1756 HAMPTON *Polybius* (1773) III. 131 These vessels.. carried to the walls certain machines called Sackbuts.

Hence †'**sackbut(t)er**, a player on the sackbut.

1503 in *Cal. Doc. rel. Scotl.* (1888) 347 [Warrant.. to deliver.. a banner.. to.. the K.'s five trumpetters, and also to Johannes and Edward], shakbotters. 1916 STANFORD & FORSYTH *Hist. Mus.* ix. 180 *Four* sackbutters were enough for her grandfather. *Ibid.* 188 The other three are playing on brass instruments with slides. One may call them simply trombones. These are the *Royal Sackbutters.*

†'**sack-butt**. *Obs.* [f. SACK *sb.*^{3} + BUTT *sb.*^{2}] A butt of sack.

1600 HEYWOOD *2nd Pt. Edw. IV*, Wks. 1874 I. 93 Will no man thrust the staue into a sack-but? 1623 MARKHAM *Eng. Housew.* ii. 149 The depth of euery Sack-Butt is the foure pricks next to the puncheon. 1657 TRAPP *Comm. Ezra* ix. 6 But he is past grace that is past shame, and can blush no more then a sackbut.

punningly. 1623–4 MIDDLETON & ROWLEY *Sp. Gipsy* II. i, *Al.*.. You must not look to have your Dinner serv'd in with Trumpets. *Cor.* No, no, Sackbuts shall serve us. 1623 FLETCHER *Rule a Wife* V. v, I' th' celler.. He will make dainty musick among the sack-butts.

sackcloth ('sækklɒθ, -ɔ:θ). Forms: 4 **sekk-clathe**, **sekklath**, 5 **sekclath**, **-cloth**, **cekclothe**, **sak clothe**, 6 **sack(e)cloth(e**, **sacclothe**, **sack-cloath**, 6– **sackcloth**. [f. SACK *sb.*^{1} + CLOTH.]

1. a. A coarse textile fabric (now of flax or hemp) used chiefly in the making of bags or sacks and for the wrapping up of bales, etc.; sacking.

1373–4 *Durham Acc. Rolls* (Surtees) 578 In Sekklath empt. in villa et in patria, xxvjs. iiijd. *c* 1420 ? LYDG. *Assembly of Gods* 290 Ceres, the goddesse, in a garment Of sak clothe.. Embrowderyd with sheues & sykelys bent. 1423 JAS. I *Kingis Q.* cix, Als like ȝe bene, as.. sek-cloth is vnto fyne cremeseye. *c* 1440 *Promp. Parv.* 64/1 Cek, or cekclothe, or poke, *saccus*. 1484–5 *Durham Acc. Rolls* (Surtees) 415 Sol. pro ix uln. de Sekclath pro altaribus ecclesiæ, ijs. iijd. 1548 THOMAS *Ital. Dict.* (1567), *Canauaccio*, canuasse or sackecloth. 1623 MARKHAM *Cheap Husb.* I. iv. (ed. 3) 50 Cloath him temperately, as with a single cloth, of canuasse or sacke-cloth. 1896 *Daily News* 21 Apr. 6/4 The latest novelty in dress materials is sackcloth... It is common hemp sacking,.. but let no one imagine for a single moment that it is cheap. The open canvas ground is intended to be lined with the richest.. silks and satins, and itself forms a groundwork for elaborate embroideries.

the coarsest possible clothing, indicative of extreme poverty or humility. ***in sackcloth and ashes*** (Biblical): clothed in sackcloth and having ashes sprinkled on the head as a sign of lamentation or abject penitence. †Also with *a* (cf. SACK *sb.*^{1} 5).

The penitential 'sackcloth' of the Bible (Heb. *saq*, Gr. σάκκος) was a dark-coloured fabric of goats' or camels' hair.

13.. *St. Alexius* 191 in Horstm. *Altengl. Leg.* (1881) 178 All hir bodi scho made bare & did apon hir a sekk-clathe. 1526 TINDALE *Matt.* xi. 21 They had repented longe agon in sack cloth and asshes. 1535 COVERDALE *Ps.* XXXIV. 13 When they were sick, I put on a sack cloth. 1553 EDEN *Treat. Newe Ind.* (Arb.) 5 He whiche cloteth [*sic*] an ape in purple, & a king in sacke-cloth. 1575 GASCOIGNE *Flowers* Wks. 51, I was in sack-cloth I, now am I clad in gold, And weare such robes, as I my selfe take plesure to behold. 1590 SPENSER *F.Q.* I. iii. 14 And to augment her painefull penaunce more,.. shee ..next her wrinkled skin rough sacke-cloth wore. 1649 JER. TAYLOR *Gt. Exemp.* I. Disc. iv. 128 S. Lewis King of France wore sack-cloth every day unless sicknesse hindred. 1726 AYLIFFE *Parergon* 47 And being clad in Sackcloth, he was to lie on the Ground, and.. implore God's Mercy. 1788 GIBBON *Decl. & F.* xlviii. V. 55 While he groaned and prayed in sackcloth and ashes, his brother.. smiled at his remorse. 1829 LYTTON *Devereux* IV. v, I should have gone into a convent and worn sackcloth. *a* 1839 PRAED *Poems* (1864) II. 356 The low and great, Who in their sack-cloth or their purple, creep Beneath the summit of the viewless steep. 1885 'H. CONWAY' *Fam. Affair* XXVI, He knew that for all that had befallen she was mourning in mental sackcloth and ashes.

†c. *pl.* [See CLOTHES.] Garments of sackcloth.

1594 GREENE & LODGE *Looking-gl.* (1598) H 4, He sits him down in sack-cloathes, his hands and eyes reared to heauen.

d. *attrib.* and *Comb.*, as ***sackcloth-bag***, ***-garb***, ***-mourner***, ***-prophecy***, etc.; ***sackcloth-bound***, ***-clad***, adjs.

1679 C. NESSE *Antichrist* 127 The sackcloth-prophecy of the witnesses. *Ibid.* 221 A sackcloth-mourner. *Ibid.* 229 Italy it self had several sackcloth-witnesses. *Ibid.* 232 That famous sackcloth-prophet John Wickliffe. 1812 BYRON *Ch. Har.* II. lxxviii, Ere his sackcloth garb Repentance wear. 1843 LYTTON *Last Bar.* I. iii, It's ill-leaping now-a-days in a sackcloth-bag. 1843 J. G. WHITTIER *Lays of My Home* 14 And mate with maniac women, loose-haired and sackcloth-bound. 1855 MILMAN *Lat. Chr.* XIV. viii. (1864) IX. 287 The sackcloth-clad bare-foot friar.

†2. A material for ladies' dresses. Cf. SACK *sb.*^{1} 6.

1571 in Feuillerat *Revels Q. Eliz.* (1908) 136 Sackclothe stripte with sylver. [1896: see 1.]

Hence '**sackclothed** *a. rare*, clad in sackcloth; also *fig.*

1641 BP. HALL *Mischief Faction* Rem. Wks. (1660) 69 To be joviall when God calls to mourning,.. to glitter when he would have us sackcloth'd and squalid, he hates it to the death. 1829 I. TAYLOR *Enthus.* ix. 250 A healthy force of mind utterly incompatible with.. the petty solicitudes of sackclothed abstinence. 1922 BLUNDEN *Shepherd* 23 And rising floods gleam silver on the verge Of sackclothed skies and melancholy grounds. 1924 R. CLEMENTS *Gipsy of Horn* ix. 169 Half-bred negroes and Indians, sackclothed and uncivilised.

sacked (sækt), *a. nonce-wd.* [f. SACK *sb.*^{4} + -ED^{2}.] Wearing a sack.

1847 DISRAELI *Tancred* II. xiv, Gentlemen in wigs, and ladies powdered, patched and sacked.

sacked (sækt), *ppl. a.*^{1} [f. SACK *v.*^{2} + -ED^{1}.] That has been given up to sack; plundered, ravaged.

1593 SHAKS. *Lucr.* 1740 Who like a late sack't Iland vastlie stood Bare and vnpeopled. 1632 LITHGOW *Trav.* V. 200 Semblable to that sacked Lacedemon in Sparta. 1697 DRYDEN *Æneid* IX. 350 Two large Goblets.. which, when old Priam reign'd, My conqu'ring Sire at sack'd Arisba gain'd. 1864 LOWELL *Fireside Trav.* 239 An old woman.. who looked as sacked and ruinous as everything around her.

sacked, *ppl. a.*^{2} [f. SACK *v.*^{1} + -ED^{1}.] 1. That has been put into a sack; stored in a sack.

1895 *Funk's Stand. Dict.* s.v. sack' *vt.*, Sacked grain. 1937 E. HEMINGWAY *To have & have Not* II. i. 78 The man went on slowly lifting the sacked packages of liquor and dropping them over the side. 1970 D. WATERFIELD *Continental Waterboy* i. 3 The trouble with lock gates built of sacked mud is that they do not ordinarily open easily.

2. That has been 'given the sack'; dismissed, discharged (from employment or office). Also *absol.*

1934 G. B. SHAW *On Rocks* 148 The exterminated, or, as we call them, the evicted and sacked, try to avoid starvation. 1981 *Daily Tel.* 10 Sept. 8/8 (*heading*) Pay out for sacked heart man.

Sacked Friar: see SACK-FRIAR.

†'**sacken**, *a. Obs. rare.* [f. SACK *sb.*^{1} + -EN^{4}.] Made of sackcloth. ***sacken gown***, ***sark***, ***weed*** = ***sack gown***: see SACK *sb.*^{1} 8.

13.. *S. Eng. Leg.* (MS. Bodl. 779) in *Archiv Stud. neu. Spr.* LXXXII. 334/47 þat was a sakken curtil & a pilche also & a blak froccke þer-vppon. 1710 *Brit. Apollo* III. No. 20. 2/2 Sacken bottom'd Beds. 1779 D. GRAHAM *Jocky & Maggy's Courtship* Writ. 1883 II. 20 And wha can bide the shame, whan every body looks to them, wi' their sacken sarks or gowns on them. 1780 W. FORBES *Dominie* 6 In case they wear the sacken-weed For fornication. *Ibid.* 13 He'll get the dud an' sacken gown.

sacker^{1} ('sækə(r)). [f. SACK *v.*^{2} + -ER^{1}.] One who sacks or plunders.

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content the authors name to lose. 1722 WOLLASTON *Relig. Nat.* vii. 149 Unless to be unjustly treated, pilled, and abused can be happiness. 1867 J. B. ROSE tr. *Virgil's Æneid* 250 The fields Ausonian they have held and pilled.

†b. To exhaust, impoverish (soil); = PEEL *v.*[1] 1 b. *Obs.*

1594 PLAT *Jewell-ho.* i. 51 Flax, whose seede..doth most burne, and pill the ground. 1610 W. FOLKINGHAM *Art of Survey* i. ix. 23 Wilde Oates pestering and pilling of Tilthes.

†2. *absol.* To commit depredation, rapine, pillage, or extortion; to rob, plunder. *Obs.*

a. *c*1330 R. BRUNNE *Chron. Wace* (Rolls) 6282 þey..pylede & robbed at ilka cost. *c*1386 CHAUCER *Pars. T.* ¶695 They ne stynte neuere to pile. *c*1450 *Merlin* 191 For thei hadde so piled and robbed thourgh the contrey and the portes where the shippes were a-ryvved.

β. 1513 MORE *Rich. III* (1883) 6 For whiche hee was fain to pil and spoyle in other places. *a*1548 HALL *Chron., Hen. IV* 7 He..suffered them to robbe and pill without correction or reprefe. 1607 SHAKS. *Timon* IV. i. 12 Large-handed Robbers your graue Masters are, And pill by Law. 1678 SHADWELL *Timon* IV. ii, They govern for themselves and not the people, They rob and pill from them.

†3. *trans.* To take by violence, force, or extortion; to make a prey of. *Obs.*

a. 13.. *E.E. Allit. P.* B. 1270 þenne ran þay to þe relykes as robbers wylde, & pyled alle þe apparement þat pented to þe kyrke. 1390 GOWER *Conf.* I. 17 What Schep that is full of wulle Upon his back, thei toose and pulle, Whil ther is eny thing to pile [*rime* skile].

β. *c*1400 *Destr. Troy* 2282 In enpayryng of our persons, & pyllyng our goodes. 1513 MORE *Rich. III*, Wks. 62/1 So that there was dayly pilled fro good men & honest, gret substaunce of goodes. 1594 SHAKS. *Rich. III*, I. iii. 159 You wrangling Pyrates, that fall out, In sharing that which you haue pill'd from me. 1618 WITHER *Motto, Nec Habeo* Juvenilia (1633) 521, I have no Lands that from the Church were pild.

†4. To pluck, pull, tear. *Obs.*

*c*1533 LATIMER *Let. to Morice* in Foxe *A. & M.* (1570) 1911/2 Who can pill Pilgrimages from Idolatry? 1566 T. STAPLETON *Ret. Untr. to Jewel* Epist., Your Borrowed Fethers pilled awaye. 1599 NASHE *Lenten Stuffe* Wks. (Grosart) V. 261 In spite of his hairie tuft or loue-locke, he leaues on the top of his crowne, to be pilld vp, or pullied vp to heauen by. 1605 CAMDEN *Rem.* 235 Such which in Ordinaries..will pill and pull them by their wordes..as it were by the beards.

II. To decorticate: = PEEL *v.*[1] II.

5. a. *trans.* To strip of the skin, rind, or integument, as an orange, apple, potato, garlic, etc., a tree of its bark, etc.; to remove the peel of. Rarely const. *of* (that which is stript off): = PEEL *v.*[1] 3. Now *arch.* (in Bible of 1611), and *dial.*

a. [*a*1225 *Ancr. R.* 150 þeonne is þe figer bipiled, & te rinde irend of.] 1382 WYCLIF *Gen.* xxx. 37 And riendis drawun awey; in thilke that weren pilde semede whytnes [1388 and whanne the ryndis weren drawun awei, whitnesse apperide in these that weren maad bare]. 1393 LANGL. *P. Pl.* C. x. 81 To rubbe and to rely russhes to pilie [*v.r.* pil].

β. *c*1420 [see PILLED 1]. *c*1440 *Promp. Parv.* 399/1 Pyllyn, or schalyn nottys, or garlyk, *vellifico.* 1523 FITZHERB. *Husb.* §134 Yf there be any okes..fell them and pyll them and sell the barke. 1530 PALSGR. 657/2 Pyll these oignons whyle I skumme the potte. 1535 COVERDALE *Gen.* xxx. 38 The staues that he had pilled [1611 *ibid.* the rods which he had pilled, 1885 *R.V.* peeled]. 1596 SHAKS. *Merch. V.* I. iii. 85 The skilfull shepheard pil'd me certaine wands, And..stucke them vp before the fulsome Ewes. 1653 H. COGAN tr. *Pinto's Trav.* xxvi. 101 We met with three men that were pilling flax. 1678 RAY *Prov.* (ed. 2) 53 Pill a fig for your friend, and a peach for your enemy. 1721 BAILEY, To *peel*, to pill or take off the rind. 1745 *MS. Indenture* (Sheffield), The burgesses may pill and fell timber trees. 1865 T. F. KNOX tr. *Suso's Life* 226 The sisters went..to pill the flax which they had gathered. 1879 MISS JACKSON *Shropsh. Word-bk.* s.v., They'n al'ays got a stick to pill. [In E.D.D. from Yorksh. to Somerset.]

b. To strip off (bark, skin, etc.); to pare off: = PEEL *v.*[1] 3 b. Often with *off*. Also *fig.*

*c*1440 *Promp. Parv.* 399/1 Pyllyn, or pylle bark, or oper lyke, *decortico.* *c*1440 *Anc. Cookery* in *Househ. Ord.* (1790) 436 Take hom [chickens] up and pylle of the skynne. 1542 BOORDE *Dyetary* xxi. (1870) 283 If the pyth or skyn be pylled of. 1593 SHAKS. *Lucr.* 1167 Ay me, the Barke pild from the loftie Pine, His leaues will wither. 1599 HAKLUYT *Voy.* II. 264 Cinamon..is pilled from fine young trees. 1604 E. G[RIMSTONE] *D'Acosta's Hist. Indies* IV. xxiv. 278 This fruite is most vsuall in Mexico, having a thinne skinne, which may be pilled like an apple. *a*1680 BUTLER *Rem.* (1759) II. 81 If you do but pill the Bark off him he deceases immediately. [1887 *N.W. Linc. Gloss.* 405, I seed 'em pillin' bark e' Mr. Nelthorpe woods..to daay.]

†c. To make or form by peeling. *Obs. rare.*

1535 COVERDALE *Gen.* xxx. 37 But Iacob toke staues of grene wyllies,..and pylled [1611 pilled, 1885 *R.V.* peeled] whyte strekes in them.

6. a. *intr.* Of skin, bark, etc.: To become detached, come off, scale or peel *off*. (The earliest recorded sense.) b. Of animal bodies, trees, etc.: To become bare of skin or bark; also, to admit of being peeled or barked. = PEEL *v.*[1] 4. Now *dial.*

*c*1100 (MS. *a* 1200) *Sax. Leechd* III. 114 þis lace cræft sceal to þan handan þe þæt fell of pyleþ. *c*1400 *Lanfranc's Cirurg.* 199 Al his fleisch wole pile & alle hise heeris wolen falle awei. 1523 FITZHERB. *Husb.* §134 To fall..all okes as sone as they wyll pyll. 1545 RAYNOLD *Byrth Mankynde* i. ii. (1634) 19 The which thin skin..skaleth or pilleth off the hands. 1611 BIBLE *Tobit* xi. 13 The whitenesse pilled away from..his eyes. *a*1631 DONNE *Serm.* xcv. IV. 238, I have seen Marble buildings, and..a face of Marble hath pilled off and I see brick bowels within. 1631 R. H. *Arraignm. Whole Creature* vi. 46 Neither doth the Tree wither so long as the sap is found at the roote, though the barke pill, the flowers fall. 1886 *S.W. Linc. Gloss.* s.v., They'll not cut them [oaks] while [till] the bark'll pill.

c. To gather into small balls of fluff on the surface of a fabric (said of the fibre, and of the fabric as a whole). Hence **pilled** *ppl. a.*, of or pertaining to fibres that have gathered in this way.

1962 *Which?* Aug. 240/1 One [Orlon cardigan]..was starting to pill after 10 washes. 1970 *Cabinet Maker & Retail Furnisher* 23 Oct. 173/2 Cloth so blended 'pilled'—fluffed, if you prefer it—very badly. *Ibid.*, While most worsted and woollen cloths, like a woollen carpet, tend to pill in the beginning, these pills wear off quickly and never recur. 1970 *Which?* Oct. 301/3 Trousers didn't pill, but as they were knitted some snagged. 1971 *Daily Tel.* 19 Apr. 12/4 That curious pilled wool we wore a few years ago, bumpy as if the wool had come out in a rash. 1971 *New Yorker* 21 Aug. 46/2 (Advt.), An exclusive Hathaway process that keeps the collar from pilling (i.e., fuzzing) throughout the life of the shirt.

7. a. *trans.* To make bare of hair, remove the hair from, make bald; to remove (hair). *Obs.* [Cf. F. *peler* 'to bauld or pull the haire off' (Cotgr.).]

*c*1400 *Lanfranc's Cirurg.* 186 þou schalt anoynte his heed wiþ þe oynement þat wole pile awei þe heeris. *c*1410 *Master of Game* (MS. Digby 182) xii, þat one is cleped quyc maniewes, þe whiche pileth [*Douce MS.* pilleth, *Royal MS.* pelyth] þe houndes and breketh hyr skynnes in many places. 1591 PERCIVAL *Sp. Dict., Pelar*, to pill, to make balde, to make bare, *depilare, deglabrare.* 1612 tr. *Benvenuto's Passenger* i. iv. §16. 265 Tell him that I will pill his beard, hair by hair. 1648 HERRICK *Hesper., Duty to Tyrants*, Doe they first pill thee, next pluck off thy skin?

†b. *intr.* To lose hair, become bald. *Obs.*

*c*1386– [see PILLED *ppl. a.* 2]. 1523 FITZHERB. *Surv.* xli. (1539) 58 b, Those beastis in the house haue short here and thynne, and towarde Marche they wyll pylle and be bare. 1614 MARKHAM *Cheap. Husb.* II. vii. (1668) 75 The Closh or Clowse which causeth a Beast to pill and loose the hair from his Neck.

8. *trans.* To bare (land) by eating or shaving off, or cutting down crops, etc., close to the ground. [Cf. F. *peler la terre*, 'enlever le gazon' (Littré).]

1555 W. WATREMAN *Fardle Facions* App. 347 Pille ye not the countrie, cutting doune the trees. 1615 W. LAWSON *Orch. & Gard.* (1623) 12 Whosoeuer makes such Walls, must not pill the ground in the Orchard, for getting earth. 1903 *Eng. Dial. Dict., Pill*..2 To graze land very closely. *Som.* I put some sheep in to pill the field.

III. 9. Phrase. *to pill (peel) and poll*, also *poll and pill* (*lit.* to make bare of hair and skin too): to ruin by depredations or extortions; to rifle, strip bare, pillage; also *absol.*; rarely, to plunder or rob *of* something. *Obs.* or *arch.* (Common in 16–17th c. See also POLL *v.*)

1528 TINDALE *Obed. Chr. Man* Prol., Wks. (1573) 105 They haue no such authoritie of God so to pylle and polle as they do. 1545 BRINKLOW *Compl.* ii. (1874) 14 The officers robbe his grace, and polle and pylle his leage subiectys in his name. 1550 CROWLEY *Epigr.* 278 Thus pore men are pold and pyld to the bare. *c*1557 ABP. PARKER *Ps.* liv, They have no God before theyr eyes, they me both pill and powle. 1583 STUBBES *Anat. Abus.* II. (1882) 30 No man ought to poole and pill his brother. *a*1652 BROME *City Wit* IV. i, Churches poule the People, Princes pill the Church. 1675 CROWNE *Country Wit* II. i, 'Tis a rare thing to be an absolute prince, and have rich subjects; Oh, how one may pill 'em and poll 'em. 1844 BROWNING *Colombe's Birthday* I, We tax and tithe them, pill and poll, They wince and fret enough, but pay they must.

*a*1635 NAUNTON *Fragm. Reg.* (Arb.) 27 His Father dying in ignominie, and at the Gallows, his Estate confiscate, and that for peeling and polling. 1687 tr. *Sallust, Life* 3 By Peeling and Polling the Country, he so well lin'd his Coffers. 1865 KINGSLEY *Herew.* xxx, Us..whom he hath polled and peeled till we are [etc.].

pill (pɪl), *v.*[2] [f. PILL *sb.*[2] Cf. *to dose.*]

1. a. *trans.* To dose with pills.

1736 FIELDING *Pasquin* IV. i, Handle her pulse, potion and pill her well. 1775 J. ADAMS in *Fam. Lett.* (1876) 58, I found Dr. Young here, who..has pilled and electuaried me into pretty good order. 1850 *Fraser's Mag.* XLII. 345 The..patient is again pilled and purged.

b. *fig.* (see PILL *sb.*[2] 2 b).

1900 *Daily News* 14 May 3/2 Our fellows will probably pill you with their rifle fire.

2. To make or form into pills. *rare.*

1882 in OGILVIE (Annandale).

3. a. To reject by ballot; to blackball. *slang.*

1855 THACKERAY *Newcomes* xxx, He was coming on for election at Bays', and was as nearly pilled as any man I ever knew in my life. 1883 *Cornh. Mag.* Oct. 412 (*Heading*) On being 'Pilled'. 1894 SALA *London up to Date* v. 68 A practically accurate opinion as to how many candidates will be elected..and how many will be 'pilled'.

b. To fail (a candidate) in an examination. *slang.*

1908 A. S. M. HUTCHINSON *Once aboard Lugger* I. i. 15 'Your examination?' George half turned away. The bitterest moment of a sad day had come. He growled: 'Pipped.' 'Pipped?' 'Pilled.' 'Pilled?' 'Spun... I failed. I was referred for three months.' 1925 W. DEEPING *Sorrell & Son* xxii. 208 Gorringe had a sick face... 'Pilled,' thought Kit, and was not sorry, for Gorringe needed a course of pilling.

Hence '**pilling** *vbl. sb.*

1882 *Sat. Rev.* 18 Mar. 324 The pastime of 'pilling' seems to have begun at a large non-political club. 1883 *Cornh. Mag.* Oct. 412 The 'pilling'..is the delicate expression in club circles for black-balling.

pilla, obs. f. PILLOW.

pillaf(f, var. PILAU.

pillage ('pɪlɪdʒ), *sb.* Forms: 4–5 pilage, 5 pyl-, pel-, peilage (*Sc.*), 5–6 pyllage, 6 pielage, pilladge, 5– pillage. [a. F. *pillage* (14th c. in Hatz.-Darm.), f. *piller* to plunder (PILL *v.*[1]).]

1. The action of plundering or taking as spoil; spoliation, plunder: chiefly that practised in war; but also in extended sense, extensive or wholesale robbery or extortion. Also *fig.*

1390 GOWER *Conf.* III. 153 Thilke folk, that were unsauhte Toward here king for his pilage. 1494 FABYAN *Chron.* v. lxxxvii. 64 [He] shall sette his mynde all to Pyllage and Rauyne. 1560 DAUS tr. *Sleidane's Comm.* 48 They desyre to be deliuered from the pillage..of the Bishoppe of Rome. 1581 J. BELL *Haddon's Answ. Osor.* 278 With such furious outrage..pilladge & polladge. 1639 S. DU VERGER tr. *Camus' Admir. Events* 87 Exposing his reputation to the pillage of every mans tongue. 1781 GIBBON *Decl. & F.* xxxvi. (1869) II. 313 The pillage lasted fourteen days and nights. 1798 FERRIAR *Illustr. Sterne* ii. 34 Beroalde has furnished subjects of pillage to a great number of authors. 1800 COLQUHOUN *Comm. Thames* Introd. 27 Pecuniary losses suffered by pillage and embezzlements. 1838 *Murray's Hand-bk. N. Germ.* 176 He gave it up to pillage for three days, and then set fire to it. 1844 H. H. WILSON *Brit. India* II. 190 The object of the incursion being pillage, not fighting.

†2. Goods forcibly taken from another, esp. from an enemy in war; booty, spoil, plunder. *Obs.*

*a*1400 *Prymer* (1891) 102 (Ps. cxix. 162) He þat fyndeth manye pilages. 1456 SIR G. HAYE *Law Arms* (S.T.S.) 121 All suld be at his will—prisonaris and pillagis, to part at his will. 1494 FABYAN *Chron.* VI. cxlvii. 133 He commandyd all the pyllage to be brought to one place. 1596 SPENSER *F.Q.* v. ix. 4 That robbed all the countrie there about, And brought the pillage home, whence none could get it out. 1623–33 FLETCHER & SHIRLEY *Night-Walker* I. ii, I know this wedding Will yield me lusty pillage. 1750 BEAWES *Lex Mercat.* (1752) 7 Nations greedy of blood and pillage.

†3. Some kind of impost or tax; cf. PEAGE, PEDAGE, PICKAGE. *Obs.*

1513 BRADSHAW *St. Werburge* II. 1782 All theyr tenauntes and seruauntes haue fre passage Within all chesshire without tolle and pillage. 1591 *Canterbury Cath. MS.*, All the other profits..of all the Pillage, Stallage, Toll and other advantages belonging unto the said Dean and Chapter within the said market and fair.

pillage ('pɪlɪdʒ), *v.* [f. PILLAGE *sb.*]

1. *trans.* To rob, plunder, sack (a person, place, etc.): esp. as practised in war; to rifle.

*c*1592 MARLOWE *Jew of Malta* v. iv, To feast my train Within a town of war so lately pillaged, Will be too costly, and too troublesome. 1634 MASSINGER *Very Woman* v. v, We were boarded, pillaged to the skin, and after Twice sold for slaves. 1642 FULLER *Holy & Prof. St.* II. xxi. 136 He pillaged many Spanish towns, and took rich prizes. 1765 GOLDSM. *Ess.* Pref., Our modern compilers..think it their undoubted right to pillage the dead. 1790 BURKE *Fr. Rev.* (Walter Scott Libr.) 292 They pillaged the crown of its ornaments, the churches of their plate, and the people of their personal decorations. 1874 GREEN *Short Hist.* iii. §5. 140 His armed retainers pillaged the markets.

2. To take possession of or carry off as booty; to make a spoil of; to appropriate wrongfully.

1600 HAKLUYT *Voy.* III. 196, I..tooke away from our men whatsoeuer they had pillaged, and gaue it..to the owners. 1670 W. SIMPSON *Hydrol. Ess.* 11 Those four waves of imbibitions..are pillag'd out of Dr. French his book. 1789 JEFFERSON *Writ.* (1859) III. 98 Hoping to pillage something in the wreck of their country. 1855 MACAULAY *Hist. Eng.* xvii. IV. 55 Every thing that was given to others seemed to him to be pillaged from himself.

3. *absol.* or *intr.* To take booty; to plunder; to rob with open violence.

1593 NASHE *Christ's T.* Wks. (Grosart) IV. 140 Eyther to hang at Tyborne, or pillage and reprizall where he may. 1811 WELLINGTON in Gurw. *Desp.* VIII. 7, I will not allow the soldiers to pillage. 1855 MACAULAY *Hist. Eng.* xiv. III. 417 They were suffered to pillage wherever they went.

Hence '**pillaged** *ppl. a.*, '**pillaging** *vbl. sb.* and *ppl. a.*; also '**pillageable** *a.*, that may be pillaged; **pilla'gee** [see -EE], one who is pillaged.

1895 SAINTSBURY *Corrected Impress.* xvii. 188 Authorities quotable and *pillageable. 1711 STEELE *Spect.* No. 152 ¶3 The Devastation of Countries, the Misery of Inhabitants, the Cries of the *Pillaged. 1800 *Miscell. Tracts* in *Asiat. Ann. Reg.* 150/2 A man who had come to his pillaged hut. 1856 DE QUINCEY in *Titan Mag.* July 93/2 He urged his friend by marrying to enrol himself as a *pillagee elect. 1629 WADSWORTH *Pilgr.* 8 For feare hee should loose the *pillaging of the other. 1870 *Daily News* 3 Sept. 5 The pillaging of provision waggons by MacMahon's own troops. *c*1670 WOOD *Life* Apr. an. 1645, This is that captaine Bunce, who shot the *pillaging Scot cal'd major Jecamiah Abercromy. 1875 C. GORDON *Let.* 1 Nov. in *More about G.* (1894) 152 A pillaging horde of brigands.

pillager ('pɪlɪdʒə(r)). [f. PILLAGE *v.* + -ER[1].] One who pillages; a plunderer.

*c*1611 CHAPMAN *Iliad* IV. 146 Joves seed the pillager, Stood close before, and slackt the force the arrow did confer. 1715 POPE *Iliad* x. 408 Some..nightly pillager that strips the slain. 1809–10 COLERIDGE *Friend* (1818) I. 122 The power of transporting mediately the pillagers of his hedges and copses. 1882 SERJT. BALLANTINE *Exper.* iii. 37 These pillagers of the public had to submit to be pillaged themselves.

pillaloo ('pɪləlu:, -lju:), *sb.* (*int.*) *dial.* Also pillilew, pilliloo, etc. [Imit.] a. A cry expressing grief or anger. b. A name for such a cry; a noise,

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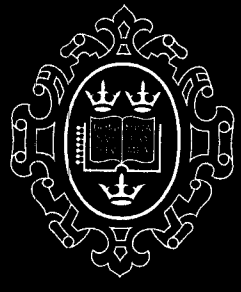
THE MANUAL OF THE LAW OF ARMED CONFLICT

UK MINISTRY OF DEFENCE



OXFORD

1.42.2 The development of the prohibition on the use of force, through the Pact of Paris and the UN Charter, has important implications for the traditional law of neutrality. Since the end of the Second World War and the establishment of the United Nations, the traditional law of neutrality has been affected by and, to a large extent, superseded by the UN Charter. First, the conduct of armed conflict is subject to the limitations imposed by the Charter on all use of force. Secondly, UN member states are required to give the UN every assistance in any action it takes, and refrain from giving assistance to any state against which the UN is taking preventive or enforcement action.[69] UN members are further bound to accept and carry out the decisions of the UN Security Council,[70] and join in affording mutual assistance in carrying out the measures decided upon by the Security Council under Chapter VII of the Charter.[71]

1.42.3 A number of treaties concluded since the establishment of the UN implicitly accept that non-participation in hostilities continues to be a valid position, and that it can take different forms: such treaties contain references to 'neutral or non-belligerent powers'[72] and 'neutral and other States not Parties to the conflict'.[73]

Basic Principles

1.43 Certain fundamental principles of neutrality law remain applicable:

a. Neutral states must refrain from allowing their territory to be used by belligerent states for the purposes of military operations. If a neutral state is unable or unwilling to prevent the use of its territory for the purposes of such military operations, a belligerent state may become entitled to use force in self-defence against enemy forces operating from the territory of that neutral state. Whether or not they are so entitled will depend on the ordinary rules of the *jus ad bellum*.[74]

b. Given the duties of neutral states, targets in neutral territory cannot be legitimate military objectives and they must not be attacked by belligerent states. Nor may belligerent states conduct military operations in neutral territory (including territorial waters). This prohibition applies also to military operations that infringe the rights of a neutral state in any other of its maritime zones: for example, targeting oil installations or erecting military installations on its continental shelf.[75]

[69] UN Charter, Art 2(5). [70] UN Charter, Art 25. [71] UN Charter, Art 49.
[72] eg, GC III, Arts 4B(2) and 122. [73] eg, AP I, Arts 9(2)(a), 19 and 31.
[74] See para 1.2.
[75] The two principles detailed in this paragraph are examples and are not necessarily exhaustive.

2

Basic Principles of the Law of Armed Conflict

Introduction

At the outset of any consideration of the law of armed conflict, it must be emphasized that the right of the parties to the conflict to choose methods or means of warfare is not unlimited.[1] Despite the codification of much customary law into treaty form during the last one hundred years, four fundamental principles still underlie the law of armed conflict. These are military necessity, humanity, distinction, and proportionality. The law of armed conflict is consistent with the economic and efficient use of force. It is intended to minimize the suffering caused by armed conflict rather than impede military efficiency. **2.1**

Military Necessity

Military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial[2] submission of the enemy at **2.2**

[1] This general principle is firmly rooted in the law of armed conflict, see Hague Regulations 1907 (HR) Art 22, Additional Protocol I 1977 (AP I), Art 35(1). AP I, Art 36 also places an obligation on states party to recognize this principle in the development of new weapons.
[2] The traditional wording omits 'partial'. However, armed conflict can have a limited purpose, as in the termination of the occupation of the Falkland Islands in 1982 or of Kuwait in 1991.

the earliest possible moment with the minimum expenditure of life and resources.

2.2.1 The principle of military necessity contains four basic elements:

a. the force used can be and is being controlled;

b. since military necessity permits the use of force only if it is 'not otherwise prohibited by the law of armed conflict', necessity cannot excuse a departure from that law;

c. the use of force in ways which are not otherwise prohibited is legitimate if it is necessary to achieve, as quickly as possible, the complete or partial submission of the enemy;

d. conversely, the use of force which is not necessary is unlawful, since it involves wanton killing or destruction.

2.2.2 Military necessity was defined as long ago as 1863 in the Lieber Code as 'those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war'.[3] The principle is encapsulated in the Preamble to the St Petersburg Declaration 1868 that the only legitimate object which states should endeavour to accomplish in war is to weaken the military forces of the enemy and that for this purpose it is sufficient to disable the greatest possible number of men.

2.2.3 The practical application of the principle of military necessity has been described, in the context of belligerent occupation, as follows:

> Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operation. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit the wanton devastation of a district or the wilful infliction of suffering upon its inhabitants for the sake of suffering alone.[4]

[3] Lieber Code, Art 14.

[4] *The Hostages Case (United States v List and others)* (1980) 8 WCR 34.

Military necessity cannot justify departure from the law of armed conflict

2.3 It was formerly argued by some that necessity might permit a commander to ignore the laws of war when it was essential to do so to avoid defeat, to escape from extreme danger, or for the realization of the purpose of the war.[5] The argument is now obsolete as the modern law of armed conflict takes full account of military necessity.[6] Necessity cannot be used to justify actions prohibited by law. The means to achieve military victory are not unlimited. Armed conflict must be carried on within the limits of international law, including the restraints inherent in the concept of necessity.[7]

Humanity

2.4 Humanity forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes.

2.4.1 The principle of humanity is based on the notion that once a military purpose has been achieved, the further infliction of suffering is unnecessary. Thus, if an enemy combatant has been put out of action by being wounded or captured, there is no military purpose to be achieved by continuing to attack him. For the same reason, the principle of humanity confirms the basic immunity of civilian populations and civilian objects from attack because civilians and civilian objects make no contribution to military action.

2.4.2 However, civilian immunity does not make unlawful the unavoidable incidental civilian casualties and damage which may result from legitimate attacks upon military objectives, provided that the incidental casualties and damage are not excessive in relation to the concrete and direct military advantage anticipated. This is the principle of proportionality.[8]

2.4.3 The principle of humanity can be found in the Martens Clause in the Preamble to Hague Convention IV 1907.[9] It incorporates the earlier rules of

[5] These arguments were mainly advanced by German theorists, such as Lueder, between 1871 and 1914, and are summed up in the translated maxim 'The purpose of war overrides its usages'.

[6] There are numerous examples of allowances for military necessity in the Geneva Conventions 1949, the Hague Cultural Property Convention 1954, and AP I, see the list in WA Solf and J Ashley Roach (eds), *Index of International Humanitarian Law* (1987) 152.

[7] See J Cameron (ed), *The Peleus Trial* (1948) where the defendant claimed unsuccessfully that he was under an operational necessity to protect his boat and crew. Similarly, self-preservation or military necessity can never provide an excuse for the murder of prisoners of war. See also para 8.32.

[8] Which is explained in paras 2.6 and 5.33.

[9] '[I]n cases not included in the Regulations . . . the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the

chivalry that opposing combatants were entitled to respect and honour. From this flowed the duty to provide humane treatment to the wounded and those who had become prisoners of war.

Distinction

2.5 Since military operations are to be conducted only against the enemy's armed forces and military objectives, there must be a clear distinction between the armed forces and civilians, or between combatants and non-combatants, and between objects that might legitimately be attacked and those that are protected from attack.

2.5.1 The principle of distinction, sometimes referred to as the principle of discrimination or identification, separates combatants from non-combatants and legitimate military targets from civilian objects. This principle, and its application to warfare, is given expression in Additional Protocol I 1977.[10]

2.5.2 Only combatants[11] are permitted to take a direct part in hostilities.[12] It follows that they may be attacked. Civilians may not take a direct part in hostilities and, for so long as they refrain from doing so, are protected from attack.[13] Taking a direct part in hostilities is more narrowly construed than simply making a contribution to the war effort. Thus working in a munitions factory or otherwise supplying or supporting the war effort does not justify the targeting of civilians so doing. However, munitions factories are legitimate military targets and civilians working there, though not themselves legitimate targets, are at risk if those targets are attacked. Such incidental damage is controlled by the principle of proportionality.[14]

2.5.3 As with personnel, the attacker also has to distinguish between civilian objects and military targets. This obligation is dependent on the quality of the information available to the commander at the time he makes decisions. If he makes reasonable efforts to gather intelligence, reviews the intelligence available to him and concludes in good faith that he is attacking a legitimate military target, he does not automatically violate the principle of distinction if the target turns out to be of a different and civilian nature.

usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.' A more recent version of this clause can be found in API, Art 1(2) and APII, Preamble.

[10] API, Arts 48 and 49(3). Although the application of API to naval warfare is somewhat limited, the principle of discrimination is inherent in customary law.

[11] API, Art 43(1), (2). [12] API, Art 43(2). [13] API, Art 51(2), (3).

[14] See paras 2.6 and 5.33.

Proportionality

The principle of proportionality requires that the losses resulting from a military action should not be excessive in relation to the expected military advantage. **2.6**

Additional Protocol I is the first treaty to set out the principle of proportionality specifically. Despite its importance, proportionality is not the subject of a separate article but is to be found in two different references. In the first, it features as an example of an attack that is prohibited because it is indiscriminate.[15] In the second, it appears in almost identical language in the article dealing with precautions in attack.[16] That article requires commanders to cancel, suspend, or re-plan attacks if they may be expected to offend the proportionality principle. **2.6.1**

The principle of proportionality is a link between the principles of military necessity and humanity. It is most evident in connection with the reduction of incidental damage caused by military operations. **2.6.2**

A munitions factory may be such an important military objective that the death of civilians working there would not be disproportionate to the military gain achieved by destroying the factory. A more significant factor may be the number of incidental casualties and the amount of property damage caused among civilians living nearby if the factory is in a populated area. The explosion of a munitions factory may cause serious collateral damage but that is a risk of war that would not automatically offend the proportionality rule. In such a case, the likely civilian casualties must be weighed against the military advantages which are expected to result from the attack. **2.6.3**

Applying the principle of proportionality

Modern, smart weaponry has increased the options available to the military planner. He needs not only to assess what feasible precautions can be taken to minimize incidental loss but also to make a comparison between different methods of conducting operations, so as to be able to choose the least damaging method compatible with military success. **2.7**

The application of the proportionality principle is not always straightforward. Sometimes a method of attack that would minimize the risk to civilians may involve increased risk to the attacking forces. The law is not **2.7.1**

[15] '[A]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated': API, Art 51(5)(b).

[16] API, Art 57(2)(a)(iii) and (b).

"WHAT ARE JUS AD BELLUM AND JUS IN BELLO?" , EXTRACT FROM ICRC PUBLICATION " INTERNATIONAL HUMANITARIAN LAW: ANSWERS TO YOUR QUESTIONS"

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ICRC International Committee of the Red Cross

31-10-2002

What are jus ad bellum and jus in bello?

Extract from ICRC publication "International humanitarian law: answers to your questions"

The purpose of international humanitarian law is to limit the suffering caused by war by protecting and assisting its victims as far as possible. The law therefore addresses the reality of a conflict without considering the reasons for or legality of resorting to force. It regulates only those aspects of the conflict which are of humanitarian concern. It is what is known as jus in bello (law in war). Its provisions apply to the warring parties irrespective of the reasons for the conflict and whether or not the cause upheld by either party is just.

In the case of international armed conflict, it is often hard to determine which State is guilty of violating the United Nations Charter . The application of humanitarian law does not involve the denunciation of guilty parties as that would be bound to arouse controversy and paralyse implementation of the law, since each adversary would claim to be a victim of aggression. Moreover, IHL is intended to protect war victims and their fundamental rights, no matter to which party they belong. That is why jus in bello must remain independent of jus ad bellum or jus contra bellum (law on the use of force or law on the prevention of war).

On the prohibition of war

Until the end of the First World War, resorting to armed force was regarded not as an illegal act but as an acceptable way of settling differences.

In 1919, the Covenant of the League of Nations and, in 1928, the Treaty of Paris (Briand-Kellogg Pact) sought to outlaw war. The adoption of the United Nations Charter in 1945 confirmed the trend: The members of the Organization shall abstain, in their international relations, from resorting to the threat or use of force (...).

When a State or group of States is attacked by another State or group of States, however, the UN Charter upholds the right to individual or collective self-defence. The UN Security Council, acting on the basis of Chapter VII of the Charter , may also decide on the collective use of force. This may involve:
-coercive measures aimed at restoring peace against a State threatening international security;
-peace-keeping measures in the form of observer or peacekeeping missions.

A further instance arises within the framework of the right of peoples to self-determination: in resolution 2105 (XX) adopted in 1965, the UN General Assembly recognizes the legitimacy of the struggle waged by peoples under colonial domination to exercise their right to self-determination and independence (...).

Section: Humanitarian law > IHL in brief

28 October 2004

JUS AD BELLUM, JUS IN BELLO AND NON-INTERNATIONAL ARMED CONFLICTS [1]

François Bugnion [2]

"Lost to the clan, lost to the hearth,
lost to the old ways,
that one who lusts for all the horrors
of war with his own people."

Homer, *The Iliad*, Book IX

1. INTRODUCTION

Of all the calamities that can befall a people or a state, civil war has always been considered one of the worst. Setting son against father, brother against brother and neighbour against neighbour, civil war is a merciless struggle that is not limited to the clash of armed forces. Characterised by denunciations, acts of

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1 This article has been originally published in the *Yearbook of International Humanitarian Law*, T. M. C. Asser Press, vol. VI, 2003, pp. 167-198. It is displayed on the website of the International Committee of the Red Cross, courtesy Dr Avril MacDonald, Editor in Chief of the *Yearbook of International Humanitarian Law*.

2 François Bugnion, Bachelor of Arts and Doctor of Political Sciences, joined the International Committee of the Red Cross in 1970. He served the institution in Israel and the Occupied Territories, Bangladesh, Turkey and Cyprus, Chad, Vietnam and Cambodia. Since January 2000, he is Director for International Law and Cooperation at the ICRC. The present article is a personal contribution of the author and does not necessarily reflect the views of the ICRC.

vengeance and the settling of scores, civil war unleashes the built-up tension and hatred within a society.

On the pretext of doing nothing that might legitimise insurrection or rebellion, states refused for too long to adopt rules intended to limit violence in civil war and to protect its victims. Even today, the law applicable to such conflicts remains rudimentary and responds in only a very limited manner to the need for protection generated by internecine strife. Furthermore, each party accuses the other of having torn apart the social fabric and uses this argument to justify the escalation of violence. At a time when the criminal law cannot be enforced in part of the national territory, the party claiming to represent the legitimate government often inflicts the most severe penalties on the insurgents, who no longer recognise the authority of the national laws or the legitimacy of the power that is enforcing them; the courts hand down the maximum sentence for the crime of rebellion. As for the insurgents, they set up their own courts to penalise their adversaries or give free rein to reprisals.

Are the distinction between *jus ad bellum* and *jus in bello* and the principle of the autonomy of *jus in bello* with regard to *jus ad bellum*, which are not easily imposed even in conflicts between states, applicable to civil wars? In other words, is it possible to apply all or part of the laws and customs of war in the event of civil war, leaving aside the question as to which of the warring parties was responsible for sparking off the struggle? That is the question to which this article seeks to offer a reply.[3] Before this question is considered, however, it has to be established whether the concepts of *jus ad bellum* and *jus in bello* do indeed apply in the event of civil war.

It would be easy to put forward the view that the concepts of *jus ad bellum* and *jus in bello* emerged in relation to conflicts between states and that they do not apply to civil war.

But the matter calls for a closer look. Beginning with *jus in bello*, while it is true that the law of war developed in the framework of conflicts between states, the latter ended up by admitting that certain basic rules also apply in the event of internal conflict. There is, therefore, a set of treaty and customary rules

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3 'Traditionally, a distinction is drawn between *jus ad bellum* (that is, the set of rules of international law relating to the conditions in which a subject of international law is permitted to resort to armed force) and *jus in bello* (that is, the set of rules of international law applicable to the mutual relations of parties to an international armed conflict, or more briefly the laws and customs of war).' Ch. Rousseau, *Le droit des conflits armés* (Paris, Éditions A. Pedone 1983) p. 25. In the present article the expression *jus ad bellum* is used to designate the set of rules governing the right to resort to force or the prohibition on so doing, whether these are rules of international law or rules prohibiting the use of force in domestic law, and *jus in bello* to designate the set of rules governing the mutual relations between belligerents, whether in an international or an internal armed conflict.

that govern the mutual relations of the warring parties in cases of non-international armed conflict. In its judgment of 2 October 1995 in the *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia expressly recognised that the concept of serious violations of the laws and customs of war applied to internal as well as international conflicts.[4] Similarly, the Statute of the International Criminal Court, adopted on 17 July 1998, allows the Court to impose penalties for war crimes committed during non-international armed conflicts as well as those committed during international armed conflicts.[5] It is therefore indisputable that the concept of *jus in bello* applies to non-international armed conflicts.[6] The content of these rules is more rudimentary than that of the rules applicable in international armed conflicts, but today there can be no doubt that a body of treaty and customary rules applicable to non-international armed conflicts does indeed exist.

Does the concept of *jus ad bellum* also apply to such conflicts? Here there is room for doubt. Admittedly, the United Nations Charter does not prohibit civil war,[7] and it is recognised that every state has the right to resort to force in order to preserve its territorial integrity and to crush a rebellion. However, the Charter of the United Nations[8] and a long series of resolutions of the General Assembly[9] recognise the peoples right of self-determination. The exercise of this right may

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4 'All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.' *The Prosecutor* v. *Duško Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, 2 October 1995, para. 134, cited by M. Sassoli and A. Bouvier in *How does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva, ICRC 1999) pp. 1192-1193.

5 Art. 8(2)(c) of the Statute of the International Criminal Court, *International Review of the Red Cross (IRRC)* No. 325, December 1998, pp. 678-682, in particular p. 681; A. Roberts and R. Guelff, eds, *Documents on the Laws of War,* 3rd edn., (Oxford, Oxford University Press 2000) pp. 667-697, in particular pp. 678-679.

6 'International humanitarian law governs the conduct of both internal and international armed conflicts.' *The Prosecutor* v. *Duško Tadić*, *supra* n. 4, para. 67.

7 In its judgment of 2 October 1995 in the *Tadić* case, the ICTY Appeals Chamber nevertheless recognised that an internal conflict could constitute a threat to peace: 'It can thus be said that there is a common understanding, manifested by the subsequent practice of the membership of the United Nations at large, that the threat to peace of Article 39 may include, as one of its species, internal armed conflicts.' Ibid., para. 30.

8 In particular Art. 1(2) and Art. 55.

9 In particular Resolutions 1514 (XV) 1960, 2621 (XXV) 1970, 2625 (XXV) 1970, 2674 (XXV) 1970, 2852 (XXVI) 1971 and 3103 (XXVIII) 1973.

include the resort to armed force to achieve it.[10] There is therefore a set of norms regulating the recourse to armed force in non-international armed conflicts, although those rules are still rudimentary and state practice is not always consistent.[11] At the domestic level, the law of every state prohibits rebellion and applies the most severe penalties for the offence.[12] It is therefore essentially in the context of the prohibition of rebellion in domestic law that the question of the relationship between the ban on the use of force and the rules governing the mutual relations of the parties to the conflict must be examined. Does the fact that one or another of the warring parties has violated the law by resorting to armed force preclude the application of the humanitarian rules applicable to

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10 '... the continuation of colonialism in all its forms and manifestations [...] is a crime and [...] colonial peoples have the inherent right to struggle by all necessary means at their disposal against colonial Powers and alien domination in exercise of their right of self-determination recognized in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. [...] The struggle of peoples under colonial and alien domination and racist regimes for the implementation or their right to self- determination and independence is legitimate and in full accordance with the principles of international law. Any attempt to suppress the struggle against colonial and alien domination and racist regimes is incompatible with the Charter of the United Nations [...] and constitutes a threat to international peace and security' proclaims Resolution 3103 (XXVIII) 1973 adopted by the General Assembly on 12 December 1973. See also Resolutions 1514 (XV) 1960, 2621 (XXV) 1970, 2625 (XXV) 1970, 2674 (XXV) 1970 and 2852 (XXVI) 1971.

11 Few states recognized the right of the population of East Pakistan to revolt against the central government of Pakistan in the spring and summer 1971. However, as soon as the intervention of the Indian Armed Forces in support of the insurgents precipitated the break up of Pakistan and the emergence of the new state of Bangladesh, most states and international organizations rushed to recognize it.

12 In legal theory a fundamental distinction is drawn between the situation of a state, which is entitled to resort to the use of armed force in order to preserve its national integrity and to crush a rebellion, and that of the insurgent party, which has no right to take up arms, except in the exercise of the right of self-determination. There is therefore a fundamental inequality between the two parties, from the viewpoint of both the internal law of the state concerned and that of international law. In practice, the situation is often more complex. If a civil war occurs, it is always because the legitimacy of the party in power is in dispute. In many cases that party has not respected the constitutional order or has gained power by force, or is violating human rights or a people's right to self-determination. Quite frequently there are two parties involved, each claiming to embody the legitimacy of the state. Finally, even the international community may be divided on the issue. Depending on their political interests and ideological leanings, some states grant recognition to one of the parties to the conflict while others recognise the adverse party. In the absence of any centralised and binding mechanism for granting recognition, the distinction between government party and insurgent is often not as clear-cut in practice as legal theory would have it.

non-international armed conflict? That is the question we shall now endeavour to answer.

First of all, however, it is necessary to recall the origins and development of the principle of the autonomy of *jus in bello* with regard to *jus ad bellum* in international armed conflict.[13] This study therefore focuses on the following themes:

- the question of the autonomy of *jus in bello* with regard to *jus ad bellum* in international armed conflict;
- the regulation of internal conflicts via the traditional mechanism of recognition of belligerency;
- the question of the autonomy of *jus in bello* with regard to *jus ad bellum* in the light of Article 3 common to the four 1949 Geneva Conventions;
- the question of the autonomy of *jus in bello* with regard to *jus ad bellum* in the light of Protocol II additional to the 1949 Geneva Conventions; and
- prospects for the future: towards further development of the law applicable to non-international armed conflict.

2. THE AUTONOMY OF *JUS IN BELLO* WITH REGARD TO *JUS AD BELLUM* IN INTERNATIONAL ARMED CONFLICT

Throughout history, whenever states and peoples have taken up arms, they have asserted that they were doing so for a just cause. All too often this argument has been used to justify refusing their opponents any mercy. In fact, history shows that the more the belligerents insist on the sanctity of their reasons for resorting to armed force, the more those same reasons are used to justify the worst excesses. The Crusades and the wars of religion, alas, left a long trail of atrocities in their wake.

It was only when war was recognised as a means – and a very imperfect means – of settling a dispute between two sovereigns that states began to accept the idea of limiting armed violence.[14] The emergence of nation states and the

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13 For a more thorough consideration of this matter, reference may be made to the works and articles cited in the author's study, 'Just Wars, War of Aggression and International Humanitarian Law', 84 *IRRC* (2002) pp. 523-546.

14 'War inexorably expresses the prevailing ideas of the age. It takes the form of the passions on which it feeds. On the battlefield man encounters his own demons. It is in fact the ceremonial aspect of this bloody confrontation that the law of war is designed to regulate. But the law of war also implies a certain respect for one's adversary. The

development of professional armies led states to gradually accept a body of rules intended to limit the horrors of war and to protect its victims. For a long time these rules remained customary in nature; they began to be codified in the mid Nineteenth Century.

The law of war developed, however, in an environment where the use of force was not prohibited. War was an attribute of sovereignty and was lawful when waged on the orders of the ruler, who was the sole judge of the reasons which prompted him to take up arms. In these circumstances, the application of the laws and customs of war could not be contingent on the reasons for resorting to armed force, and the question of the possible subordination of *jus in bello* to *jus ad bellum* did not arise.

Today the situation is entirely different. Recourse to force as an instrument of national policy was restricted by the Covenant of the League of Nations, and then prohibited by the Pact of Paris and the United Nations Charter.

Under the terms of the Pact of Paris, the contracting states declared that they condemned 'recourse to war for the solution of international controversies', and renounced it 'as an instrument of national policy'.[15] The United Nations Charter prohibits any recourse to force in international relations, with the exception of the collective enforcement action provided for in Chapter VII and the right of individual or collective self-defence reserved in Article 51.

That being the case, the following question arises: Is the fact that a belligerent has resorted to armed force in violation of international treaties and commitments an obstacle to the application of *jus in bello*? Two possibilities may be envisaged:

- either the war of aggression is deemed to be the international crime *par excellence*, a crime which subsumes all others and which therefore cannot be regulated, in which case the laws and customs of war do not apply to either of the belligerents; or

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Roman canon that that which is foreign is barbarian legitimates extermination and creates a barrier to the emergence of the law. The same applies when the enemy are considered as inferior beings or as the agents of a criminal ideology. Here again the conditions for an attitude of restraint disappear and the 'right' which justifies the unleashing of violence highlights the defeat of the rule of law. War against criminals is not subject to any restraining influence since one does not negotiate with criminals. It is only to the extent that war appears as an unfortunate and tragically inadequate means of settling international disputes that it can be tacitly or contractually codified.' P. Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima* (Geneva, Henry Dunant Institute 1985) pp. 141-142.

15 Pact of Paris or Briand-Kellogg Pact, signed at Paris on 27 August 1928. Text in 94 *LNTS*, pp. 58-64.

- the aggressor alone is deprived of the rights conferred by *jus in bello*, whereas all his obligations under this law remain unchanged, while the state which is the victim of the aggression continues to enjoy all the rights conferred by *jus in bello* without incurring any obligations.

The first hypothesis is the only one that draws all the logical conclusions from any subordination of *jus in bello* to *jus ad bellum.* It must nevertheless be rejected out of hand, for it would lead to unbridled violence. The consequence of an abdication of the rule of law, that solution would produce absurd and monstrous results.

The second solution entails a differentiated application of the laws and customs of war, but it must be rejected just as vigorously as the first, for in practice it would produce the same result. In the absence of a mechanism to determine aggression and to designate the aggressor in every case and in such a way as to be binding equally on all belligerents, each of the latter would claim to be the victim of aggression and take advantage of this to deny his adversary the benefits afforded by the laws and customs of war. In practice, therefore, this solution would lead to the same result as the hypothesis whereby wars of aggression cannot be regulated: a surge of unchecked violence. The autonomy of *jus in bello* with regard to *jus ad bellum* must therefore be preserved. This conclusion had already been clearly demonstrated by Emer de Vattel (1714-1767) :

> 'War cannot be just on both sides. One party claims a right, the other disputes the justice of the claim; one complains of an injury, the other denies having done it. When two persons dispute over the truth of a proposition it is impossible that the two contrary opinions should be at the same time true. However, it can happen that the contending parties are both in good faith; and in a doubtful cause it is, moreover, uncertain which side is in the right. Since, therefore, Nations are equal and independent, and can not set themselves up as judges over one another, it follows that in all cases open to doubt the war carried on by both parties must be regarded as equally lawful, at least as regards its exterior effects and until the cause is decided.'[16]

Thus, Vattel does not expressly reject the doctrine of just war, developed by the Fathers of the Church, but puts it into perspective and draws its sting.

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16 E. de Vattel, *The Law of Nations or Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns*, translated by Charles G. Fenwick (Washington D.C., Carnegie Institution 1916) Book III, Chapter III, p. 247, paras 39 and 40 (new edn: William S. Hein, Buffalo, N.Y. 1995; 1st edn: London 1758).

The autonomy of *jus in bello* with regard to *jus ad bellum* was confirmed after the Second World War by the Charter of the Nuremberg Tribunal, which made a distinction between war crimes, that is, acts committed in violation of the laws and customs of war, and crimes against peace.[17] This distinction was confirmed by the practice of the Tribunal. Indeed, the Tribunal scrupulously respected the distinction between crimes against peace on the one hand and war crimes on the other; it assessed the intrinsic unlawfulness of war crimes against the laws and customs of war, regardless of the fact that the crimes concerned had been committed during a war of aggression. By acknowledging that the laws and customs of war could be invoked not only by the prosecution but also by the defence for the accused, the Tribunal unequivocally confirmed the autonomy of *jus in bello* with regard to *jus ad bellum*.[18] The great majority of national tribunals entrusted with the task of judging war crimes committed during the Second World War upheld this distinction.[19]

The Geneva Conventions of 12 August 1949 doubly confirmed the autonomy of *jus in bello* with regard to *jus ad bellum*. First, in Article 1 common to the four Conventions, the High Contracting Parties undertake to respect and ensure respect for these instruments 'in all circumstances'.[20] There can be no doubt that in adopting this provision states ruled out the possibility of invoking arguments based on the legality of the use of force in order to be released from their obligations under the Conventions.[21]

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17 Art. 6 of the Charter of the International Military Tribunal. The text of the London Agreement of 8 August 1945 and of the annexes thereto is reproduced in 82 *UNTS*, pp. 280-301.

18 The judgment of the Nuremberg International Tribunal is reproduced in 41 *AJIL* (1947) pp. 172-333. It should be noted in particular that the Tribunal refused to condemn Admirals Dönitz and Raeder for conducting all-out submarine warfare, including the torpedoing of Allied and neutral merchant shipping and the abandonment of the survivors, on the grounds that the illegality of these acts under the laws and customs of war had not been sufficiently proven (pp. 304-305 and 308). Thus the Tribunal acknowledged that the rules of *jus in bello* worked not only against the accused but also in their favour. The accused could not be condemned for hostile acts whose illegality under the laws and customs of war had not been proven, even though the acts in question had been committed during a war of aggression.

19 Here reference may be made to the numerous cases cited by H. Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre* (Paris, Éditions A. Pedone 1970) pp. 62-76.

20 Furthermore, common Art. 2 specifies that the Conventions apply to all cases of declared war or of any other armed conflict between two or more of the High Contracting Parties.

21 The same interpretation is given in Meyrowitz, op. cit. n. 19, pp. 37-40.

Secondly, the Conventions prohibit any reprisals against persons or property protected by their provisions.[22] Obviously, any state using the argument that it is the victim of a war of aggression to justify its refusal to apply humanitarian law to enemy nationals would be in violation of this prohibition.

Finally, the Preamble to Protocol I additional to the Geneva Conventions, adopted by consensus on 7 June 1977, put an end to all argument on the matter by a pointing out that:

> '... the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'.[23]

The principle of the equality of belligerents before the law of war, which is in a way the corollary of the autonomy of *jus in bello* with regard to *jus ad bellum*, is thus firmly rooted in both treaty law and state practice.

This principle dominates the entire body of the laws and customs of war. It finds its main application, however, in the status of prisoners of war as it took shape in Europe from the Seventeenth Century. The decision to make war was the responsibility of the sovereign alone; the soldier, who was in the sovereign's service, could not be held responsible for his participation in the hostilities. Hence captivity in a war situation was no longer seen as a dishonour or a punishment but as a security measure whereby the captor prevented enemy soldiers who had surrendered from again taking up arms against him. When peace was restored, prisoners of war had to be freed, regardless of their number or rank and without any ransom being demanded. This was the rule laid down by Article LXIII of the Treaty of Münster of 30 January 1648, which put an end to the Thirty Years War:

> 'All Prisoners of War shall be released on both sides, without payment of any ransom, without distinction and without exception....'[24]

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22 First Geneva Convention, Art. 46; Second Geneva Convention, Art. 47; Third Geneva Convention, Art. 13(3); Fourth Geneva Convention, Art. 33(3).

23 Protocol I, para. 5 of the Preamble. Under the terms of Art. 31(2) of the Vienna Convention on the Law of Treaties of 23 May 1969, the preamble is an integral part of the treaty.

24 'Omnes bello capti relaxentur, ab una & altera parte, sine lytri ullius solutione, distinctione, aut exceptione captivorum qui extra Belgium militarunt & sub aliis

Recognition of the principle of the equality of belligerents before the law of war was not achieved without difficulty, however, and its implementation raises recurrent problems and comes up against psychological obstacles which cannot be disregarded. Indeed, states and peoples that are convinced that they are victims of a war of aggression are often extremely reluctant to acknowledge that their enemies are entitled to enjoy the benefits afforded by the laws and customs of war.

In both the United States and the Soviet Union, certain authors tried to formulate a theory based on a differentiated application of the laws and customs of war.[25] While in the United States these ideas were never recognised as official doctrine, quite a different view was taken in the Soviet Union. The theory that the victim of aggression was not bound by humanitarian law constituted the official doctrine of the Soviet state, it being understood that from the Marxist-Leninist viewpoint aggression was by definition an attribute of capitalist states.[26] In this way the Soviet Union maintained the possibility of claiming the protection of international humanitarian law for itself while refusing from the outset to grant the benefits afforded by the law to its enemies.

Only the Democratic Republic of Vietnam, however, went so far as to draw practical conclusions from the subordination of *jus in bello* to *jus ad bellum* in order to call into question the application of humanitarian law and the activities of the International Committee of the Red Cross (ICRC). Indeed, until the Paris agreements of January 1973 which were supposed to bring the Vietnam War to an end, and until the repatriation of the American prisoners of war, the Democratic Republic of Vietnam rebuffed all offers of services by the ICRC. It

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vexillis signisve quam Dominorum Ordinum,' Art. LXIII of the peace treaty between Spain and the Low Countries, signed at Münster on 30 January 1648, C. Parry, ed., *The Consolidated Treaty Series*, Vol. 1 (New York, Oceana Publications 1969-1986) pp. 1-91, *ad* pp. 31-32 and 88.

25 The main positions of this theory are set forth in Meyrowitz, op. cit. n. 19, pp. 77-140. For a review of the American positions, see R.W. Tucker, *The Just War: A Study in Contemporary American Doctrine* (Baltimore, The Johns Hopkins Press 1960). For a summary of the Soviet doctrine, see G. I. Tunkin, *Droit international public: Problèmes théoriques* (translated from the Russian by the Center for Research on the USSR and the Eastern Countries of the Strasbourg University Faculty of Law, Political Science and Economics), (Paris, Éditions A. Pedone 1965) pp. 35-55 and 210-219. With regard to the Soviet conception of the law of armed conflict, reference may be made to J. Toman, *L'Union soviétique et le droit des conflits armés* (Geneva, Graduate Institute of International Studies 1997).

26 Lenin (Vladimir Ilich Ulianov), *Imperialism: The Highest Stage of Capitalism*, New York, International Publ. Corp. 1939 (fisrt edn : 1917) *passim*; J. Toman, *L'Union soviétique et le droit des conflits armés*, op. cit. n. 25, in part, p. 19.

argued, in particular, that Vietnam was the victim of a war of aggression waged by the United States and that in consequence the country was not bound to apply the Third Geneva Convention to American prisoners of war or to allow the ICRC to conduct the activities provided for in the Convention on behalf of those prisoners. All the ICRC's approaches aimed at bringing aid to the prisoners remained in vain.[27]

The government of the Socialist Republic of Vietnam relied on the same argument during the Sino-Vietnamese conflict of February 1979. Following lengthy discussions, however, this government finally authorised ICRC delegates to visit the Chinese prisoners of war captured during the conflict, despite Viet Nam's assertion that it had been the victim of a war of aggression waged by the People's Republic of China.[28]

If the application of the principle of the equality of belligerents before the law of war raises major difficulties in situations of international armed conflict, it may well be imagined that even more formidable obstacles lie in its way in

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27 The Hanoi government stated its position on many occasions, and in particular in the note of 31 August 1965 from the Ministry of Foreign Affairs of the Democratic Republic of Vietnam in response to the appeal of 11 June 1965 by the International Committee of the Red Cross relating to the conduct of hostilities in Vietnam (the English translation of this note was reproduced in 5 *IRRC* (1965) pp. 527-528). Reference may also be made to document CDDH/41 submitted on 12 March 1974 to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (Geneva, 1974-1977), 17 vols., Vol. IV (Berne, Federal Political Department 1978) pp. 177-190. A summary of the negotiations between the ICRC and the government of the Democratic Republic of Vietnam is to be found in the study by M. Barde entitled *La Croix-Rouge et la révolution indochinoise: Histoire du Comité international de la Croix-Rouge dans la guerre du Vietnam* (Geneva, Graduate Institute of International Studies 1975), and in the work by Professor J. Freymond, *Guerres, révolutions, Croix-Rouge: Réflexions sur le rôle du Comité international de la Croix-Rouge* (Geneva, Graduate Institute of International Studies 1976) pp. 85-94. The government of the Democratic Republic of Vietnam also invoked the reservation it had formulated with regard to Art. 85 of the Third Convention, relating to the treatment of war criminals. For an examination of the position of the Hanoi authorities in the light of international humanitarian law, reference may be made to an article by P. de La Pradelle, 'Le Nord-Vietnam et les Conventions humanitaires de Genève', 75 *Revue générale de droit international public* (1971), pp. 313-332.

28 Report on the protection and assistance mission to the Socialist Republic of Vietnam, 5-14 April 1979, in particular Annex 7.1, p. 11; Report on the protection and assistance mission to the Socialist Republic of Vietnam, 24-31 May 1979, in particular pp. 6-10 and Annex 8, ICRC Archives, file 251 (69).

situations of non-international armed conflict. Indeed, a state facing an insurrection will almost invariably begin by invoking a dual inequality:

- on the one hand, the state will accuse the insurgents of having violated national law and endeavour to bring the full force of the criminal law to bear against them; while claiming to be fully within its rights, it will do everything it can to criminalise its adversaries;
- on the other hand, the state will rely on the inequality of the insurgents' legal status under domestic law and, in most cases, under international law, to justify rejecting any relationship with them based on an equal footing.

The autonomy of *jus in bello* with regard to *jus ad bellum* and the principle of the equality of belligerents before the law of war therefore meet with particular obstacles in situations of non-international armed conflict. It is on that type of conflict that we shall now focus our attention.

3. *JUS AD BELLUM*, *JUS IN BELLO* AND INTERNAL CONFLICT: THE REGULATION OF INTERNAL CONFLICTS BY MEANS OF RECOGNITION OF BELLIGERENCY

The law of war was born of the clash on the battlefield of sovereigns enjoying equal status under the law.[29] For a long time it was a body of customary rules which sovereigns respected with regard to their peers but ignored in confrontations with their rebellious subjects. Similarly, the earliest humanitarian law conventions applied only between the contracting parties, that is, between states.

For having rejected the authority of the ruler and taken up arms against him, the insurgents were regarded as outlaws and treated accordingly. Moreover, having taken up arms without the authorisation of their sovereign, the insurgents were taking part in a private war and could not claim the protection of the laws and customs of war.

The ruler therefore considered himself free of any obligation deriving from the laws and customs of war and applied the most violent measures of repression. As for the insurgents, being rejected from the ambit and protection of

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29 'The law of war, as a system of legal rules, finds its origin in the customary regulation of relations on the battlefield between two entities which were equal in legal terms,' J. Siotis, *Le droit de la guerre et les conflits armés d'un caractère non-international* (Paris, Librairie générale de Droit et de Jurisprudence 1958) p. 53.

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1

Historical Development and Legal Basis

I. DEFINITION OF THE TERM 'HUMANITARIAN LAW'

The use of force is prohibited under Art. 2(4) of the UN Charter. States may resort to force only in the exercise of their inherent right of individual or collective self-defence (Art. 51 UN Charter) or as part of military sanctions authorized by the Security Council (Arts. 43–8 UN Charter). International humanitarian law applies with equal force to all the parties in an armed conflict irrespective of which party was responsible for starting that conflict. It comprises the whole of established law serving the protection of man in armed conflict. 101

1. *Introduction.* Although the subject of this Manual is the law applicable to the conduct of hostilities once a State has resorted to the use of force (the *ius in bello*), that law cannot be properly understood without some examination of the separate body of rules which determines when resort to force is permissible (the *ius ad bellum*). The modern *ius ad bellum* is of relatively recent origin and is based upon Art. 2(4) and Chap. VII of the UN Charter.

2. *The Charter Prohibition on the Use of Force.* Art. 2(4) of the UN Charter states that: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.' By prohibiting the use of *force*, rather than *war*, this provision avoids debate about whether a particular conflict constitutes war. Although some writers have endeavoured to read Art. 2(4) narrowly, arguing that there are instances in which the use of force may occur without it being directed 'against the territorial integrity or political independence of any State' or being 'in any other manner inconsistent with the purposes of the United Nations',[1] the prevailing view is that any use of force by one state against the forces of another, or on the territory of another, will contravene Art. 2(4) unless it can be justified by reference to one of the specific exceptions to that provision.

3. *The Right of Self-Defence.* Art. 51 of the Charter provides that: 'Nothing in the present Charter shall impair the inherent right of individual or collective

[1] See the discussion of this question by various writers in Cassese (Ed.).

c) To give effect to this provision, Art. 43 envisaged that member states would conclude with the UN a series of bilateral agreements under which they would make forces and other facilities available to the Council on call. Arts. 46–7 provided that plans for the use of armed force were to be made by the Council with the assistance of a Military Staff Committee which was charged by Art. 47 with responsibility, under the Council, for 'the strategic direction of any armed forces placed at the disposal of the Security Council'. Due to Cold War rivalries and different perceptions of the UN's military role, no Art. 43 agreements were concluded and the Military Staff Committee has never functioned as intended.[20] Nevertheless, the Security Council has authorized a number of operations which have involved the deployment of military forces.

d) Most of these operations were peace-keeping operations, in which UN forces, made up of units contributed on a voluntary basis by various member states, were deployed with the consent of the states in whose territory they operated. The sole purpose of these forces was to police a cease-fire line or to monitor compliance with a truce or deliver relief supplies. The UN forces in Cyprus, Cambodia, Croatia, Lebanon, and on the Iran–Iraq border are all examples of this kind of peace-keeping by consent. Although peacekeeping forces are not intended to engage in combat operations, they have sometimes become involved in fighting when attacked.[21]

e) On occasions, however, the Council has come closer to taking enforcement action of the kind envisaged in Art. 42. In the Korean conflict in 1950 the Council (which was able to act because the USSR was boycotting its meetings) condemned North Korea's invasion of South Korea, and called upon all member states to go to the assistance of South Korea.[22] Following Iraq's invasion of Kuwait in 1990 the Council adopted Resolution 678, which authorized those States co-operating with the Government of Kuwait to use 'all necessary means' to ensure that Iraq withdrew from Kuwait and complied with the various Security Council resolutions on the subject and to 'restore international peace and security in the area'. It was this resolution which provided legal authority for the use of force by the coalition of states against Iraq in 1991. In the absence of Art. 43 agreements, the Council was not able to require states to take part in these operations. Instead, it relied upon voluntary contributions of forces from a wide range of states.[23] Nor did the Council and the Military Staff Committee direct the two operations. In Korea, the Council established a unified command under the United States and expressly left to the United States Government the choice of a commander, although the contingents operating in Korea were regarded as a UN force and were authorized to fly the UN flag.[24] In the Kuwait conflict, the Council authorized the use of force, but command and control arrangements were made by the states concerned and the coalition forces fought as national contingents, not as a UN force.

[20] Bowett, *UN Forces*, 12. [21] e.g. in the Congo. [22] Bowett, *UN Forces*, 29.
[23] In Korea, sixteen states contributed forces. The coalition forces in the Kuwait conflict were drawn from twenty-eight states.
[24] Res. 84 (7 July 1950).

f) It has been argued that neither the Korean nor the Kuwaiti operation constituted enforcement actions of the kind provided for in Art. 42 of the Charter, because neither operation was controlled by the Council and neither was based upon the use of forces earmarked for UN operations under Art. 43 agreements. Yet there is nothing in Art. 42 which stipulates that military enforcement action can only be carried out using Art. 43 contingents, nor does Chapter VII preclude the Security Council from improvising to meet a situation in which military operations can effectively be conducted only by large national contingents contributed by states which wish to retain control in their own hands. Moreover, the Charter expressly envisages that the Council might authorize an *ad hoc* coalition of States to carry out its decisions, for Art. 48 provides that: 'The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the members of the United Nations or by some of them, as the Security Council may determine.' While the wording of the key resolutions in both Korea and Kuwait leaves room for argument on this point, both operations should be seen as instances of enforcement action authorized by the Council.[25]

g) If the legal basis for an operation is to be found in the enforcement powers of the Security Council, then the objectives for which force is used may go beyond the limits of what is permissible in self-defence. In the Kuwait case, a military action which was based on the right of collective self-defence could not lawfully have gone beyond liberating Kuwait and ensuring Kuwait's future security, whereas enforcement action against Iraq would have justified more extensive measures to re-establish peace in the region. The fact that Res. 678 authorized the coalition to ensure that Iraq complied with all relevant Security Council resolutions and 'to restore international peace and security in the area'[26] indicates that the operation was seen by the Council as enforcement action.

h) Only the Security Council has the authority to authorize enforcement action but it may choose to make use of other organizations (or, as in Kuwait and Korea, *ad hoc* coalitions) to carry out such action. Arts. 52 and 53 of the Charter provide that regional organizations may undertake enforcement action with the authorization of the Security Council. The recent decision of the Organization on Security and Co-operation in Europe (OSCE) to constitute itself as a regional organization under Art. 53 makes it possible for the CSCE, with the consent of the Security Council, to undertake action of this kind in Europe. In such a case, there seems to be no legal obstacle to the OSCE using NATO or the WEU as the military vehicle for conducting such operations.

6. *The Equal Application of International Humanitarian Law.* Once hostilities have begun, the rules of international humanitarian law apply with equal force to both sides in the conflict, irrespective of who is the aggressor. On the face of it, this seems completely illogical. To place the aggressor and the victim of that aggression

[25] Bowett Greenwood, *Modern Law Review* 55 (1992); compare 153; Schachter, *AJIL* 85 (1991), 452; Rostow, *AJIL* 85 (1991), 506.

[26] Res. 678, para. 2.

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Elements of War Crimes

under the Rome Statute of the International Criminal Court

Sources and Commentary

ICRC

CAMBRIDGE

Art. 8(2)(b)(xvi) – Pillaging a town or place, even when taken by assault

Text adopted by the PrepCom

War crime of pillaging

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.[47]
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

[47] As indicated by the use of the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging.

Commentary

Travaux préparatoires/Understandings of the PrepCom

The difficulty in drafting the elements of this crime consisted in distinguishing pillage, which is absolutely prohibited, from other behaviours that are subject to different rules, namely, on the one hand, the taking of war booty (i.e. the seizure of military equipment from the enemy), which is allowed under international humanitarian law; and, on the other hand, the war crimes of appropriation of protected property (Art. 8(2)(a)(iv)) and seizure of protected property (Art. 8(2)(b)(xiii)).

In the course of negotiations some delegations claimed that the essence of pillage would be the appropriation or seizure of property not justified by military necessity. However, as pointed out by several delegations, this approach would have created difficulties in distinguishing the crime of pillaging from the crimes defined under Art. 8(2)(b)(xiii) and Art. 8(2)(a)(iv). Secondly, these delegations emphasised that mentioning 'military necessity' in relation to pillage was unfounded: an element referring to military necessity would introduce an extra element and create the result of permitting an evaluation, whereas an absolute prohibition exists. Thirdly, a reference to military necessity would criminalise the taking of military equipment when no necessity could be shown for this, whereas international humanitarian law allows the taking of war booty without the need for justification. These delegations suggested that the essence of pillage was the taking of civilian property for personal use. Eventually the PrepCom decided to define more precisely the prohibited conduct.

In the compromise achieved, the property protected is not limited to civilian property as suggested by several delegations. The second part of Element 2 is the result of the criticism expressed with regard to the first draft, which included a reference to military necessity.[1] Due to the importance some delegations accorded to the reflection of the concept of military necessity in the elements, the PrepCom included this in a footnote instead of in the main text.

The terms 'private' and 'personal' in this element were used in order to be broad enough to include cases where property is given to third persons and not only used by the perpetrator.

The phrase 'even when taken by assault', which had been included in the ICC Statute, was omitted in the elements. The PrepCom concluded that the fact that the prohibition is defined in absolute terms in the elements made it superfluous to mention one particular highlighted example, which is undoubtedly included by the wording as adopted. This approach has been taken consistently throughout the EOC.

The elements as drafted pose at least two problems. First, as a result of the referral to all types of property, the taking of war booty appears to be criminalised (this might, however, be corrected by applying para. 6 of the General Introduction relating to 'unlawfulness' and by applying the second part of Element 2; it appears to be generally accepted now that even war booty must be handed over to the authorities, i.e. cannot be taken for *private or personal use*). Second, comparing the elements of Art. 8(2)(a)(iv) and Art. 8(2)(b)(xvi), one might question whether the intent to deprive the owner of his or her property is only an element of pillage or whether it is not also inherent in the concept of appropriation and therefore should either have been an element of both crimes or not have been mentioned at all in either.

Legal basis of the war crime

The phrase 'pillaging a town or place, even when taken by assault' is derived directly from Art. 28 of the 1907 Hague Regulations.

Remarks concerning the material elements

'Pillage' and the terms 'plundering', 'looting' and 'sacking' are very often used synonymously. None has been defined adequately for the purposes of international law.

The ICTY Prosecution in the *Delalic* case considered that the following constituted the material elements of the offence 'plunder of public or

[1] PCNICC/1999/L.5/Rev.1/Add.2 of 22 December 1999.

private property' as listed under Art. 3(e) of the ICTY Statute:

- The accused must be linked to one side of the conflict.
- The accused unlawfully destroyed, took, or obtained any public or private property belonging to institutions or persons linked to the other side of the armed conflict.[2]

Later on, in the *Kordic and Cerkez* case, the ICTY Prosecution defined the elements in a different manner and mentioned only one specific material element:

- Public or private property was unlawfully or violently acquired.[3]

In its judgment in the *Delalic* case, the ICTY specifically dealt with the war crime of plunder. It described in general terms the rules aimed at protecting property rights in times of armed conflict, without naming explicitly the elements of these offences. Nevertheless, these findings may give some guidance in the determination of the elements of the crime 'pillaging a town or place, even when taken by assault' as contained in the ICC Statute.

> [I]nternational law today imposes *strict limitations on the measures which a party to an armed conflict may lawfully take in relation to private and public property of an opposing party*. The *basic norms* in this respect, which form part of customary international law, are contained *in the Hague Regulations, articles 46 to 56* which are broadly aimed at preserving the inviolability of public and private property during military occupation. In relation to private property, the fundamental principle is contained in article 46, which provides that private property must be respected and cannot be confiscated. While subject to a number of well-defined restrictions, such as the right of an occupying power to levy contributions and make requisitions, this rule is reinforced by article 47, which unequivocally establishes that '[p]illage is forbidden'. Similarly, article 28 of the Regulations provides that '[t]he pillage of a town or place, even when taken by assault, is prohibited'.[4]
>
> The principle of respect for private property is further reflected in the four Geneva Conventions of 1949. [Reference is made to Arts. 15 GC I, 18 GC II, 18 GC III.] Likewise, article 33 of Convention IV categorically affirms that '[p]illage is prohibited'. It will be noted that this prohibition is of general application, extending to the entire territories of the parties to a conflict, and is thus not limited to acts committed in occupied territories.[5]

[2] ICTY, Closing Statement of the Prosecution, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, A1-11.

[3] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 50.

[4] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 587 (emphasis added, footnotes omitted).

In the following, the ICTY addressed the terminological question of whether the acts alleged in the indictment (plunder of money, watches and other valuable property belonging to persons at the Celebici camp), if at all criminal under international law, constituted the specific offence of 'plunder'. It held:

> In this connection, it is to be observed that *the prohibition against the unjustified appropriation of public and private enemy property* is general in scope, and *extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory*. Contrary to the submissions of the Defence, the fact that it was acts of the latter category which were made the subject of prosecutions before the International Military Tribunal at Nürnberg and in the subsequent proceedings before the Nürnberg Military Tribunals *does not demonstrate the absence of individual criminal liability under international law for individual acts of pillage committed by perpetrators motivated by personal greed*. In contrast, when seen in a historical perspective, it is clear that the prohibition against pillage was directed precisely against violations of the latter kind. Consistent with this view, isolated instances of theft of personal property of modest value were treated as war crimes in a number of trials before French Military Tribunals following the Second World War. Commenting upon this fact, the United Nations War Crimes Commission correctly described such offences as 'war crimes of the more traditional type'.
>
> While the Trial Chamber, therefore, must reject any contention made by the Defence that the offences against private property alleged in the Indictment, if proven, could not entail individual criminal responsibility under international law, it must also consider the more specific assertion that the acts thus alleged do not amount to the crime of 'plunder'. In this context, it must be observed that the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed 'pillage', 'plunder' and 'spoliation'. Thus, whereas article 47 of the Hague Regulations and article 33 of Geneva Convention IV by their terms prohibit the act of 'pillage', the Nürnberg Charter, Control Council Law No. 10 and the Statute of the International Tribunal all make reference to the war crime of 'plunder of public and private property'. *While it may*

[5] *Ibid.*, para. 588 (footnotes omitted).

be noted that the concept of pillage in the traditional sense implied an element of violence not necessarily present in the offence of plunder, it is for the present purposes not necessary to determine whether, under current international law, these terms are entirely synonymous. The Trial Chamber reaches this conclusion on the basis of its view that the latter term, as incorporated in the Statute of the International Tribunal, should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'.[6]

In sum the ICTY found the following:

- the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organised seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory; in both cases it entails individual criminal responsibility;
- the protection of property is subject to a number of well-defined restrictions, such as the right of an Occupying Power to levy contributions and make requisitions;
- the concept of pillage in the traditional sense implied an element of violence;
- the term 'plunder', as incorporated in the ICTY Statute, should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'.

In accordance with Art. 154 GC IV cited above, the provisions of GC IV supplement Sections II and III of the Hague Regulations. Therefore, both the Hague Regulations and the relevant provisions of the 1949 Geneva Conventions must be taken into account for the interpretation of this offence, mainly the determination of what constitutes conduct which is unlawful under international law.

The 1907 Hague Regulations postulate the principle of respect for private property and expressly prohibit any act of pillage (Arts. 28 and 47).

[6] *Ibid.*, paras. 590 ff. (emphasis added, footnotes omitted). See also ICTY, Judgment, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 184; 122 ILR 1 at 72. ICTY, Judgment, *The Prosecutor v. Goran Jelisic*, IT-95-10-T, para. 48; ICTY, Judgment, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-T, paras. 351–3.

Art. 28 of the 1907 Hague Regulations formally prohibits pillage of a town or place, even when taken by assault, whereas Art. 47 stipulates that '[p]illage is formally forbidden'. The latter provision applies to all occupied enemy territory. A specific protection is given to cultural property in Art. 4(3) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict:

> The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.[7]

According to Arts. 15(1) GC I, 18(1) GC II, 16(2) and 33(2) GC IV protected persons, in particular sick or dead persons, shall be protected against pillage. The prohibition of pillage in Art. 33 GC IV more specifically applies to the entire territories of the parties involved in the conflict and to any person, without restriction. The ICRC Commentary on that provision states:

> This prohibition is general in scope. It concerns not only pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay. Paragraph 2 of Article 33 is extremely concise and clear; it leaves no loophole. The High Contracting Parties prohibit the ordering as well as the authorization of pillage. They pledge themselves furthermore to prevent or, if it has commenced, to stop individual pillage. Consequently, they must take all the necessary legislative steps. The prohibition of pillage is applicable to the territory of a Party to the conflict as well as to occupied territories. It guarantees all types of property, whether they belong to private persons or to communities or the State. On the other hand, it leaves intact the right of requisition or seizure.[8]

Besides the right of requisition or seizure, weapons and military equipment of the enemy found on the battlefield may be lawfully taken as war booty.[9] However, a number of military manuals and

[7] See also the recently adopted Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999), especially Arts. 9, 15.

[8] J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 33, pp. 226 ff.

[9] See, for example, L. Oppenheim, *International Law. A Treatise*, ed. H. Lauterpacht (7th edn, Longmans, London, 1952), vol. II, pp. 401 ff.

national legislation provide that booty must be handed over to the authorities.[10]

In an attempt to clarify the term 'pillage' by examining historical examples, linguistic usage and military regulations, a commentator elaborated the following definition:

> (a) in a narrow sense, the unauthorized appropriation or obtaining by force of property . . . in order to confer possession of it on oneself or a third party;
>
> (b) in a wider sense, the unauthorized imposition of measures for contributions or sequestrations, or an abuse of the permissible levy of requisitions (e.g. for private purposes), each done either through taking advantage of the circumstances of war or through abuse of military strength. In the traditional sense, pillage implied an element of violence. The notion of appropriation or obtaining against the owner's will (presumed or expressed), with the intention of unjustified gain, is inherent in the idea of pillage so that it is also perceived as a form of theft through exploitation of the circumstances and fortunes of war.[11]

The following cases from post-Second World War trials specifically refer to the above-cited rules of the 1907 Hague Regulations for the description of the material elements of plunder, pillage, spoliation and exploitation. Although the elements of Art. 28 of the Hague Regulations are not specifically elaborated, the findings of the Tribunals may have an indicative value. With respect to terminology, the Tribunal in the *IG Farben* case found that:

> the Hague Regulations do not specifically employ the term 'spoliation', but we do not consider this matter to be one of any legal significance. As employed in the indictment, the term is used interchangeably with the words 'plunder' and 'exploitation' . . . [T]he term 'spoliation' . . . applies to the widespread and systematized acts of dispossession and acquisition of property in violation of the rights of the owners, which took place in territories under the belligerent occupation or control of Nazi Germany during World War II. We consider that 'spoliation' is synonymous with the word 'plunder' as employed in Control Council Law 10, and that it embraces offences against property in violation of the laws and customs of war.[12]

[10] For example, Australia's Defence Force manual provides that seized property belongs to the capturing State, Australian Defence Force, *Law of Armed Conflict-Commander's Guide*, Operations Series, ADFP 37 Supplement-Interim edn, 7 March 1994, p. 12–4, para. 1224. New Zealand's military manual states that all enemy public movable property captured or found on the battlefield is known as booty and becomes the property of the capturing State, New Zealand Defence Force, Headquarters, Directorate of Legal Services, *Interim Law of Armed Conflict Manual*, DM 112 (Wellington, November 1992), p. 5–35. According to Arts. 15, 38 and 45 of the Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, seized property and war booty can only be used to benefit the army or the country and cannot be taken for personal gain.

[11] A. Steinkamm, 'Pillage' in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (North Holland, Amsterdam, Lausanne, New York, Oxford, Shannon, Singapore and Tokyo, 1997), vol. III, p. 1029. See also, for example, the Canadian military manual, Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, in http://www.dnd.ca/jag/operational_pubs_e.html@top, p. 6-5.

Hence, it appears that the terms 'plunder', 'pillage', 'spoliation' and 'exploitation' were used interchangeably with the term 'appropriation'.[13]

Therefore, the case law cited under section 'Art. 8(2)(a)(iv)', subsection 'Legal basis of the war crime' describing the term 'appropriation' may be a further indication of what constitutes pillage.

The following post-Second World War trials deal explicitly with pillage without giving further clarification:

In the *F. Holstein and Twenty-three Others* case[14] the accused were found guilty under Art. 221 of the French Code of Military Justice ('pillage committed in gangs by military personnel with arms or open force').

In the *P. Rust* case,[15] the accused was found guilty of abusive and illegal requisitioning of French property, a case of pillage in time of war, under Art. 221 of the French Code of Military Justice and Art. 2(8) of the Ordinance of 1944 for the prosecution of war criminals. These provisions give effect to Art. 52 of the Hague Regulations of 1907.

In the *H. Szabados* case, the accused was found guilty of pillage (i.e. the looting of personal belongings and other property of the civilians evicted from their homes prior to the destruction of the latter) under Art. 440 of the French Code.[16]

Art. 28 of the 1907 Hague Regulations was quoted for the *actus reus* in the *T. Sakai* case.[17]

Pillage is defined more precisely in the following military manuals:

Australia's Defence Force manual defines pillage as 'the violent acquisition of property for private purposes' or 'the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually armed forces, for private purposes'.[18] Canada's military

[12] *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. VIII, p. 1133; 15 AD 668 at 673.

[13] See also 'Digest of Laws and Cases', in UNWCC, *LRTWC*, vol. XIV, p. 126; P. Verri, *Dictionary of the International Law of Armed Conflict* (ICRC, Geneva, 1988), p. 85.

[14] In UNWCC, *LRTWC*, vol. VIII, p. 31; 13 AD 261.

[15] In UNWCC, *LRTWC*, vol. IX, pp. 71 ff.; 15 AD 684.

[16] In UNWCC, *LRTWC*, vol. IX, pp. 60 ff.; 13 AD 261.

[17] In UNWCC, *LRTWC*, vol. XIV, p. 7; 13 AD 222.

[18] Australian Defence Force, *Law of Armed Conflicts-Commander's Guide*, paras. 743 and 1224.

manual defines pillage as 'the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually soldiers, for private purposes'.[19] In the 'Military Handbook' and 'Military Manual' of the Netherlands pillage is defined as 'stealing goods (or property) belonging to civilians'.[20] The military manual of the Socialist Federal Republic of Yugoslavia considered the appropriation of private property, *inter alia*, as pillage.[21] New Zealand's military manual states that 'pillage, the violent acquisition of property for private purposes, is prohibited'.[22]

Remarks concerning the mental element

The ICTY Prosecution in the *Delalic* case considered that the following constituted the mental elements of the offence 'plunder of public or private property' under Art. 3(e) of the ICTY Statute:

- The destruction, taking, or obtaining by the accused of such property was committed with the intent to deprive the owner or any other person of the use or benefit of the property, or to appropriate the property for the use of any person other than the owner.

Later on in the *Kordic and Cerkez* case,[23] the ICTY Prosecution defined the mental element in a different manner:

- The property was acquired wilfully.[24]

In the *H. A. Rauter* case,[25] the accused was found guilty of 'intentionally' taking the necessary measures to carry out the systematic pillage of the Netherlands population.

[19] Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, p. 12–8.

[20] *Toepassing Humanitair Oorlogsrecht*, Voorschift No. 27-412/1, Koninklijke Landmacht, Ministerie van Defensie (1993), p. IV-5; *Handboek Militair* (Ministerie van Defensie, 1995), p. 7–43.

[21] *Propisi o Primeri Pravila Medjunarodnog Ratnog Prava u Oruzanim Snagama SFRJ*, Savezni Sekretarijat za Narodnu Odbranu (Pravna Uprava, 1988), Point 92.

[22] New Zealand Defence Force, *Interim Law of Armed Conflict Manual*, p. 5–35.

[23] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 50.

[24] In the *Simic and Others* case the ICTY Prosecution defined the notion of 'wilful' as 'a form of intent which includes recklessness but excludes ordinary negligence. "Wilful" means a positive intent to do something, which can be inferred if the consequences were foreseeable, while "recklessness" means wilful neglect that reaches the level of gross criminal negligence.' ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Simic and Others*, IT-95-9-PT, p. 35.

[25] In UNWCC, *LRTWC*, vol. XIV, pp. 89 ff.; 16 AD 526.

Art. 8(2)(b)(xvii) – Employing poison or poisoned weapons

Text adopted by the PrepCom

War crime of employing poison or poisoned weapons

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.

2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.

3. The conduct took place in the context of and was associated with an international armed conflict.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Commentary

Travaux préparatoires/Understandings of the PrepCom

Due to the very brief wording of the Rome Statute for the war crime of 'employing poison or poisoned weapons' (Art. 8(2)(b)(xvii)), it was necessary for the EOC to explain the requirements under this crime in more detail. However, in order to avoid the difficult task of negotiating a definition of poison, the text adopted includes a specific threshold with regard to the effects of the substance: 'The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.' These effects must be the consequence of the toxic features of the substance. A number of delegations opposed the threshold 'serious' in the elements requiring 'serious damage to health', but eventually joined the consensus.

Legal basis of the war crime

The phrase 'employing poison or poisoned weapons' is directly derived from Art. 23(a) of the Hague Regulations.

The prohibition of poison is probably the most ancient prohibition of a means of combat in international law. Since the late Middle Ages the use of poison has always been strictly prohibited.[1] An early reference to this

[1] Y. Sandoz, *Des armes interdites en droit de la guerre* (Imprimerie Grounauer, Geneva, 1975), pp. 11 ff.; S. Oeter, 'Methods and Means of Combat' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), p. 138.

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Customary International Humanitarian Law

Volume I: Rules

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CAMBRIDGE

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DESTRUCTION AND SEIZURE OF PROPERTY

Rule 49. The parties to the conflict may seize military equipment belonging to an adverse party as war booty.

Practice

Volume II, Chapter 16, Section A.

Summary

State practice establishes this rule as a norm of customary international law applicable in international armed conflicts.

International armed conflicts

The rule whereby a party to the conflict may seize military equipment belonging to an adverse party as war booty is set forth in the Lieber Code.[1] It reflects long-standing practice in international armed conflicts. It is also implicit in the Hague Regulations and the Third Geneva Convention, which require that prisoners of war must be allowed to keep all their personal belongings (as well as protective gear).[2]

This rule is also contained in numerous military manuals.[3] As Australia's Defence Force Manual explains, "booty includes all articles captured with prisoners of war and not included under the term 'personal effects'".[4] The rule has also been referred to in case-law.[5]

[1] Lieber Code, Article 45 (cited in Vol. II, Ch. 16, § 4).
[2] Hague Regulations, Article 4 (*ibid.*, § 2); Third Geneva Convention, Article 18, first paragraph (*ibid.*, § 3).
[3] See, e.g., the military manuals of Argentina (*ibid.*, § 5), Australia (*ibid.*, §§ 6–7), Belgium (*ibid.*, § 9), Benin (*ibid.*, § 10), Cameroon (*ibid.*, § 12), Canada (*ibid.*, §§ 13–14), Dominican Republic (*ibid.*, § 15), France (*ibid.*, § 16), Germany (*ibid.*, § 17), Hungary (*ibid.*, § 18), Israel (*ibid.*, § 19), Kenya (*ibid.*, § 20), Madagascar (*ibid.*, § 21), Netherlands (*ibid.*, § 22), New Zealand (*ibid.*, § 23), Spain (*ibid.*, § 25), Togo (*ibid.*, § 26), United Kingdom (*ibid.*, § 27) and United States (*ibid.*, §§ 29–31).
[4] Australia, *Defence Force Manual* (*ibid.*, § 7).
[5] See, e.g., Israel, High Court, *Al-Nawar case* (*ibid.*, § 39).

According to the Lieber Code, war booty belongs to the party which seizes it and not to the individual who seizes it.[6] This principle is reflected in numerous military manuals.[7] It is also supported in national case-law.[8] As a result, individual soldiers have no right of ownership over or possession of military equipment thus seized. Some manuals explicitly state that it is prohibited for soldiers to take home "war trophies".[9] It has been reported that in the United Kingdom soldiers have been court-martialled for trying to smuggle out weapons taken from the adversary following the Gulf War.[10]

Practice also indicates that booty may be used without restriction and does not have to be returned to the adversary.[11]

Non-international armed conflicts

With respect to non-international armed conflicts, no rule could be identified which would allow, according to international law, the seizure of military equipment belonging to an adverse party, nor was a rule found which would prohibit such seizure under international law.

Definition

Numerous military manuals define war booty as enemy military objects (or equipment or property) captured or found on the battlefield.[12] Several other manuals specify that it must concern movable "public" property.[13] With respect to private property found on the battlefield, the UK Military Manual and US Field Manual specify that to the extent that they consist of arms, ammunition, military equipment and military papers, they may be taken as booty as well.[14] In the *Al-Nawar case* before Israel's High Court in 1985, Judge Shamgar held that:

[6] Lieber Code, Article 45 (*ibid.*, § 4).
[7] See, e.g., the military manuals of Argentina (*ibid.*, § 5), Australia (*ibid.*, §§ 6–7), Benin (*ibid.*, § 10), Bosnia and Herzegovina (*ibid.*, § 11), Canada (*ibid.*, § 13), Germany (*ibid.*, § 17), Hungary (*ibid.*, § 18), Israel (*ibid.*, § 19), Kenya (*ibid.*, § 20), Madagascar (*ibid.*, § 21), Netherlands (*ibid.*, § 22), New Zealand (*ibid.*, § 23), Spain (*ibid.*, § 25), Togo (*ibid.*, § 26), United Kingdom (*ibid.*, § 27) and United States (*ibid.*, § 29).
[8] See, e.g., Israel, High Court, *Al-Nawar case* (*ibid.*, § 39) and United States, Court of Claims, *Morrison case* (*ibid.*, § 41).
[9] See, e.g., the military manuals of Canada (*ibid.*, § 14) and United States (*ibid.*, § 32).
[10] See the Report on UK Practice (*ibid.*, § 40).
[11] See, e.g., the military manuals of Benin (*ibid.*, § 10), Cameroon (*ibid.*, § 12), France (*ibid.*, § 16), Kenya (*ibid.*, § 20), Madagascar (*ibid.*, § 21), Netherlands (*ibid.*, § 22) and Togo (*ibid.*, § 26).
[12] See, e.g., the military manuals of Australia (*ibid.*, §§ 6–7), Benin (*ibid.*, § 10), Cameroon (*ibid.*, § 12), France (*ibid.*, § 16), Hungary (*ibid.*, § 18), Kenya (*ibid.*, § 20), Madagascar (*ibid.*, § 21), Netherlands (*ibid.*, § 22), Spain (*ibid.*, § 25) and Togo (*ibid.*, § 26).
[13] See, e.g., the military manuals of Argentina (*ibid.*, § 5), Canada (*ibid.*, § 13), Germany (*ibid.*, § 17), New Zealand (*ibid.*, § 23), United Kingdom (*ibid.*, § 27) and United States (*ibid.*, § 29).
[14] United Kingdom, *Military Manual* (*ibid.*, § 27); United States, *Field Manual* (*ibid.*, § 29).

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All movable State property captured on the battlefield may be appropriated by the capturing belligerent State as booty of war, this includes arms and ammunition, depots of merchandise, machines, instruments and even cash.

All private property actually used for hostile purposes found on the battlefield or in a combat zone may be appropriated by a belligerent State as booty of war.[15]

The definition of booty as used by Judge Shamgar goes beyond military equipment and relies on the wider definition found in Article 53 of the Hague Regulations, which defines the objects that may be seized in occupied territory as including "cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations".[16] To the extent that these objects may be seized, they are in effect war booty, even though technically they may not be captured or found on the battlefield. This link is also made in the military manuals of France, Germany and the Netherlands.[17] Germany's manual, for example, states that "movable government property which may be used for military purposes shall become spoils of war".

Special rules

The capture of military medical units, both mobile and fixed, and military medical transports is governed by the First Geneva Convention.[18] Mobile medical units must be reserved for the care of the wounded and sick. Fixed medical units may not be diverted from their intended purpose as long as they are required for the care of the wounded and sick.

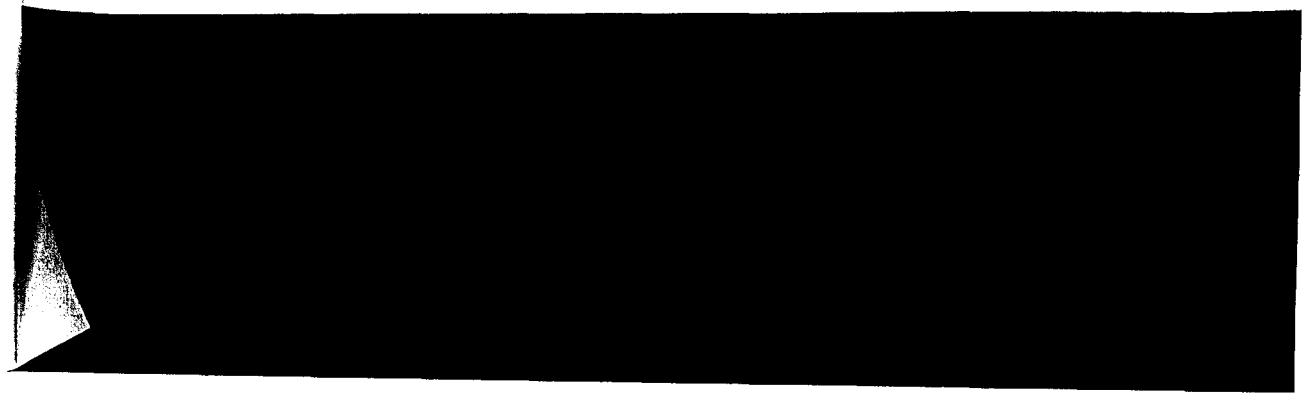
Additional Protocol I lays down further rules on medical ships and aircraft.[19] The capture of the materiel and buildings of military units permanently assigned to civil defence organisations is also regulated in Additional Protocol I.[20]

Rule 50. The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity.

Practice

Volume II, Chapter 16, Section B.

[15] Israel, High Court, *Al-Nawar case* (*ibid.*, § 39).
[16] Hague Regulations, Article 53 (*ibid.*, § 245).
[17] France, *LOAC Manual* (*ibid.*, § 16); Germany, *Military Manual* (*ibid.*, § 17); Netherlands, *Military Manual* (*ibid.*, § 22).
[18] First Geneva Convention, Articles 33 and 35.
[19] Additional Protocol I, Articles 22, 23 and 30.
[20] Additional Protocol I, Article 67.



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Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International armed conflicts

This is a long-standing rule of customary international law already recognised in the Lieber Code and the Brussels Declaration and codified in the Hague Regulations.[21] The violation of this rule through "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," is a grave breach under the Geneva Conventions.[22] Under the Statute of the International Criminal Court, "destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war" constitutes a war crime in international armed conflicts.[23] With respect to the requirement that the destruction be extensive for it to constitute a grave breach, the International Criminal Tribunal for the Former Yugoslavia stated in the *Blaškić case* that "the notion of 'extensive' is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count".[24]

The rule is contained in numerous military manuals.[25] It is an offence under the legislation of many States to destroy or seize the property of an adversary unless it is required by imperative military necessity.[26] The rule was applied

[21] Lieber Code, Articles 15–16 (cited in Vol. II, Ch. 16, §§ 57–58); Brussels Declaration, Article 13(g) (*ibid.*, § 60); Hague Regulations, Article 23(g) (*ibid.*, § 51).

[22] First Geneva Convention, Article 50 (*ibid.*, § 53); Second Geneva Convention, Article 51 (*ibid.*, § 53); Fourth Geneva Convention, Article 147 (*ibid.*, § 53).

[23] ICC Statute, Article 8(2)(b)(xiii) (*ibid.*, § 55).

[24] ICTY, *Blaškić case*, Judgement (*ibid.*, § 239).

[25] See, e.g., the military manuals of Argentina (*ibid.*, §§ 70–71), Australia (*ibid.*, §§ 72–73), Belgium (*ibid.*, §§ 74–75), Benin (*ibid.*, § 76), Cameroon (*ibid.*, § 77), Canada (*ibid.*, §§ 78–79), Colombia (*ibid.*, § 80), Dominican Republic (*ibid.*, § 82), Ecuador (*ibid.*, § 83), France (*ibid.*, §§ 84–87), Germany (*ibid.*, § 88), Israel (*ibid.*, § 90), Italy (*ibid.*, §§ 91–92), Kenya (*ibid.*, § 93), South Korea (*ibid.*, § 94), Lebanon (*ibid.*, § 95), Madagascar (*ibid.*, § 96), Netherlands (*ibid.*, § 97), New Zealand (*ibid.*, § 98), Nigeria (*ibid.*, §§ 100–102), Peru (*ibid.*, § 103), Philippines (*ibid.*, § 104), Romania (*ibid.*, § 105), Russia (*ibid.*, § 106), Senegal (*ibid.*, § 107), South Africa (*ibid.*, § 108), Spain (*ibid.*, § 109), Sweden (*ibid.*, § 110), Switzerland (*ibid.*, § 111), Togo (*ibid.*, § 112), United Kingdom (*ibid.*, §§ 113–114) and United States (*ibid.*, §§ 115–120).

[26] See, e.g., the legislation of Armenia (*ibid.*, § 122), Australia (*ibid.*, §§ 123–125), Azerbaijan (*ibid.*, § 126), Bangladesh (*ibid.*, § 127), Barbados (*ibid.*, § 128), Belarus (*ibid.*, § 129), Belgium (*ibid.*, § 130), Bosnia and Herzegovina (*ibid.*, § 131), Botswana (*ibid.*, § 132), Bulgaria (*ibid.*, § 133), Canada (*ibid.*, §§ 136 and 138), Chile (*ibid.*, § 139), Congo (*ibid.*, § 142), Cook Islands (*ibid.*, § 143), Croatia (*ibid.*, § 144), Cuba (*ibid.*, § 145), Cyprus (*ibid.*, § 146), Czech Republic (*ibid.*, § 147), El Salvador (*ibid.*, §§ 149–150), Estonia (*ibid.*, § 151), Georgia (*ibid.*, § 154), Germany (*ibid.*, § 155), India (*ibid.*, § 157), Iraq (*ibid.*, § 158), Ireland (*ibid.*, § 159), Israel (*ibid.*, § 160), Italy (*ibid.*, §§ 161–162), Kenya (*ibid.*, § 165), Latvia (*ibid.*, § 166), Lithuania (*ibid.*, § 168), Luxembourg (*ibid.*, §§ 169–170), Malawi (*ibid.*, § 171), Malaysia (*ibid.*, § 172), Mali (*ibid.*, § 174), Mauritius (*ibid.*, § 175), Mexico (*ibid.*, § 176), Moldova (*ibid.*, § 177), Mozambique (*ibid.*, § 178), Netherlands (*ibid.*, §§ 179–180), New Zealand (*ibid.*, §§ 181–182), Nicaragua (*ibid.*, §§ 183–184), Niger (*ibid.*, § 185), Nigeria (*ibid.*, § 186), Norway (*ibid.*, § 187), Papua New Guinea

in several cases after the Second World War.[27] Several indictments before the International Criminal Tribunal for the Former Yugoslavia are based on this rule, and in the *Blaškić case* and *Kordić and Čerkez case*, the accused were found guilty of its violation.[28]

Non-international armed conflicts

Under the Statute of the International Criminal Court, "destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict" constitutes a war crime in non-international armed conflicts.[29]

This rule is included in military manuals which are applicable in or have been applied in non-international armed conflicts.[30] Its violation is an offence under the legislation of many States.[31]

No official contrary practice was found with respect to either international or non-international armed conflicts.

(*ibid.*, § 189), Paraguay (*ibid.*, § 190), Peru (*ibid.*, § 181), Philippines (*ibid.*, § 192), Portugal (*ibid.*, § 193), Romania (*ibid.*, § 194), Seychelles (*ibid.*, § 196), Singapore (*ibid.*, § 197), Slovakia (*ibid.*, § 198), Slovenia (*ibid.*, § 199), Spain (*ibid.*, §§ 200–201), Tajikistan (*ibid.*, § 205), Uganda (*ibid.*, § 207), Ukraine (*ibid.*, § 209), United Kingdom (*ibid.*, §§ 210–211), United States (*ibid.*, §§ 212–213), Uzbekistan (*ibid.*, § 215), Vanuatu (*ibid.*, § 216), Vietnam (*ibid.*, § 218), Yugoslavia (*ibid.*, § 219) and Zimbabwe (*ibid.*, § 220); see also the draft legislation of Argentina (*ibid.*, § 121), Burundi (*ibid.*, § 134), Jordan (*ibid.*, § 164), Lebanon (*ibid.*, § 167), Sri Lanka (*ibid.*, § 204) and Trinidad and Tobago (*ibid.*, § 206).

27 See, in particular, France, Permanent Military Tribunal at Dijon, *Holstein case* (*ibid.*, § 221); Germany, Oberlandsgericht of Dresden, *General Devastation case* (*ibid.*, § 222); Netherlands, Special Court of Cassation, *Wingten case* (*ibid.*, § 224); United States, Military Tribunal at Nuremberg, *List (Hostages Trial) case* (*ibid.*, § 225) and *Von Leeb (The High Command Trial) case* (*ibid.*, § 226).

28 ICTY, *Nikolić case*, Initial Indictment and Review of the Indictment (*ibid.*, § 236), *Karadžić and Mladić case*, First Indictment and Review of the Indictments (*ibid.*, § 237), *Rajić case*, Initial Indictment and Review of the Indictment (*ibid.*, § 238), *Blaškić case*, Judgement (*ibid.*, § 239), and *Kordić and Čerkez case*, Judgement (*ibid.*, § 240).

29 ICC Statute, Article 8(2)(e)(xii) (*ibid.*, § 56).

30 See, e.g., the military manuals of Australia (*ibid.*, § 72), Benin (*ibid.*, § 76), Canada (*ibid.*, § 79), Colombia (*ibid.*, § 80), Ecuador (*ibid.*, § 83), Germany (*ibid.*, § 88), Italy (*ibid.*, §§ 91–92), Kenya (*ibid.*, § 93), Lebanon (*ibid.*, § 95), Madagascar (*ibid.*, § 96), Nigeria (*ibid.*, §§ 100 and 102), Peru (*ibid.*, § 103), Philippines (*ibid.*, § 104), South Africa (*ibid.*, § 108) and Togo (*ibid.*, § 112).

31 See, e.g., the legislation of Armenia (*ibid.*, § 122), Australia (*ibid.*, § 125), Azerbaijan (*ibid.*, § 126), Belarus (*ibid.*, § 129), Belgium (*ibid.*, § 130), Bosnia and Herzegovina (*ibid.*, § 131), Cambodia (*ibid.*, § 135), Canada (*ibid.*, § 138), Congo (*ibid.*, § 142), Croatia (*ibid.*, § 144), El Salvador (*ibid.*, §§ 149–150), Estonia (*ibid.*, § 151), Georgia (*ibid.*, § 154), Germany (*ibid.*, § 155), Latvia (*ibid.*, § 166), Lithuania (*ibid.*, § 168), Moldova (*ibid.*, § 177), Netherlands (*ibid.*, § 180), New Zealand (*ibid.*, § 182), Nicaragua (*ibid.*, § 184), Niger (*ibid.*, § 185), Portugal (*ibid.*, § 193), Slovenia (*ibid.*, § 199), Spain (*ibid.*, §§ 200–201), Tajikistan (*ibid.*, § 205), United Kingdom (*ibid.*, § 211), Uzbekistan (*ibid.*, § 215) and Yugoslavia (*ibid.*, § 219); see also the legislation of Bulgaria (*ibid.*, § 133), Czech Republic (*ibid.*, § 147), Italy (*ibid.*, §§ 161–162), Mozambique (*ibid.*, § 178), Nicaragua (*ibid.*, § 183), Paraguay (*ibid.*, § 190), Peru (*ibid.*, § 191), Romania (*ibid.*, § 194) and Slovakia (*ibid.*, § 198), the application of which is not excluded in time of non-international armed conflict, and the draft legislation of Argentina (*ibid.*, § 121), Burundi (*ibid.*, § 134), Jordan (*ibid.*, § 164) and Trinidad and Tobago (*ibid.*, § 206).

4. REPORTS

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Document:-
A/50/10

Report of the International Law Commission on the work of its forty-seventh session, 2 May - 21 July 1995, Official Records of the General Assembly, Fiftieth session, Supplement No.10

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1995, vol. II(2)

While some authors believe that this prohibition is derived from the primary rules concerning the protection of diplomatic envoys which they characterize as peremptory norms,[208] others find its basis in the particular nature of diplomatic law as a "self-contained" regime,[209] as recognized by ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*.[210] A few authors, however, question the existence of a rule of general international law condemning otherwise not unlawful acts of coercion directed against diplomatic envoys.[211]

(16) An explicit reference to multilateral diplomacy was considered to be unnecessary since representatives to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations, no retaliatory step taken by a host State to their detriment could ever qualify as a countermeasure since it would involve non-compliance—not with an obligation owed to the wrongdoing State—but with an obligation owed to a third party, namely the international organization concerned.

(17) *Subparagraph* (d) prohibits the resort, by way of countermeasures, to conduct derogating from basic human rights. This prohibition, which is dictated by fundamental humanitarian considerations, initially developed in the context of the law of war since such considerations were most frequently sacrificed as a result of the exceptional circumstances existing in time of war.[212] As early as 1880, the Institute of International Law attempted to regulate reprisals in its Manual on the laws and customs of war on land which provided that such measures "must conform in all cases to the laws of humanity and morality".[213] The human suffering caused by reprisals during the First World War led to the adoption of a rule prohibiting reprisals against prisoners of war in the Convention relative to the Treatment of Prisoners of War of 1929.[214] Since the Second World War, reprisals against protected persons or property have also been unanimously prohibited by the Geneva Conventions of 12 August 1949[215] as well as Additional Protocol I thereto of 1977.[216] Furthermore, the absolute character of this prohibition is indicated in the Vienna Convention on the Law of Treaties which expressly provides that the termination or suspension of a treaty in response to a material violation shall not be resorted to with regard "to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties".[217]

(18) In addition to the prohibition of certain belligerent reprisals, the development of international humani-

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and their property in good faith to its protection" (*The Law of Nations (considered as Independent Political Communities)*, rev. ed., Oxford, Clarendon Press, 1884, p. 39).

See also P. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962), p. 22; Tomuschat, op. cit. (footnote 177 above), p. 187; and C. Dominicé, "Représailles et droit diplomatique", in *Recht als Prozess und Gefüge, Festschrift für Hans Huber* (Bern, 1981), p. 547.

[208] Discussing the criteria used in the ICJ judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran* (Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3), B.V.A. Röling stated that it

> "would have been a good thing if the Court had had or taken the opportunity to make a clear statement that those involved were persons against whom reprisals are forbidden in all circumstances, according to unwritten and written law—even if the wrong against which a State wished to react consisted of the seizure of its diplomats! The provisions of the Convention are so formulated that 'reprisals in kind' are also inadmissible. It is possible to dispute the wisdom of this legal situation, but the arguments in favour of the current law—total immunity of diplomats because of the great importance attached to unhindered international communication—prevail." ("Aspects of the case concerning United States diplomats and consular staff in Tehran", *Netherlands Yearbook of International Law* (Alphen aan den Rijn), vol. XI (1980), p. 147).

The same opinion is held by Dominicé, who wonders: *Que deviendraient les relations diplomatiques, en effet, si l'État qui, fût-ce à juste titre, prétend être victime d'un fait illicite, pouvait séquestrer un agent diplomatique ou pénétrer dans les locaux d'une mission en s'appuyant sur la doctrine des représailles?* ("Observations . . .", op. cit. (footnote 188 above), p. 63). Sicilianos states *il y a certainement un noyau irréductible du droit diplomatique ayant un caractère impératif—l'inviolabilité de la personne des agents diplomatiques, l'inviolabilité des locaux et des archives—qui est de ce fait réfractaire aux contre-mesures. Il y a en revanche d'autres obligations qui ne semblent pas s'imposer forcément en toute hypothèse et qui pourraient, certes avec toute la précaution voulue, faire l'objet de contre-mesures proportionnées* (op. cit. (footnote 194 above), p. 351).

[209] Lattanzi, op. cit. (footnote 188 above), pp. 317-318; Elagab, op. cit. (footnote 184 above), pp. 116 *et seq.*

[210] In this regard, the Court expressed the following view:

> "[t]he rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the missions and specifies the means at the disposal of the receiving State to counter any such abuse" (*I.C.J. Reports 1980* (see footnote 208 above), p. 40, para. 86).

[211] See Anzilotti, op. cit. (footnote 175 above), p. 167, and more recently, Conforti, op. cit. (footnote 188 above), pp. 360-361.

[212] The development of humanitarian limitations to the right of adopting reprisals is thoroughly illustrated by Lattanzi, op. cit. (footnote 188 above), pp. 295-302.

[213] Manual adopted at Oxford, September 9, 1880, see *Resolutions of the Institute of International Law dealing with the Law of Nations*, J. B. Scott, ed. (New York, Oxford University Press, 1916), p. 42, art. 86.

[214] Article 2 of the Convention. There is no similar provision in the Geneva Convention for the Amelioration of the Wounded and Sick in Armies in the Field of 1929. However, it has been suggested that this omission was due to an oversight and that, in any event, the Convention implicitly prohibits reprisals by requiring respect for the Convention "in all circumstances" under article 25.

> "The fact that this prohibition was not also inserted in 1929 in the Convention dealing with the wounded and sick—not explicitly, that is to say, for it follows by implication from the principle of the respect to which they are entitled—can only have been due to an oversight. The public conscience having disavowed reprisals against prisoners of war, that disavowal is a fortiori applicable to reprisals against military personnel who, like the wounded and sick, are defenceless and entitled to protection." (J. S. Pictet, *The Geneva Conventions of 12 August 1949, Commentary: Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field* (Geneva, International Committee of the Red Cross, 1952), vol. I, p. 344).

[215] Article 46 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,; article 47 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; article 13, paragraph 3, of the Geneva Convention relative to the Treatment of Prisoners of War; article 33, paragraph 3, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War.

[216] Article 20 of Additional Protocol I.

[217] Article 60, paragraph 5. The doctrine indicates that this limitation applies to the various instruments relating to humanitarian law as

(*Continued on next page.*)

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tarian law is also significant in its recognition of the existence of imprescriptible and inviolable rights conferred on individuals by international law.[218] The requirement of humane treatment based on the principle of respect for the human personality[219] extends to internal armed conflicts by virtue of common article 3 of the Geneva Conventions of 1949 as well as Additional Protocol II thereto of 1977. According to the commentary to the first Geneva Convention of 1949, this common provision "makes it absolutely clear that the object of the Convention is a purely humanitarian one . . . and merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself".[220] Thus, common article 3 prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts[221] as well as any other reprisal incompatible with the absolute requirement of humane treatment.[222] The requirement of humane treatment in non-international armed conflicts applies to all protected persons without discrimination, including foreign nationals notwithstanding the absence of a specific reference to nationality in the non-discrimination clause contained in paragraph 1 of common article 3.[223]

(19) The recognition of essential rules of humanity and inviolable rights which led to the prohibition of reprisals in time of international or internal armed conflict led to similar restrictions on reprisals in time of peace.[224] The general character of the humanitarian limitation on reprisals was recognized in the award in the *Portuguese Colonies* case (Naulilaa incident) which stated that a lawful reprisal must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States".[225] Similarly, the International Law Association in its 1934 resolution stated in paragraph 4 of article 6 that in the exercise of reprisals a State must *s'abstenir de toute mesure de rigueur qui serait contraire aux lois de l'humanité et aux exigences de la conscience publique*.[226] More specifically, the debates in the Assembly of the League of Nations on the implementation of article 16 of the Covenant emphasized that the economic measures to be applied in case of aggression should not endanger humanitarian relations.[227]

(20) The inhumane consequences of a reprisal may be the direct result of measures taken by a State against foreign nationals[228] within its territory or the indirect result

(*Footnote 217 continued.*)

well as human rights law. On the inapplicability of the principle of reciprocity in case of violations of human rights treaty obligations, see Lattanzi, op. cit. (footnote 188 above), pp. 302 *et seq.*; Sicilianos, op. cit. (footnote 194 above), pp. 352-358. Schachter is of the opinion that the "treaties covered by this paragraph clearly include the Geneva Conventions of 1949, the various human rights treaties, and conventions on the status of refugees, genocide and slavery" (Schachter, "International Law in Theory . . ." loc. cit. (footnote 177 above), p. 181). The inviolability of these rules by way of reprisal is also maintained by K. Zemanek, "Responsibility of States: General principles", *Encyclopedia of Public International Law* (Amsterdam, North-Holland) vol. 10 (1987), p. 371.

[218] See Pictet, op. cit. (footnote 214 above), p. 82, commentary to article 7, which states as follows:

"In the development of international law the Geneva Convention occupies a prominent place. For the first time, with the exception of the provisions of the Congress of Vienna dealing with the slave-trade, which were themselves still strongly coloured by political aspirations, a set of international regulations was devoted, no longer to State interests, but solely to the protection of the individual. The initiators of the 1864 and following Conventions wished to safeguard the dignity of the human person, in the profound conviction that imprescriptible and inviolable rights were attached to it even when hostilities were at their height."

[219] "The principle of respect for human personality, which is at the root of all the Geneva Conventions, was not a product of the Conventions. It is older than they are and independent of them." (Pictet, op. cit. (footnote 214 above), p. 39.)

[220] Pictet, op. cit. (ibid.), p. 60.

[221] The first paragraph of common article 3 provides as follows:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

"(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

"To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

"(*a*) violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;

"(*b*) taking of hostages;

"(*c*) outrages upon personal dignity, in particular humiliating and degrading treatment;

"(*d*) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

[222] See, for example, Pictet, op. cit. (footnote 214 above), pp. 54-55, which states as follows:

"Reprisals . . . do not appear here in the list of prohibited acts. Does that mean that reprisals, while formally prohibited under Article 46, are allowed in the case of non-international conflicts, that being the only case dealt with in Article 3? As we have seen, the acts referred to under items (*a*) to (*d*) are prohibited absolutely and permanently, no exception or excuse being tolerated. Consequently, any reprisal which entails one of these acts is prohibited, and so, speaking generally, is any reprisal incompatible with the 'humane treatment' demanded unconditionally in the first clause of sub-paragraph (1)."

[223] See Pictet (ibid.), p. 56, stating as follows:

"To treat aliens in a civil war in a manner incompatible with humanitarian requirements, or to believe that one was justified in letting them die of hunger or in torturing them, on the grounds that the criterion of nationality had been omitted, would be the very negation of the spirit of the Geneva Conventions."

[224] See Lattanzi, op. cit. (footnote 188 above), pp. 293-302; similarly De Guttry, *Le rappresaglie . . .*, op. cit. (footnote 184 above), pp. 268-271. After explaining that resort to one or the other of the possible coercive measures depends on the choice of States, Anzilotti noted that States are not absolutely free in their choice. He listed a number of actions condemned by the laws of warfare, although constituting a *minus* as compared to warfare itself, and concluded that these actions were to be condemned a fortiori in peacetime (op. cit. (footnote 172 above), pp. 166-167).

[225] UNRIAA (see footnote 178 above), p. 1026.

[226] *Annuaire de l'Institut de droit international* (see footnote 185 above), p. 709.

[227] League of Nations, *Reports and Resolutions on the subject of Article 16 of the Covenant, Memorandum and Collection of Reports, Resolutions and References prepared in Execution of the Council's Resolution of December 8th, 1926*, Geneva, 13 June 1927 (League of Nations publication, *V. Legal, 1927.V.14* (document A.14.1927.V)), p. 11.

[228] In this regard, the comment to section 905 of the *Restatement of the Law, Third*, expresses the view that "Self-help measures against the offending State may not include measures against the State's nationals that are contrary to the principles governing human rights and *the treatment of foreign nationals*" (see footnote 178 above).

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Report of the Secretary-General on the establishment of a Special Court for Sierra Leone

4 October 2000

Author: UN Secretary-General, Kofi Annan
Date: 4 October 2000
Title: Report of the Secretary-General on the establishment of a Special Court for Sierra Leone
Internal reference: Document S/2000/915
Original language: English
Concerning: In accordance with the agreement between the UN and the Government of Sierra Leone (September 2000), the UN is to establish a special court for Sierra Leone, trying those accused of war crimes and crimes against the humanity in the 9 year old Sierra Leonean civil war. The Secretary-General was requested to make a report, outlining the premises for this Special Court.
Source: United Nations, Security Council

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

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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 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

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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

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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

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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:

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> "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

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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.

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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

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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]

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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

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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.

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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

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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,

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however, that the financing of the Special Court through assessed contributions of the Member States would for all practical purposes transform a treaty-based court into a United Nations organ governed in its financial and administrative activities by the relevant United Nations financial and staff regulations and rules.

72. The Security Council may wish to consider an alternative solution, based on the concept of a "national jurisdiction" with international assistance, which would rely on the existing — however inadequate — Sierra Leonean court system, both in terms of premises (for the Court and the detention facilities) and administrative support. The judges, prosecutors, investigators and administrative support staff would be contributed by interested States. The legal basis for the special "national" court would be a national law, patterned on the Statute as agreed between the United Nations and the Government of Sierra Leone (the international crimes being automatically incorporated into the Sierra Leonean common-law system). Since the mandate of the Secretary-General is to recommend measures consistent with resolution 1315 (2000), the present report does not elaborate further on this alternative other than to merely note its existence.

IX. Conclusion

73. At the request of the Security Council, the present report sets out the legal framework and practical arrangements for the establishment of a Special Court for Sierra Leone. It describes the requirements of the Special Court in terms of funds, personnel and services and underscores the acute need for a viable financial mechanism to sustain it for the duration of its lifespan. It concludes that assessed contributions is the only viable and sustainable financial mechanism of the Special Court.

74. As the Security Council itself has recognized, in the past circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace in that country. In reviewing the present report and considering what further action must be taken, the Council should bear in mind the expectations that have been created and the state of urgency that permeates all discussions of the problem of impunity in Sierra Leone.

Notes

1 - At the request of the Government, reference in the Statute and the Agreement to "Sierra Leonean judges" was replaced by "judges appointed by the Government of Sierra Leone". This would allow the Government flexibility of choice between Sierra Leonean and non-Sierra Leonean nationals and broaden the range of potential candidates from within and outside Sierra Leone.

2 - In the case of the Tribunals for the Former Yugoslavia and for Rwanda, the non-inclusion in any position of nationals of the country most directly affected was considered a condition for the impartiality, objectivity and neutrality of the Tribunal.

3 - This method may not be advisable, since the Court would be manned by a substantial number of staff and financed through voluntary contributions in the amount of millions of dollars every year.

4 - Article 6, paragraph 5, of the 1977 Protocol II Additional to the Geneva Conventions and Relating to the Protection of Non-international Armed Conflicts provides that: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

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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.

5. Other International Cases

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INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

ADVISORY OPINION OF 8 JULY 1996

1996

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

LICÉITÉ DE LA MENACE OU DE L'EMPLOI D'ARMES NUCLÉAIRES

AVIS CONSULTATIF DU 8 JUILLET 1996

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Official citation:
Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226

Mode officiel de citation:
Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996, p. 226

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74. The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.

75. A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The "laws and customs of war" — as they were traditionally called — were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This "Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the "Geneva Law" (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

76. Since the turn of the century, the appearance of new means of combat has — without calling into question the longstanding principles and rules of international law — rendered necessary some specific prohibitions of the use of certain weapons, such as explosive projectiles under 400 grammes, dum-dum bullets and asphyxiating gases. Chemical and bacteriological weapons were then prohibited by the 1925 Geneva Protocol. More recently, the use of weapons producing "non-detectable fragments", of other types of "mines, booby traps and other devices", and of "incendiary weapons", was either prohibited or limited, depending on the case, by the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. The provisions of the Convention on "mines, booby traps and other devices" have just been amended, on 3 May 1996, and now regulate in greater detail, for example, the use of anti-personnel land mines.

77. All this shows that the conduct of military operations is governed by a body of legal prescriptions. This is so because "the right of belligerents to adopt means of injuring the enemy is not unlimited" as stated in Article 22 of the 1907 Hague Regulations relating to the laws and customs of war on land. The St. Petersburg Declaration had already condemned the use of weapons "which uselessly aggravate the suffering of

disabled men or make their death inevitable". The aforementioned Regulations relating to the laws and customs of war on land, annexed to the Hague Convention IV of 1907, prohibit the use of "arms, projectiles, or material calculated to cause unnecessary suffering" (Art. 23).

78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

80. The Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war" (*Trial of the Major War Criminals, 14 November 1945-1 October 1946,* Nuremberg, 1947, Vol. 1, p. 254).

81. The Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), with which he introduced the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and which was unanimously approved by the Security Council (resolution 827 (1993)), stated:

> "In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law . . .
>
> The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945."

82. The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States.

83. It has been maintained in these proceedings that these principles and rules of humanitarian law are part of *jus cogens* as defined in Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969. The question whether a norm is part of the *jus cogens* relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter.

NMT05-T0195

[*Note*: There is no Page 194 in this volume]

INTRODUCTION

The "Pohl Case" was tried at the Palace of Justice in Nuernberg before Military Tribunal II. The Tribunal convened 194 times, and the duration of the trial is shown by the following schedule:

Indictment filed	13 January 1947
Indictment served	13 January 1947
Arraignment	10 March 1947
Prosecution opening statement	8 April 1947
Defense opening statements	14-15 May 1947
Prosecution closing statement	17 September 1947
Defense closing statements	17-20 September 1947
Final statements of defendants	22 September 1947
Judgment	3 November 1947
Sentences	3 November 1947
Concurring opinion of Judge Musmanno (Filed)	3. November 1947
Order of the Military Governor reconvening Military Tribunal II	7 June 1948
Order of the Tribunal permitting the defendants to file additional briefs	14 July 1948
Supplemental judgment	11 August 1948
Confirmation and revision of sentences by the Military Governor	30 April, 11 May 1949
Order of the United States Supreme Court denying writ of habeas corpus on behalf of all defendants	2 May 1949

The English transcript of the Court proceedings runs to 8,461 mimeographed pages. The prosecution introduced into evidence 734

NMT05-T0985

DESTRUCTION OF THE WARSAW GHETTO

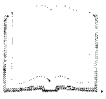
In the fall of 1942, Himmler's plans for the complete subjugation of Poland reached a pinnacle. The Jewish ghetto at Warsaw covered a total area of approximately 320 hectares, or 800 acres. It comprised a large residential area and, in addition, housed a great number of industrial enterprises, principally textile and fur manufacturing plants. The ghetto had a population of nearly 60,000 persons. In October, Himmler ordered that the entire Jewish population of the ghetto was to be gathered together in concentration camps in Warsaw and Lublin to be used as an immense labor pool for armament purposes. After the round-up was completed, the Jews were to be deported to large concentration camps in the East and Polish labor substituted in the Warsaw industries. Himmler added: "Of course, there, too, the Jews shall someday disappear in accordance with the Fuehrer's wishes." All private Jewish firms were to be eliminated and no Jew was to be employed in private industry. This order raised a strong protest from the armament firms in Warsaw, in which a large number of Jews were employed, but Himmler was obdurate and insisted on the letter of his order being carried out. The Jewish residents of the ghetto, however, resisted deportation vigorously, and a pitched battle, lasting over a week, was necessary to uproot them. In February 1943, Himmler directed that after the removal of the concentration camp the ghetto be completely demolished. In his order he stated:

"A master plan for the pulling down of the ghetto has to be submitted to me. It has to be accomplished in any case that the living space, which accommodated 500,000 subhumans and was never suitable for Germans, will completely disappear, and that the city of Warsaw, with its one million inhabitants, will be reduced in size, having always been a dangerous center of rebellion."

This gigantic task of destruction and deportation was committed to Pohl as chief of the WVHA. Himmler directed that the "city center of the former ghetto is to be flattened completely and every cellar and

every canal is to be filled in. After the work is finished, the area is to be covered up with earth, and a large park is to be planted."

By an order dated 23 June 1943, addressed to the Higher SS and Police Leader in the East and to Pohl, Himmler ordered the erection of a concentration camp in the vicinity of Riga, to which the largest possible number of the male Jews were to be transferred. Surplus Jews from the ghetto were to be evacuated to the East, which meant ultimate starvation or extermination. In the



summer of 1943, Pohl set to work to carry out Himmler's order. The concentration camp in the Warsaw ghetto was established and Pohl appointed Goecke, a veteran of Mauthausen, as commandant. Pohl reported to Himmler that at first there were only 300 prisoners in the camp but that this number would be increased as speedily as possible. In October, Pohl reported that Amtsgruppe C of the WVHA had been charged with the technical execution of the demolition order and Amtsgruppe D with the placing of the prisoners. Pohl engaged four private contracting firms, who guaranteed to pull down and remove 4,500 cubic meters daily. He advised that 1,500 prisoners were being used as laborers at the end of October, but that upon securing additional mechanical equipment 2,000 more prisoners would be needed at once. In February 1944, Pohl reported that 3,750,000 cubic meters of buildings had been demolished, and that 2,040 prisoners were being used. By April, 6,750,000 cubic meters had been "pulled down and blasted," and 2,180 prisoners were being used. By June, 10,000,000 cubic meters had been destroyed and the concentration camp had been completed. Thus was accomplished the most complete task of destruction of a modern city since Carthage met its fate many centuries ago, and in this nefarious undertaking Pohl stood hand in glove with Himmler and Stroop in accomplishing the task of total destruction. This was not a city taken in battle; it had long before been captured and occupied by the German armed forces. It was the deliberate and intentional destruction of a large modern city and its entire civilian population. It was wholesale murder, pillage, thievery, and looting, and Pohl's part in accomplishing this abominable project is recorded in his own handwriting. He cannot free himself from his share in Brigadefuehrer Stroop's shameful boast — "The total number of Jews dealt with is 56,065, including Jews caught, and Jews whose extermination can be proved."

MEDICAL EXPERIMENTS

Pohl's connection with the medical experiments, which have already